



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 29 OF 2019

ABDI NOOR UMAR.....PLAINTIFF

VERSUS

ADAN MAMO ELEMA.....1ST DEFENDANT

ANWAR ABDUL.....2ND DEFENDANT

STEPHEN ELOTO.....3RD DEFENDANT

NASIR ALI.....4TH DEFENDANT

NIMO MOHAMED.....5TH DEFENDANT

SAMSON NAMUDANG EDOME.....6TH DEFENDANT

AHLKANO MOHAMED.....7TH DEFENDANT

ABDIKADIR ALI KORICHA.....8TH DEFENDANT

ABDI RASSA.....9TH DEFENDANT

AKUYA NANOK.....10TH DEFENDANT

VERONICA MUSA.....11TH DEFENDANT

AYUBU MUSA.....12TH DEFENDANT

BUKE OKOBA.....13TH DEFENDANT

HAWO MUGAMBI.....14TH DEFENDANT

ABDULAHY GUYO.....15TH DEFENDANT

JOHN ARITE.....16TH DEFENDANT

MARIA EDOME.....17TH DEFENDANT

FRANCIS LOKUK.....18TH DEFENDANT

JOHN ECHWA.....19TH DEFENDANT

JOSEPH NIBEYO.....20TH DEFENDANT

JOHN EMBU LOKAI.....21ST DEFENDANT

FATUMA RACHO.....22ND DEFENDANT

THE COUNTY GOVERNMENT OF ISIOLO.....INTERESTED PARTY

RULING

A. THE APPLICATION AND REPLY

1. Through an application dated 12.7.2021 the defendants seek for the setting aside of the proceedings of 5.5.2021 and all other consequential orders thereto; leave to cross examine the plaintiff witnesses and lastly leave to testify and to be heard. The application is supported by an affidavit sworn on 16.7.2021 by Adan Mamo Elema.

2. The grounds upon which the application is based are that the matter proceeded in the absence of the defendants without their knowledge or notice; the former lawyers on record did not notify them; they came to know of the outcome in July through rumours, and the subsequent visit at the registry on 6.7.2021; they have come to court without undue delay; mistake of counsel should not be visited upon them; there will be no prejudice to the plaintiff; or in the alternative, they be allowed to testify and that it is in the interest of justice to allow the application.

3. The plaintiff is opposed to the application through a replying affidavit sworn on 29.9.2021. It is stated the date had been taken by consent in open court and their advocates on record appeared in the morning of the hearing virtually and time allocation was taken but eventually, he disappeared when the matter was reached at noon. Similarly, the defendants did not show up in the open court.

4. Secondly, it is averred the court record shows there has been a clear pattern of continuous time wasting attempts to prolong the suit and this application is yet another effort to delay justice in this matter.

5. Thirdly, the plaintiff avers is the defendants have never appeared in court in person ever since the matter was filed in court so they cannot blame their former lawyers since they had entrusted them with the matter otherwise the application and the blame game is an afterthought.

6. Fourthly, is there is no authority attached by the rest of the defendants for the deponent to swear the affidavit on their behalf and give whatever explanation for non-appearance as ordered by the court previously.

7. Fifthly, there are court orders which the defendants have not complied with such as those issued on 29.10.2019 and that there has been no explanation given for non-compliance.

8. The plaintiff confirms the 2nd defendant were in court on 2.5.2021 as a plaintiff witness and made his testimony hence it cannot be true the defendants were not aware of the hearing.

9. Further, it is averred the 4th and 8th defendants are still continuing with construction activities on the suit plot despite being aware of the court orders and efforts to intervene have been futile otherwise any delay in the finalization of this matter will be prejudicial to the plaintiff since it will allow the defendants to prolong the illegal occupation of the suit land.

10. The plaintiff takes the view the application is an abuse of the court process, brought too late in the day so as to embarrass him with no good reasons to show where the defendants have been throughout the history of this suit so as to be believed when they turn around and make unsubstantiated accusations against their former lawyers whose remedy in any event, is elsewhere.

11. Regarding the previous orders of the court, the plaintiff states the defendants are bound by those orders and cannot turn around and or escape from it especially the one made on 17.3.2021 otherwise looked at in totality, the application lacks merit, is made on falsehood and that the defendants have not explained their absence on the hearing dates of 4.11.2021 and later on 5th and 6th May 2021, when none of the defendants showed up. This clearly indicates the defendants have not been vigilant in following up their case with their former lawyers.

12. Lastly, the plaintiff avers the conduct of the defendants shows lack of seriousness and respect of court, orders, timelines and directives to an extent that their lawyers on 28.1.2021 sought the court to issue witness summons for their witnesses which indicated their former lawyers have been dedicated to their work despite apathy and lethargy by the defendants.

13. On the issue of prejudice, the plaintiff avers he will be severely prejudiced and embarrassed if the suit was to start all over again especially after spending eight years in the court corridors and therefore he should not be made to shoulder the consequences of the negligence of the defendants and or their advocates especially since hearing dates were taken by consent and the orders given thereof were fair, timely and in the interest of justice.

B. WRITTEN SUBMISSIONS

14. With leave of court, parties filed written submissions dated 1.11.2021 and 24.11.2021 respectively.

15. The defendants submit the application is based on mistake and negligence of the former law firm on record in failing to attend court or notify them to avail themselves and their witnesses on 5th and 6th May, 2021.

16. Secondly, the defendants submit whereas there is no express provision on setting aside *ex parte* proceedings, they rely on **Order 10 Rule 11 Civil Procedure Rules, Order 51 Rule 15 and Sections 1A and 3A of the Civil Procedure Act** on the inherent jurisdiction of the court.
17. Thirdly, the defendants submit that even though the case belongs to them and they ought to have followed up with their lawyers, the said lawyers had an obligation to inform them on the date, the requirement to attend and prepare for the hearing.
18. Fourthly, it is submitted once the defendants got wind of the happenings from third parties, they moved with speed and filed the instant application. The applicants rely on ***PIO –vs- BO & Another [2021] eKLR*** on the proposition that there is an obligation on counsel on record to inform client of a hearing date and failure to do so is excusable and should not be visited upon a client.
19. The applicants also rely on ***Mbogo –vs- Shah as quoted in Patriotic Guards Ltd –vs- James Kipchirchir Sambu [2018] eKLR*** regarding the purpose of discretion to set aside *ex parte* judgment so as to avoid injustice and excusable mistake or error.
20. Further, the applicants rely on ***Eliud Muya Kariuki & 2 Others –vs- Wilson Kabiru Nganga & 6 Others [2017] eKLR*** on the proposition that where there is no delay in bringing the application and a satisfactory explanation is offered for non-attendance, the court should allow the application.
21. Reliance is also placed on ***Philip Keipto Chemwolo & Another –vs- Augustine Kubende [1986] eKLR*** on the proposition that blunders continue to happen and should be excused unless there is fraud or intention to overreach, errors or defaults that can be put right by payment of costs and that the court exists to decide rights of parties but not to impose discipline.
22. Lastly, the defendants submit their defence has triable issues and they should not be locked out of the seat of justice for mistakes of their former advocates. For that proposition, they rely on ***Desbro (K) Ltd –vs- Polypipes Ltd & Another [2018] eKLR*** and urge the court to find that the application is made in good faith and that there will be no prejudice to the plaintiff since he will have an opportunity to cross-examine their witnesses. Similarly, that they aver that they and that they are ready to comply with any conditions imposed by the court.
23. On the other hand, the plaintiff submits the defendants have been indolent, are faceless and only appear in court by filing of applications and or objections hence delaying the suit for over eight years.
24. Secondly, it is submitted the matter is where it is because 23 defendants did not show up in court on 5.5.2021 and after a successful take off of the case, the 1st defendant showed up in July 2021 to complain but has not told the court about events of prior dates and the failure to remedy the situation then, or visit the court registry on 26th - 28th January, 2021 which came soon after he had sworn a verifying affidavit to the defence and counterclaim.
25. The plaintiff urges the court to look at the application in context of the behavior of the applicants prior to May 2021 and establish if the mistake and or negligence of the previous advocates is the sole reason given there has been unpreparedness throughout especially on 4.11.2020 when the court accommodated the defendants and gave a date of 26 – 28th January, 2021.
26. The plaintiff submits the applicants' counsel appeared on 21.5.2021 and tried to apply for an adjournment but was ordered to come in open court at 11.30 a.m. He and the defendants did not show up as scheduled hence on the issue of sufficient reason to set aside the proceedings, the defendants on ***Registered Trustees of the Archdiocese of Dar es Salaam –vs- The Chairman Bunju Village Government & Others Civil Appeal 147 of 2006 C.A. and Wachira Karani –vs- Bildad Wachira [2016] eKLR*** on the proposition that sufficient cause must be shown before setting aside is granted.
27. As regards **Sections 1A and 3A of the Civil Procedure Act**, the plaintiff submits the application offend the spirit of expeditious resolution of disputes and urged the court to be guided by ***Gideon Mose Onchwati –vs- Kenya Oil Co. Ltd & Another [2018] eKLR***.
28. The plaintiff submits the court must be satisfied that the applicants were not served with a hearing date or that the applicants failed to appear due to a sufficient cause as held in ***Philip Ongom, Capt –vs- Catherine Nyero Owota [2003] eKLR***.
29. The plaintiff submits the whole application is based on assertion of communication breakdown between the defendants and their former lawyers which has not been sufficiently explained and that no attempts have been made to respond to the issues raised in the replying affidavit including whether the defence statements have any evidence to stand on given lack of authority to sue and or plead on behalf of the rest of the defendants.
30. Lastly, the plaintiff submits the application talks of one defendant, the 1st defendant, the rest of the 22 defendants did not explain if they ever followed up the matter watering the credence and believability of the reasons, if any given, by the 1st defendant to warrant the setting aside of the proceedings. The respondent urges the court to find the application without merits.

C. ISSUES FOR DETERMINATION

31. The issues commending themselves for determination are:-

- a) If the court has jurisdiction to set aside proceedings herein and allow the orders sought and under what principles.
- b) If the defendants deserve the orders sought.

D. HISTORY OF THE SUIT

32. The history of this matter started on its filing on 18.9.2013 as **Isiolo CMCC No. 51 of 2013 Abdinoor Umar –vs- Aden Mumo and 22 Others and County Government of Isiolo**. Later on, the interested party the County Government of Isiolo was removed by a notice of withdrawal order made on 2.4.2019.

33. Eventually, the suit was transferred to this court by an order made in **Meru ELC Misc. No. 22 of 2018** dated 12.6.2019 due to the monetary value of the subject land estimated at Kshs. 52 million or thereabout.

34. On 24.0.2019, the Deputy Registrar ordered the defendants to comply with Order 11 given the age of the matter.

35. On 29.10.2019, the court gave directions on all pending applications and ordered the defendants to file an authority to act signed by all the other defendants and the same was to be filed by 20.11.2019. The court also ordered an application challenging the jurisdiction be filed within 7 days by 6.11.2019. The application dated 6.11.2017 and preliminary objection dated 29.8.2017 was canvassed by way of written submissions. The **Miscellaneous Application No. 12 of 2018** was also marked closed.

36. On 3.12.2019, the defendants' counsel requested for more time to comply with the previous orders. The court by a ruling delivered on 21.5.2020 allowed all parties to file any further documents and serve the same within 45 days from that date in a paginated manner. The court also dismissed the defendants' preliminary objection the application dated 29.8.2017 and 6.11.2017 respectively.

37. The court also urged parties to be guided by the overriding objective for a speedy hearing and to abandon any maneuvers of derailing the suit.

38. On 4.11.2020, the matter came up for hearing. The court proceeded with pretrial conference and directed the parties to comply with the filing of paginated bundles by 2.12.2020. A hearing date for 26th - 28th January, 2021 was taken by the parties.

39. On 26.1.2021, the defendants failed to attend with no explanation but their lawyers on record appeared and raised some issues leading to the adjournment and a ruling on 17.3.2021. By consent the hearing was rescheduled for 5th and 6th May 2021.

40. On 17.3.2021, the court delivered a ruling and held the issues of authority to act would be determined at the hearing. The court also declined to issue summons as requested over the interested party who was no longer a party to the suit.

41. Regarding a scene visit, the court declined to allow it and made a finding that the defence had occasioned adjournment on 26.1.2021 hence condemned them to pay costs.

42. On 5.5.2021, the record shows the parties appeared with the plaintiff ready to proceed. The court gave a timing for 12 p.m. in open court. The defendants and their counsel on record did not show up and the matter proceeded. The plaintiff closed his case and a mention date for 28.7.2021 was given to confirm the filing of submissions. A notice to the defendants was also ordered to be served for the mention.

43. On 15.8.2021, the current application was filed and the vacation judge directed a date be taken at the registry. A date was eventually taken by the defendants for 14.10.2021.

E. BASIS FOR THE APPLICATION

44. The bedrock and sole basis of the defendants' application is hinged on mistake and negligence of the previous lawyers in not informing and or directing the defendants to attend court on the hearing date.

45. The 1st defendant claims he learned of the proceedings of this matter when he called the court registry on 6.6.2021 upon getting reliable sources that the plaintiff had concluded his case. He says the former advocates were not advancing any explanation for not attending court and informing them on the progress of their case.

46. It is instructive to note that the former lawyers were served with a mention notice dated 24.6.2021 on 25.6.2021 for mention on 28.7.2021 and indicated the no longer had instructions to represent the defendants and that the defendants should be served directly. So it is clear to this court the defendants as at 25.6.2021 had already withdrawn instructions from the former lawyers on record.

47. The defendants appointed the firm of Ashioya Mogire & Nkatha Advocates by a notice of appointment of advocates filed on 25.8.2017 in Isiolo suit and **ELC Misc. 12 of 2018** on 2.5.2018 respectively. The said law firm filed grounds of opposition to the application dated 13.4.2018.

48. Prior to the appointment of the aforesaid law firm, the defendants were being represented by the firm of Mukira Mbaya & Co. Advocates.

49. It is instructive also to note the applicants have been silent on the events leading to the transfer of the suit to this court and directions given thereafter on the manner of compliance with pretrial issues and hearing.

50. The 1st defendant blames former law firm without even giving credit to the efforts made in representing their interests prior to 5.5.2021.

51. The picture painted in the application and the supporting affidavit is that the aforesaid law firm is, the mistake and negligence was all theirs and not the defendants hence on those sole reasons the court should find the applicants deserving the orders sought.

52. According to **Black Laws Dictionary 11th Edition Bryan A. Garner Thomson Reuters, Pg. 1199 – 2000** a mistake is defined as an error, misconception or misunderstanding; an erroneous belief. It can be a mistake of fact or law. It can be basic, bilateral, collateral, essential, fundamental in essential, mutual or basic.
53. As regards negligence at **pg. 1245** it is defined as failure to exercise the standard duty of care that a reasonable prudent person would have exercised in a similar situation and any conduct that falls below the legal standard established to protect others against unreasonable risk of harm except conduct that is intentionally, wantonly, or willfully disregarding of others rights.
54. Expounding on mistake of lawyers, the Court of Appeal in **Patriotic Guard Ltd. –vs- James Kipchirchir Sambu [2018] eKLR**, held the trial court was wrong in failing to exercise his discretion in favour of the applicant's since there was nothing on record to infer that failure to attend court by the appellant's counsel was meant to delay the matter or was meant to defeat the ends of justice.
55. In instant case, the applicants have not told this court why their lawyers on record did not attend court. They have not told this court if they visited the said law firm to seek any explanation. It has been alleged the applicants have made a formal complaint on the negligence and non-communication on the part of their former lawyer's. Nothing has been attached to show the said law firm has formally been served by the applicants with that complaint and for that matter the nature of the complaint.
56. Strangely, the applicants have not told this court the last time they ever visited their lawyers for any update prior to 5.5.2021 given that there are other instances there has been non-attendance and non-compliance with the court orders and directives in this matter which obviously required the personal attendance of the defendants before the said law firm. For instance the court ordered a vital document an authority to swear and plead, list of witnesses and witness statements duly signed by the defendants under **Order 3 Civil Procedure Rules**.
57. Whereas the former law firm may not have informed the defendants about the progress of their case, the case belongs to them. They have an equal responsibility to request updates over the suit. Communication is a two way traffic. It cannot be one way especially in a matter like this one where a party expects his or her land right to be safeguarded.
58. The defendants have not told this court the last time they communicated with their lawyers since they engaged them in 2017. The explanation of the law firm in my view was necessary to this application as held in **Joseph Njuguna Muniu –vs- Medicino Giovanni [1998] eKLR**, as quoted in **Giro Commercial Bank Ltd –vs- Jasvinder Singh Dhadialla [2005] eKLR**. It could be the defendants left out their matter with their lawyers and neglected to give them instructions.
59. Looking at the totality of circumstances in this matter, the applicants have not given any sufficient cause why they did not attend court by themselves or through their lawyers then on record. The mistakes and or negligence alleged as evident from the court file are too many and border on derailing and obstruction of the course of justice and by extension have been prejudicial to the plaintiff in this matter.
60. In the replying affidavit, the plaintiff has raised issues on how the pendency of this matter has negatively impacted on him and the subject matter yet the defendants continue to interfere with the suit land despite the pendency of the dispute.
61. The defendants did not specifically respond to the issues either through a supplementary affidavit and or submissions other than saying the plaintiff will have occasion to cross-examine their witnesses.
62. The court had ordered the defence to file a paginated bundle in compliance with **Order 11 of the Civil Procedure Rules**. As at 20.1.2021, none had been filed and subsequently after the ruling delivered in March 2021, it appears the defendants did not comply with that even when they are urging this court to grant them an opportunity to be heard on merits and not to be condemned unheard.
63. In **Ongom –vs- Owota**, the court held an elementary principle of our legal system is that a litigant is bound by acts and omissions of the advocate representing him and a litigant should not bear the consequences of the advocates defaulting unless the litigant is privy to the default on the part of the litigant to give the advocate due instructions.
64. In **Rukenya Buuri –vs- M'arimi Minyora & 2 Others [2018] eKLR**, the court held where a party has not been a diligent litigant or indolent, he cannot blame his former law firm. The court held a litigant must be diligent enough to follow up how his case is being handled by his advocate and that it was pellucid that the plaintiff in that case had failed in his duty to give his advocate proper instructions.
65. In this case, the defendants have deliberately overlooked and or avoided explaining their part of being vigilant clients. If at all since 2017 the defendants were communicating with their counsels on record, they would have known the progress of their matter and would have made remedial action. It is not lost to this court that the current law firm is the fourth one to come on record for and on behalf of the defendants.
66. When the matter came up for hearing on 20.1.2021, the defendants' former lawyers were not even sure what defence they were relying on since as pointed out by the plaintiff's counsel, there were three different defences on record filed by three different law firms on record for the defendants at various stages of this suit. The defendants have all themselves to blame for this confusion and lack of diligence and vigilance.
67. As much as the defendants have right to fair hearing and access to justice, the two rights are subject to the rights of others.
68. It cannot be that litigants will come to court and file matters and neglect to keep abreast with the progress and once the hour of reckoning comes, they turn around and heap blame on their previous lawyers without at the very least being honest and disclosing when and how a communication breakdown arose.
69. Similarly, a party blaming his law firm must also disclose all material facts including how they ensured their instructions were executed.

At the end of the day, the beneficiary of quality legal representation is the client and not the other way.

70. It is not lost the suit has been in court for the last 8 years. Since this matter was brought to this court in 2019, the defendants create an impression of ignorance of whatever process have happened in this suit.

71. For example a joint defence dated 18.12.2020 was filed on 12.1.2021. The counsel for the plaintiff objected to same when the matter came up on 26.1.2021 alleging it raised a new issue. The verifying affidavit is sworn by Adan Mamo Edema on 18.12.2020 before Michael Osundwa Sakwa Commissioner for oaths, who is the deponent to the supporting affidavit to the notice of motion dated 12.7.2021. It is unbelievable that the former law firm prepared and filed a joint defence, list of witnesses and witness statements as well as list of defendants', 53 documents, without the involvement of the defendants, the 1st defendant who signed the verifying affidavits.

72. In my considered view, it cannot therefore be true there was no communication with the former law firm since the document was being prepared in preparation for the oncoming hearing for two days which as at 26.12.2021, was almost a month away.

73. The defendants have said that their defence raises triable issues. Looking at the defence dated 18.12.2020 it is obvious the defendants raise a counterclaim seeking for 5 principle prayers and the list of documents attached letters as late as 19.11.2019.

74. It is apparent therefore the defendants have been given several opportunities to speedily expedite the progress of this matter but have always squandered the opportunity.

75. In *Phoebe Nduta and Others –vs- Mwakini Banch Co. Ltd & Kitui County Council*, the court held a party should come on sound factual – legal basis for orders but not sympathy and that the court would be surrendering its discretion to the whims and caprice if it acceded to the application.

76. Looking at the efforts made by the former advocates, it cannot be said there was negligence and or mistake. The deponent does not deny the signature appearing on the joint defence as not his and that he was not aware the filings made on their behalf on 21.1.2021. He does not state when he last visited or communicated with the said lawyers prior to 5.5.2021 so as to turn around thereafter and cast aspersions on mistakes and negligence of his former lawyers.

77. As held in *Kiptabut Arap Boen –vs- Benjamin K Chemogos [2015] eKLR*, the defendants simply went to slumber land and or in the alternative neglected their obligations to follow up their case and or attend court as and when required.

78. The applicants herein have cherry picked what is favourable to them and forgotten to own up the entire suit and give due regard to the diligence exhibited by the former lawyers.

79. I will be abdicating why duty and responsibility to find the application with merits based on grounds which are not only unsubstantiated but also misleading and based on an affidavit full of inconsistencies, innuendos and distortions of facts.

80. In the premises, my finding is the application lacks merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

In presence of:

Ashava for plaintiff/respondent

Ondigi for defendants/applicants

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE