



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 440 OF 2012

KENNETH KANGE THE CHEGE.....PLAINTIFF

VERSUS

ALEXANDER KISILU.....1st DEFENDANT

MESHACK AMBUKA.....2nd DEFENDANT

BERNARD MAINA.....3rd DEFENDANT

RULING

1. Before this Court for determination is the 1st Defendant's Notice of Motion application dated 29th October, 2021 seeking for the following orders:

i. That the proceedings before the Honourable Mr. Justice Obaga be set aside.

ii. That this suit be heard de novo with all parties served.

iii. That the costs of this Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of David Karanja Thuo, counsel for the 1st Defendant, who deponed that on 5th October, 2021, he was served with a notice by the Plaintiffs' counsel indicating that the matter was scheduled for delivery of the Judgment on 30th November, 2021; that he was surprised because he was unaware that the matter proceeded for hearing not having been served with a hearing notice and that a letter to the Plaintiffs' counsel seeking information as to how the matter proceeded for hearing in the 1st Defendant's absence elicited no response.

3. According to counsel, it is a cardinal principle that all parties have to be served with a hearing notice before court proceedings can commence and that no service was effected and subsequently the proceedings should be set aside and the suit listed for hearing *de novo*.

4. In response to the application, the Plaintiff's counsel deponed that on 24th June, 2019, counsel for the 1st Defendant served them with a hearing notice indicating that the matter was scheduled to proceed for hearing on 5th March, 2020; that the matter did proceed for hearing on the 5th March, 2020, in the absence of the Defendants who did not attend to the same and that it is in the interest of justice that Judgment in the matter is delivered, the suit having taken nine years.

Analysis & determination

5. Having canvassed the pleadings, the sole issue that arises for determination is;

i. Whether the proceedings herein should be set aside.

6. The Applicant is seeking to have the proceedings herein stayed and the matter proceed for hearing *de novo*. According to counsel, the matter proceeded for hearing without his presence and that his absence thereof was due to the fact that he was not aware that the matter was scheduled for hearing not having been served with the hearing notice. In response, the Plaintiff deponed that it was the 1st Defendant's advocate who served them with the hearing notice and the question of service does not arise.

7. Admittedly, this court, pursuant to its inherent jurisdiction as set out under **Section 3A** of the **Civil Procedure Act** invoked by the applicant herein is vested with jurisdiction to set aside proceedings where the ends of justice so require.

8. The court has perused the pleadings and the proceedings. The present application was first in court on 8th November, 2021 wherein this court directed that the application proceeds for *inter-partes* hearing on 9th December, 2021. However, on 30th November, 2021, Judgment in this matter was delivered virtually by the Honorable Justice Obaga in the absence of the parties whom the record indicates had been served with the Judgment Notice.

9. The record shows that on 20th June, 2019, the 1st Defendant's advocate, in the absence of the Plaintiff's advocate, fixed this matter for hearing for 5th March, 2020. The 1st Defendant's advocate duly served the Plaintiff's advocate with a hearing notice for 5th March, 2020. However, when the matter came up for hearing on 5th March, 2022, it is only the Plaintiff's advocate who was in court.

10. That being the case, it is odd for the 1st Defendant's advocate to allege that he was not informed of the hearing date of 5th March, 2022 when he is the one who actually fixed the date and served the Plaintiff's advocate with a hearing notice. That being the case, it is the finding of this court that the 1st Defendant has not given any plausible reason why he did not attend court on 5th March, 2022 when the matter proceeded for hearing in his absence.

11. The upshot of the foregoing is that the application dated 29th October, 2021 is unmeritorious. The application is dismissed with costs.

12. The suit having been determined on 30th November, 2021, the same is marked as having been finalized.

Dated, signed and delivered virtually in Nairobi this 24th day of March, 2022

O. A. Angote

Judge

In the presence of;

Mr. Kuyo for Thuo for the Defendant/Applicant

Linah Moraa for Madahana for the Plaintiff/Respondent

Court Assistant: Okumu