REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 694 OF 2014

(Formerly Nyeri HCCC 20 OF 2009

JOSEPH MITHAMO KARIUKI.....1ST PLAINTIFF

MARGARET NYAWIRA GAKENGE.....2ND PLAINTIFF

-VERSUS-

NELSON KINYUA MUIGA alias KINYUA S/O MUIGA.....1ST DEFENDANT

CHARLES MUCHOKI MUIGA.....2ND DEFENDANT

JOHN WAMBATU.....3RD DEFENDANT

DAVID MUIGA MUCHOKI.....4TH DEFENDANT

ROBERT MAINA MUCHOKI.....5TH DEFENDANT

RULING

A. THE DEFENDANTS' APPLICATION

1. By a notice of motion dated 7th March, 2019 brought under **Order 12 Rule 7, Order 45 Rule 1** and **Order 51 Rule 1 of the Civil Procedure Rules 2010 (the Rules), Sections 1A** and **1B of the Civil Procedure Act (Cap 21) and all enabling provisions of the law** the Defendants sought the following orders:

a. That this honourable court may be pleased to review, set aside and or vary the orders made on the 30th July, 2018 closing the proceedings in this matter.

b. That the proceedings of 30th July, 2018 be reopened and the Defendants be allowed or granted leave to tender their evidence and the case to proceed on merit.

c. That the costs of this application be provided.

2. The said application was based upon the grounds set out on the face of the application and the contents of two supporting affidavits of the Defendants' advocates namely, Geoffrey G. Mahinda and Caroline M. Guy both sworn on 7th March , 2019. It was contended that the suit had proceeded for hearing *ex parte* on 30th July, 2018 due to an inadvertent mistake on the part of the Defendants' advocate and their court clerk. It was contended that the Defendants had a good defence to the suit and that it would be in the interest of justice to allow the application.

B. THE PLAINTIFFS' RESPONSE

3. The Plaintiffs filed a replying affidavit sworn by the 1st Plaintiff, Joseph Mithamo Kariuki, on 26th March, 2019 in opposition to the said application. It was contended that Mr. Geoffrey Mahinda the advocate for the Defendant had severally failed to attend court on previous occasions and that he was in the habit of sending a junior advocate to hold his brief.

4. The Plaintiffs contended that no good reason had been advanced for the failure by the Defendants' advocate, Mr. Mahinda, to attend court on the hearing date. They further contended that the suit was almost concluded and the only thing which was pending was delivery of judgment.

C. DIRECTIONS ON SUBMISSIONS

5. When the application was listed for hearing on 22nd July, 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 21 days each to file and exchange their written submissions. However, the record shows that the Plaintiffs filed their submissions on 19th October, 2020 whereas the Defendants filed theirs on 25th January, 2021

D. THE ISSUES FOR DETERMINATION

6. The court has considered the Defendants' notice of motion dated 7th March, 2019 together with the supporting affidavits and annextures thereto, the Plaintiffs' replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination in this matter:

a. Whether the Defendants have made out a case for review, setting aside or variation of the orders made on 30th July, 2018.

b. If the answer to (a) above is in the affirmative on what terms should the orders be granted?

c. Who shall bear the costs of the application

E. ANALYSIS AND DETERMINATION

a) Whether the Defendants have made out a case for review, setting aside or variation of the orders made on 30th July, 2018

7. The court has considered the submissions and material on record on this issue. The Defendants' advocate Mr. Mahinda contended that he was unable to attend court for the hearing of the suit on 30th July, 2018 because he mistakenly thought that the suit was coming for directions hence he sent his assistant to hold brief for him. However, it was not disclosed that the Defendants' application for adjournment was denied on that day hence the reasons why the Defendants' case was closed.

8. The Defendants referred the court to several authorities and urged the court not to visit the mistake of their advocate upon them. The Defendants referred to the case of **Patel v. E.A Cargo Handling Services Ltd [1974] EA 75; Spring Dew Properties Limited v National land Commission & Another (2018) eKLR; Shah v Mbogo & Another ([1967) EA 116** and **Belinda Murai & 9 Others vs. Amos Wainaina [1979] eKLR** among others in support of their application.

9. The Plaintiffs, on the other hand, submitted that the Defendants had completely failed to make out a case for review or setting aside of the orders made on 30th July, 2018. The Plaintiffs submitted that the failure of the Defendants' advocates to attend court on the hearing date was deliberate and inexcusable. The Plaintiffs were of the opinion that the instant application was merely a delaying tactic intended to delay the conclusion of the suit which has been pending in court since 2009. Consequently, they urged the court to dismiss the application with costs.

10. The court has perused the record of proceedings in this matter. The record shows that on 11th October, 2017 the trial court noted that there had been considerable delay in hearing the suit mainly because the Defendants had failed to comply with pre-trial directions without lawful justification or excuse. Accordingly, the Defendants were given 7 days to comply with **Order 11 of the Rules** in default of which the suit was to proceed for hearing on 30th July, 2018 anyway.

11. The material on record further shows that on 16th October, 2017 the Defendants signed witness statements which were all filed on 19th October, 2017 obviously in compliance with the orders made on 11th October, 2017 when the hearing date was fixed.

12. When the suit came up for hearing on 30th July, 2018 the record of proceedings shows that Ms. Mwikali did not inform the trial court that the suit was coming for **directions** or that she had erroneously thought the suit was coming for directions. She simply informed the court that Mr. Geoffrey Mahinda had requested for the suit to be transferred to the subordinate court on the basis that the value of the subject matter was Kshs.3 million. The trial court declined to transfer the suit and reminded Ms. Mwikali that on 11th October, 2017 the court had directed that the suit was to proceed for hearing on 30th July, 2018.

13. The record further shows during the hearing of the Plaintiffs' case Ms. Mwikali actively cross-examined the 1st Plaintiff who testified on behalf of both Plaintiffs. The proceedings further indicate that Ms. Mwikali applied for an adjournment on the basis that the Defendants were absent and that she was merely holding brief for Mr. Mahinda. It is noteworthy that she did not claim that there was any misunderstanding as to the hearing date or that the Defendants had not been informed of the hearing date.

14. The proceedings further indicate that the Defendants' application was declined and the Defendants case was closed. The suit was thereupon stood over to 22nd November, 2018 to fix a judgment date.

15. Although the Defendants' advocates contended that they had mistakenly understood the matter as coming for directions and not for hearing on 30th July, 2018, there is absolutely no evidence on record to support the suggestion. The copy of the court attendance docket

exhibited by Ms. Mwikali simply shows that the matter was to come up for directions in 2017 and not 2018. But most importantly, she never notified the trial court that there was any misunderstanding on the hearing date.

16. The court is not satisfied that the extract from Mr. Mahinda's diary and the copy of the court attendance docket exhibited by Ms. Mwikali are genuine. They appear to have been fabricated specifically for the purpose of the instant application. For instance, if the Defendants' advocates had those documents all along why did it take them about 7 months to file the instant application?

17. There is one aspect which was never brought out clearly by the Defendants in this matter. It is the fact that the Defendants had in fact sought an adjournment on 30th July, 2018 which was denied. It was never contended at the hearing that the Defendants were not aware of the hearing date. In declining the application for adjournment, the trial court was exercising judicial discretion. It has not been demonstrated that any new circumstances have arisen which would warrant a review of the order on adjournment. This court is not satisfied from the material on record that there is any sufficient cause to warrant a change of mind on the issue of adjournment.

18. The court is thus far from satisfied that the Defendants have made out a case for review, setting aside or variation of the orders made on 30th July, 2018 denying them an adjournment and closing their case. The court appreciates that it has discretion to review or vary the orders made on 30th July 2018 but such discretion must be exercised judicially and upon sufficient cause. It cannot be exercised capriciously, arbitrarily or upon sympathy.

19. In the case of **Spring Dew Properties Limited v National Land Commission & Another** (supra) which was cited by the Defendants it was held, *inter alia,* that in order to succeed in such application the court would consider the following principles:

a. Whether there was sufficient justification for failure to attend court.

b. Whether there was undue delay in filing the application for relief.

c. Whether any of the parties shall suffer prejudice.

20. There is no dispute that the impugned orders were made on 30th July, 2018. There is also no contest that the instant application was filed on 7th March, 2020. There was absolutely no explanation for the delay of over 7 months in filing the instant application. In the absence of any explanation, however feeble, the court is entitled to hold that the application was filed after undue delay.

21. The court is of the same opinion as the trial court that the Defendants are out to deliberately delay the conclusion of the suit. The material on record indicates that the Defendants were largely responsible for the delay in the hearing and conclusion of the suit. They had severally failed to comply with **Order 11 of the Rules** to facilitate the hearing of the suit. They only filed their witness statements after they were accorded a last chance to do so on 11th October, 2017.

22. The material on record further indicates that come the hearing date the Defendants did not attend court but their advocate attended for the purpose of seeking transfer of the suit to the subordinate court. This was clearly a delaying tactic since the advocates were fully aware that the trial court had directed that the suit shall proceed on 30th July, 2018. The subsequent application for adjournment was also a delaying tactic since no good reasons were given for the Defendants' absence.

23. It would further appear that upon failing to scuttle the hearing on 30th July, 2018 the Defendants went back to the drawing board to devise a new scheme to delay the conclusion of the suit. The instant application which was filed more than 7 months after the conclusion of the hearing appears to fall within the scheme to delay and subvert the course of justice.

24. In the case of **Shah v Mbogo & Another** (supra) which was also cited by the Defendants' advocates, it was held, *inter alia,* that:

> **"...The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice". (Emphasis added)**

25. The court is of the opinion that the material on record squarely places the Defendants' conduct within the exceptions set out in the said case. They appear to have applied every trick in the book to delay and scuttle the hearing of the suit as indicated before. They have also filed the instant application to delay determination of the suit since the only thing pending herein is delivery of judgment.

(b) If the answer to (a) is in the affirmative, on what terms should *the orders be granted ?*

26. The court has already found and held that the Defendants have not made out a case for the grant of the orders for review, setting aside or variation of the orders made on 30th July, 2018 denying them an adjournment and closing their case. It would, therefore, follow that the second issue does not fall for determination.

(c) Who shall bear the costs of the application

27. Although costs of an action or proceeding are at the discretion of the court the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287.** The court finds no good reason why the successful parties should not be awarded costs of the application. Accordingly, the

Plaintiffs shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL

28. The upshot of the foregoing is that the court finds no merit in the Defendants' notice of motion dated 7th March, 2020. Consequently, the same is hereby dismissed in its entirely with costs to the Plaintiffs. It is so ordered.

RULING DATED AND SIGNED IN CHAMBERS AT **NYERI** AND **DELIVERED** VIA MICROSOFT TEAMS PLATFORM THIS **24TH** DAY OF **MARCH, 2021.**

In the presence of:

The plaintiffs in person

Ms Mwikali holding brief for Mr. Mahinda for the Defendants

Court assistant – Wario

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HON. Y. M. ANGIMA

JUDGE

24.03.2021