



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 266 OF 2017

(Formerly Machakos ELC No. 169 of 2012)

SAYATON ENE MUTUTUA SIRINGET.....PLAINTIFF

VERSUS

PHILIP AMUSI.....1ST DEFENDANT

CHRISTOPHER KYENDI NDAMBUKI.....2ND DEFENDANT

RULING

What is before Court for determination is the Defendants' Counsel oral application in court on 9th February, 2021 seeking for the Court to arrest its judgement pending the hearing and determination of the defense case. The application is premised on the ground that the Defendants' Counsel's claim that he was not served with a hearing notice scheduled on 5th October, 2020 when the matter was set for defense case. Further, they were not served with the Notice for Judgement nor the Written Submissions. He insists the last time the matter was scheduled for hearing, the hearing date was not mutually fixed and Defendants were not informed. The Defendants' Counsel sought for the Plaintiff to be recalled for cross examination and to be allowed to file written submissions.

The Application is opposed by the Plaintiff's Counsel who insists they served the written submissions in court on 23rd July, 2018 upon one Viola on behalf of the Defendants' Advocate. He explained that there was a hearing scheduled on 3rd February, 2020 but the matter did not proceed as Mr. Agina's application to cease acting was pending. Further, the Court scheduled a hearing on the 20th May, 2020 but the matter did not proceed due to the COVID pandemic. He avers that the Court later scheduled the matter for hearing on 5th October, 2020 and they served Mr. Agina for the Defendants' on 24th August, 2020. He insists the Defendants' had all the time to cross examine the witnesses. He proceeded to explain that the Defense Case was closed and they took a judgement date. He enumerated that Mr. Agina was served with a Judgement Notice dated 3rd December, 2020 on 4th December, 2020 for a judgement scheduled on 8th December, 2020. Further, in the said Notice, they indicated that Mr. Agina had been granted leave to file his submissions. He states that on 8th December, 2020 Judgement was not ready but rescheduled and they proceeded to serve Mr. Agina via email on 11th January, 2021 for today's date. He reiterates that Mr. Agina is feigning ignorance about the judgement and they are greatly prejudiced as the Defendants are not ready to proceed with their matter. He urged the Court to deliver the judgement.

Mr. Agina in rejoinder insists his application to cease acting was not heard. Further, on 20th May, 2020, the matter was not heard. He contends that there is plethora allegations of service but he did not see the affidavit of service on the court file. He claims Defendants' reside in an inaccessible place and denies being served with subsequent hearing notices. He reiterates that the court should arrest the judgement and allow the Defendants to come on record for themselves.

Analysis and Determination

Upon consideration of the oral application and the rivalling submissions from the Counsels, the only issue for determination is whether the Judgement should be arrested.

The Defendants' Counsel denies service of the hearing notice including submissions and insists the Defendants' should be allowed to defend their case, which fact is opposed by the Plaintiff's Counsel who enumerates instances of service and insists she is prejudiced. She urges Court to deliver the judgement.

From a perusal of the Court records, I note the Plaintiff's Case was heard on 22nd January, 2018. Further, the Defendants' case was closed on 5th October, 2020. The Plaintiff enumerated instances when they had served the Defendants. As per the affidavit of service dated the 24th August, 2020 sworn by Lucas Maingi and filed on 2nd September, 2020, it confirms the Defendants' Advocates were served with a Hearing Notice for the Hearing scheduled on 5th October, 2020. Further, as per the affidavit of service dated the 11th December, 2019 sworn by Lucas

Maingi and filed on 17th December, 2019, it confirms the Defendants' Advocates were served with a Hearing Notice for the Hearing scheduled on 3rd February, 2020. I however note there is no other affidavits of service to confirm the Defendants' Advocate was served with any other notices. I further note the Defendants' Advocate had filed an application dated the 1st October, 2019 seeking to cease acting for the Defendants. I however note that the Defendants had filed a Counterclaim which is still pending.

Article 50 (1) of the Constitution provides that: **'(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'**

While in the case of **Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR**, the Court of Appeal observed thus: **'Therefore the focus in the 2010 Constitution is on justice, and in order to give effect to the objective and purpose of the Constitution, this Court must, in interpreting its jurisdiction, go beyond the letter in the Constitution and legislative provisions and apply the spirit of the Constitution. While the decision in the Rai case laid stress on the letter of the law as it was then, and the need for finality in litigation, the position has now changed as this Court is obligated not just to follow the letter but also the spirit of the Constitution which stresses on justice being done. Thus where appropriate as in this case, the principle of fairness and justice must take priority over the principle of finality.'**

Insofar as the Defendants' case was closed as the Counsel was absent, to my mind he seems to do an injustice to his clients. I opine that since the Counterclaim is still pending and in line with rules of natural justice including Article 50 of the Constitution, I find that in the interests of justice, the Defendants should be allowed to proceed with their counterclaim. It is my considered view that since the Plaintiff is the owner of the suit land with a Certificate of Title to it, she will suffer no prejudice which cannot be compensated by way of costs. I note from the court records that it is actually the Defendants' Counsel who is responsible for failing to attend court, and insofar as mistake to counsel cannot be visited upon the client, I will direct that he pays for the said costs personally. I further opine that the Defendants should look for an alternative Counsel to represent them since their Counsel expressly stated in court that they should look for a lawyer of their own.

It is against the foregoing that I will allow the Defence case to be reopened and Counterclaim set down for hearing within sixty (60) days from the date hereof, failure of which the court will proceed to deliver its judgement.

I direct that the Plaintiff and her witness be compensated by way of costs to be assessed in Court.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 15TH DAY OF MARCH, 2021.

CHRISTINE OCHIENG

JUDGE