



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 169 OF 2016**

**JACKSON RUIRU.....PLAINTIFF**

**VERSUS**

**WILLIAM LOKWANGAPONG.....DEFENDANT**

**RULING**

**The Application**

1. The Notice of Motion application dated **19/11/2020** and filed in court on the same date has been by the defendant bought under **Section 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act, Order 51 Rule 1 and 4** of the **Civil Procedure Rules, 2010**. The applicant seeks the following orders:-

**(1) ...spent**

**(2) ...spent**

**(3) That this honourable court be pleased to set aside its judgement, decree, eviction order and all other consequential orders arising from this matter pending the hearing and determination of this application.**

**(4) That an order do issue granting the defendant/applicant (leave) to reopen his defence and counterclaim and to be heard on merit.**

**(5) That the costs be in the cause.**

2. The application is supported by the affidavit filed on **19/11/2020** sworn by the defendant, a supporting affidavit dated **19/11/2020** sworn by *Geoffrey K. Lowasikou* his advocate and a supplementary affidavit dated **11/1/2021**.

3. The grounds upon which the application is made are that the applicant did not have a chance to be heard due to ill health; that the defendant has an arguable case; that the defendant was not accorded an opportunity to file submissions; that the defendant's counsel was not served with the judgment date; that the defendant was never served with the decree and notice to show cause and that the defendant runs the risk of eviction and he does not have any other premises upon which to settle his family.

**The Response**

4. The plaintiff filed a replying affidavit sworn on **1/12/2020**. His grounds of objection to the application are that the defendant entered appearance and filed defence in the suit out of time; that the defendant and his counsel failed to attend court on two dates on which the matter was fixed for hearing; that subsequently he applied for the suit to be set down for hearing *de novo* or that the plaintiff be recalled for cross-examination; that the application was partially allowed, only for cross-examination; that upon cross examination the case was scheduled for defence hearing on **15/11/2018** on which date the same was adjourned to **21/3/2019** at the defendant's instance; that on **21/3/2019** the same was again adjourned to **11/7/2019** again at the defendant's instance and the defendant's counsel informed court that he no longer had the defendant's instructions and the court granted defence counsel leave to file an application to cease acting provided that the hearing would proceed on **15/7/2019** if no application would have been filed by then; that by **15/7/2019** no application had been filed and there was no appearance on the part of the defence and the defence case was deemed closed and judgment was read on **30/9/2019**. The respondent avers that execution has already issued following orders procedurally secured from the court and that the applicant is guilty of laches, has come to court with unclean hands and intends to frustrate the respondent's enjoyment of the fruits of his judgment. He maintains that litigation has to come to an end. The respondent's response is basically a lamentation against the conduct of the applicant in the matter and it paints the

picture of a litigant (the defendant) keen to delay the conclusion of this litigation for as long as possible.

### **Submissions**

5. The defendant filed his submissions dated **14/12/2020**. The plaintiff filed his written submissions on **18/12/2020**.

### **Determination**

#### **Issues for determination**

6. The main issues for determination in this application are:

*(a) Whether the judgment and decree and all consequential orders in this matter should be set aside and the defendant's case be reopened and heard on the merits; and*

*(b) What Orders should issue as to costs of the application?*

7. The issues are addressed as hereunder:-

**(a) Whether the judgment and decree and all consequential orders in this matter should be set aside and the defendant's case be reopened and heard on the merits;**

8. One of the grounds that the court requires to examine is if the application for setting aside has been brought without undue delay.

9. The judgment in the matter was delivered on **30/9/2019** and the instant application was filed on **19/11/2020** after a period of one year and two months. I do not consider that to be a short period.

10. A court of law has a very wide discretion to set aside judgment and the only concern of the court in such an application is to do justice to the parties. **See Patel vs East African Cargo Handling Co. Ltd 1972**. Consequently even where the delay has been inordinate the court may consider the explanation for the delay.

11. In this case the main ground is that the applicant was ill hence could not be heard. However no medical evidence was presented to court during the time when the defendant's case had not been closed yet he had counsel handling the suit on his behalf. The applicant has now exhibited in his application a medical treatment or appointment card giving date of start of treatment as **13/1/2018**. However, there is no any evidence attached however to demonstrate that the applicant was ill to the point of not being able to attend court for the hearing.

12. It can be further noted that the conduct of the defendant in this matter is all but praiseworthy. He entered appearance and filed defence out of time with no application to deem them as properly filed and served and proceeded under the assumption that they were; he failed to attend court at the first hearing held on **9/11/2017** and sailed on the gracious consent of the counsel for the plaintiff recorded on **21/1/2018** to have the matter reopened for cross-examination of the plaintiff afterwards; having filed his defence and counterclaim on **10/1/2017**, he also failed to file statements of witnesses only to apply for leave to file them on **31/7/2018** after the plaintiff had closed his case which leave was declined; though it was alleged, and adjournment secured on the basis that the defendant had gone abroad to seek treatment the only evidence brought with the application is of local medical care; there being no evidence that the defendant was abroad, and the severity of his alleged illness not having been demonstrated to have barred him from attending court, there is no good ground why he could be said to have lost touch with his advocate in the matter to the point of the advocate wishing to withdraw from acting for him. This court reads a lot of mischief in the defendant's conduct throughout the proceedings.

13. Counsel for the applicant is no less blameworthy; he never filed his proposed application to cease acting and this court appears to have assumed rightly that he was still on the record and he is even now the counsel on record.

14. In setting aside matters, the discretion of the court is not intended to aid any party who has deliberately attempted to delay the hearing, yet the applicant's conduct herein as well as lack of proper explanation for his absence from court, can only point to his attempt to deliberately delay the finalization of this suit.

15. In the light of the foregoing I find that the application dated **19/11/2020** has no merit and it is hereby dismissed with costs to the respondent.

**Dated, signed and delivered at Kitale via electronic mail on this 10<sup>th</sup> day of February, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**