



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MIGORI

ELC CASE NO. 103 OF 2017

(Formerly Kisii ELC Case No. 366 of 2013)

SILVANCE ODHIAMBO ABAYO.....PLAINTIFF/RESPONDENT

VERSUS

MARTIN ONYANGO REGE.....DEFENDANTS/APPLICANT

RULING

1. The instant Ruling is in respect of an application by way of a Motion on Notice dated 1st March 2019 brought under Order 50 of the Constitution of Kenya 2010, Sections, 1A 1B and 3A of the Civil Procedure Act Chapter 21 of the Laws of Kenya and Order 12 Rule 7 and Order 50 Rule 1 together with all other enabling provisions of the law. The defendant, **Silvance Odhiambo Abayo (The Applicant herein)** through the firm of **Edward Kisia and Associates Advocates**, is seeking orders infra;

- a. That this honourable court be pleased to set aside the orders entered herein on 16th of April, 2018 entirely and the Defendant / Applicant be granted a date for the hearing of defence case.**
- b. That the court be pleased to make such orders as it deems fit and just.**
- c. That costs of and incidental to this application be provided for.**

2. The application is premised on a twelve (12) paragraphed supporting affidavit sworn on even date by the applicant as well as grounds one to seven set out on its face. Briefly, the applicant complains, inter alia, that he instructed the firm of **Onchuru Ayieko and Company Advocate** to represent him in this suit. That the said firm failed to do so or at all. That he has not been successful in getting an explanation in thereof and particular why the counsel failed to attend court on 16th April, 2018 when the plaintiff's case was closed and the defendant's case was deemed closed. That the application has been presented timeously for the fair hearing of this case as enshrined in the Constitution of Kenya, 2010.

3. The respondent, **Martin Odhiambo Rege** through the firm of **O. M. Otieno and Company Advocates**, opposed the application by his twelve (12) paragraphed replying affidavit sworn on 3rd April, 2019 and duly filed in court on 4th April, 2019. He deposed; inter alia, that the defence case was closed on 16th April, 2018 owing to the non-attendance of the applicant and his counsel. That the applicant has been intent in delaying the conclusion of this suit as evidenced in the Court proceedings of 3rd May 2016 to 16th April 2018.

4. The respondent further deposed that this suit is aged more than five (5) years and that the applicant has approached the court with unclean hands. That the supportive facts of the application are half-truths and falsehood. He termed the application devoid of merit and sought its dismissal with costs.

5. On 25th November 2020, this court did order and direct that the application be argued by written submissions. Pursuant to Order 51 Rule 16 of the Civil Procedure Rules, 2010. However, only the learned Counsel for the Respondent complied accordingly.

6. By submissions dated 15th September 2020 duly filed in Court on 13 January 2021, learned Counsel gave a brief introduction of suit including that the same was lodged in Court in the year 2013. That the defendant was duly served, there had been several adjournments at the instance of the applicant. That the application is devoid of merit, an abuse of the court process, lodged too late in the day and the applicant does not deserve the orders sought herein. Counsel urged this court to dismiss the application with costs. However, none of the parties complied thus, precipitating this ruling; See Order 51 Rule 16 of the Civil Procedure Rules, 2010.

7. I have anxiously considered the application, the replying affidavit and the respondent's submissions and fact that the applicant failed to file and serve submissions. So, the sole issue to resolve at this stage is whether the application rests on justifiable grounds for the grant of the orders sought therein.

8. It is important to note that the orders of 16th April, 2019 against which the applicant laments, read in part:-

“The defendant’s counsel duly served on 1/3/2018 as shown on affidavit of service sworn on 26/3/2018 by the plaintiff counsel. There is no appearance on their part. The plaintiff’s case closed as the defendant’s case deemed closed.” (Emphasis added)

9. The said affidavit sworn by **Mr. Ouma Maurice Otieno**, learned counsel for the respondent reveals at paragraphs 2 to 5 that the firm of Onchuru, Oyieko and Co Advocate for the respondent was served on 17th March 2018 with duplicate copies of the hearing notice dated 13th February 2018 as disclosed in certificate of postage dated 17th March 2018 and the parcel assigned a Track number RD312999494KE. Clearly, the respondent was made aware of the date of hearing of the suit scheduled for 16th April, 2018 as observed by the Court Appeal in the case of **Ogada vs Mollin (2009) KLR 620**.

10. Besides, the applicant claims that he cannot be condemned due to mistake of his counsel who had been duly instructed by him in this suit. This court is aware that mistake of counsel cannot be visited upon a client as noted in several authorities including **Shabir Din vs Ram Parkash Award (1955) EACA Volume 22 at page 48**.

11. Moreover, the applicant laments that the Constitution commands that he cannot be condemned unheard. I bear in mind **Articles 50(1), 25(c) and 48 of the Constitution (supra)** on the uncurtailed right to fair hearing and access to justice. On that score, I endorse the stand point in **Re-Hebtullah Properties Ltd (1976-80)KLR 1195 at 1209** on the audi alteram partem rule (Right to be heard). Furthermore, I subscribe to the Court of Appeal decision in the case of **James Kanyiita Nderitu and another vs Marios Philotas Ghikas and another (2016) eKLR** that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

12. Article **10 (2)(b) of the Constitution (supra)** provides for the application of the principles of Equity. In the case of **Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri (2014) at paragraphs 26, eKLR**, the Court of Appeal was quite emphatic, inter alia;

“This court is a court of law and a court of equity. Equity shall suffer no wrong without a remedy..... This court is bound to deliver substantive rather than technical and procedural justice....” (Emphasis supplied).

13. This Court is mindful of the constitution and statutory provisions under which the application is commenced as well the overriding objective under Section 3 of the Environment and Land Court, 2015 (2012). It is perfectly within the discretion of the court to exercise its equitable conscience not to condemn any person unheard. I find merit in the application in view of the obtaining scenario herein.

14. Wherefore, the application is hereby allowed in the terms hereunder: -

a) Order (1) sought therein as captured in paragraph 1 hereinabove, be and is hereby granted accordingly.

b) Costs of the application be in the cause.

c) In the spirit of Article 159(2)(b) of the Constitution (supra), hearing of the defendant’s case is fixed for priority hearing on 22nd April, 2021.

orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 19th day of January, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. Mulisa holding brief for O. M. Otieno learned counsel for the respondent

Tom Maurice - Court assistant