



REPUBLIC OF KENYA



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Ndungu v Rwaikamba Rwathia Trading Co. Limited & another (Environment and Land Case Civil Suit 78 of 2009) [2022] KEELC 15125 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 78 OF 2009**

JA MOGENI, J

NOVEMBER 17, 2022

BETWEEN

ZEPHANIAH GICHURE NDUNGU APPLICANT

AND

RWAIKAMBA RWATHIA TRADING CO. LIMITED 1ST RESPONDENT

CITY COUNCIL OF NAIROBI 2ND RESPONDENT

***(IN THE ESTATE OF LAND PARCEL NUMBERS 209/4401/73-81,
209/4401/110-124 AND 209/440/131-133 MAKADARA NAIROBI)***

RULING

1. This matter coming for hearing of the main suit on 17/11/2022 where the plaintiff/applicant made an oral application for adjournment stating that he is unable to reach his client who is the plaintiff since 16/11/2022. That he had left him many messages but the plaintiff has not responded. The Counsel for the plaintiff therefore sought to have the defendants/respondents to give their evidence first and then the court grants the plaintiff's advocate an adjournment to a suitable date when he will find the plaintiff who will attend court on the date the court will reserve for the plaintiff's case.
2. The advocate in imploring the court to take the defendants' evidence first stated that the court has unfettered powers on how to run its court and the bottom-line was to ensure that justice is served. That the Civil Procedure is only a guide but the court can decide on what processes to follow to harness justice for all.
3. The oral application was vehemently opposed by the advocates for the 1st and 2nd defendant who saw the application as a ploy to continue delaying the suit which is a 2009 case. The advocate for the 1st defendant/respondent implored the court to dismiss the plaintiff's case. That the Civil Procedure was clear on how cases are conducted and that it is not in order that the defense should present its case first.



The Counsel of the 2nd defendant on his part stated that the undue delay that has been experienced in this case is meant to defeat equity. Further he stated that the plaintiff was procrastinating in this matter to his benefit.

4. Counsel for 2nd defendant stated that the Civil Procedure is very clear on how cases are conducted starting with the plaintiff's case to the defense case.

Analysis and Determination

5. After listening to the submissions by the plaintiff/applicant, as well as the defendants/respondents, the court was obliged to make a determination as to whether to grant and/or refuse the application for adjournment.
6. I perused the Civil Procedure and noted that the plaintiff's advocate has a point in the court arresting the evidence of an elderly litigant who is sick and in other circumstances a litigant traveling out the Court's jurisdiction.
7. However, my reading of Order 17, rule 4 points to the fact that the court may proceed and dispense with a suit in the event any party to a suit who has been given time to attend court fails to produce evidence or cause attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith. The ambit of this Rule is that if a party is present in court, but fails to fulfil the requirements prescribed in the Rule for which time has been granted, the court would proceed to decide the suit forthwith. Emphasis is to be laid on the words "notwithstanding such default". The default referred to is not one of non-appearance of the party but is one of non-compliance with the various steps taken for the progress of the suit for which time has been granted. If the case comes within the ambit of rule 4.
8. In the instant matter, the plaintiff has chosen not to come to court. Given the circumstances I will decline to grant the application for adjournment and order the case to proceed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2022.

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MOGENI J

JUDGE

Ruling read in open court in the presence of:

Mr Evans Gaturu for the Plaintiff

Ms Matu for the 1st Defendant/Respondent

Mr Ongoro for the 2nd Defendant/Respondent

Ms. Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

