



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 642 OF 2014**

**(Formerly NYERI HCC 147 OF 2012)**

**JOHN KENNETH NJERU ..... PLAINTIFF**

**-VERSUS-**

**PETER MAINA WAWERU .....DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. The material on record indicates that this suit is part-heard before Hon. Justice L. Waithaka. The Plaintiff was heard between 2016 and 2018 and closed his case on 25<sup>th</sup> September, 2018. The Defendant then called two witnesses but the defence hearing was never concluded. The suit still remains part-heard and the parties cannot proceed further because Justice Waithaka is not sitting for reasons in the public domain.

**B. THE PLAINTIFF'S APPLICATION**

2. By a notice of motion dated 24<sup>th</sup> July, 2020 expressed to be based under **Section 3A of the Civil Procedure Act (Cap. 21)**, the Plaintiff sought an order for suit to be heard *de novo* and to be assigned a hearing date on priority basis owing to the age of the suit.

3. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Plaintiff on 24<sup>th</sup> July, 2020. It was contended that the trial judge is no longer sitting to enable her conclude the suit and that the matter should not be left in abeyance *ad infinitum*. It was further contended that it would be in the interest of justice to have the suit heard and concluded since it was quite old.

**C. THE DEFENDANT'S RESPONSE**

4. The Defendant filed a replying affidavit sworn on 4<sup>th</sup> September, 2020 in opposition to the said application. It was contended that there was no legal basis for the application and that there was no urgency in concluding the matter. It was further contended that the trial judge was only on suspension and that she had not been removed from office hence the Plaintiff should wait until the disciplinary proceedings are concluded. It was further contended that it would not be in the interest of just to grant the application and commence the hearing *de novo* since a lot of efforts had been expended on hearing witnesses in the past.

**D. DIRECTIONS ON SUBMISSIONS**

5. When the application was listed for directions on 29<sup>th</sup> July, 2020 it was directed the same shall be canvassed through written submissions. The parties were granted 21 days to file and serve their respective submissions. The record shows that the Plaintiff filed his submissions on 27<sup>th</sup> October, 2020 whereas the Defendant filed his on 26<sup>th</sup> November, 2020.

**E. THE ISSUES FOR DETERMINATION**

6. The court has considered the Plaintiff's application dated 24<sup>th</sup> July, 2020 together with the supporting affidavits, the Defendant's replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the suit should proceed for hearing before any other judge or whether the parties are bound to conclude the suit before the trial court.

(b) Who shall bear costs of the application.

## F. ANALYSIS AND DETERMINATION

### (a) Whether the suit should proceed before any other Judge or whether the parties are bound to conclude the suit before the trial court

7. The court has considered the material and submissions on record on this issue. This is actually the main question for determination in this application. The material on record shows that the suit was filed on 4<sup>th</sup> July, 2012 which is over 8 ½ years ago. The suit is part- heard before Hon. Justice Waithaka who is currently on suspension. The Plaintiff's case was heard between 2016 and 2018 after which he closed his case. The Defendant called two witnesses in 2018 but his case was not concluded. It would appear that he had one more witness to call before closing his case.

8. The suit has not proceeded for the past 2 years or so owing to the unavailability of the trial judge. The Plaintiff has consequently moved the court with a view to having the suit heard *de novo* and concluded before any other judge instead of waiting indefinitely for the resumption to duty of the trial judge. The Plaintiff is of the opinion that this is an old suit which out to be concluded one way or the other. The Plaintiff is further of the opinion that it would be in the interest of justice to unlock the current stalemate by having the suit tried by any other available Judge. The Plaintiff relied on the case of **Kiplagat Kotut v Rose Jebor Kipng'ok [2018] eKLR** and the case of **Johana Zouari Geissbulher vs Violi Fredrigo and Another [2016] eKLR** in support of the application.

9. On the other hand, the Defendant was quite content with the *status quo*. He contended that there was nothing special about this suit and that there should be no hurry in concluding the suit. It was submitted that another Judge has no jurisdiction to take over the hearing of a suit pending before Justice Waithaka hence the Plaintiff should wait patiently until the conclusion of the disciplinary proceedings. The Defendant relied upon **Section 200 of the Criminal Procedure Code (Cap 75)** and the case of **Hussein Khalid and 16 Others v Attorney General and Others [2020] eKLR** in opposition to the application.

10. The court has considered the rival submissions of the parties and the material on record. The court is of the opinion that the suits which are filed in court do not belong to the judges or judicial officers adjudicating over them. They belong to the parties and the parties have an obligation to expeditiously prosecute their suits. The primary responsibility of prosecuting a suit lies upon the Plaintiff or the party who initiated the proceedings. See **Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] E.A. 696**.

11. This suit has been pending in court for over 8 ½ years hence the Plaintiff is justified in taking steps to have the suit fully heard and determined. On the other hand, the state has an obligation to facilitate access to justice under **Article 48 of the Constitution of Kenya, 2010**. That obligation is not confined to just provision of physical infrastructure and means of transport to and from courts. The court is of the opinion that it entails all the components which facilitate efficient administration of justice including expeditious disposal of cases. In the case of **Kenya Bus Service Limited v Minister for Transport and 2 Others [2012] eKLR** **Majanja J.** considered the concept of access to justice as follows:

**“36. The strictures imposed by these provisions must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the courts. In *Dry Associates v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 (Unreported)*, the court stated, “[110] Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.” (underlining added)**

12. In the same judgment **Justice Majanja** also made the following pertinent observations:

**“37. By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See “*Law and Practical Programme for Reforms*” (1992) 109 SALJ 22). Article 48 must be located within the Constitutional imperative that recognises as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realised for it is within the legal processes that the rights and fundamental freedoms are realised. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law. (underlining added)**

13. The court is thus of the persuasion that the Plaintiff should not be made to wait indefinitely for the hearing and conclusion of his suit which has been pending in court for over 8 ½ years. The Plaintiff is entitled to access justice from our courts and the state has an obligation to facilitate enjoyment of that right as required by **Article 48 of the Constitution of Kenya, 2010**. Accordingly, the court is inclined to allow the plaintiff's application and allow his suit to proceed before any other available judge.

14. However, the question of whether the suit shall proceed *de novo* or proceed from where it had reached before Hon. Justice Waithaka shall be determined at a later stage after the proceedings on record have been typed. The court will give directions on the issue after according an opportunity to both parties to make representations on the issue.

15. The court is aware that the leadership and members of the Nyeri Bar have been gravely concerned with the lack of progress in the conclusion of part-heard matters and delivery of rulings and judgments which were pending before the Hon. Justice Waithaka. The court is further aware that at least two meetings were held sometime in 2020 between the leadership of the Nyeri Bar and the Judiciary at which it was agreed that all matters which were pending before Justice Waithaka including part-heards would be handled by any available ELC judge. The same position was to apply to pending rulings and judgments. It is, therefore, surprising that the Defendant in this matter is vehemently opposed to this part-heard suit being concluded by any other available judge.

**(b) Who shall bear costs of the application.**

16. The court has noted that although the Plaintiff prayed for costs of the application to be in the cause, the Defendant prayed for dismissal of the application with costs. The general rule is that costs of an action or proceeding shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap 21)**. The court is of the opinion that since the suit is part-heard and is yet to be concluded, the appropriate order to make is for costs of the application to be in the cause.

**G. CONCLUSION AND DISPOSAL**

17. The upshot of the foregoing is that the court finds merit in the Plaintiff's application and the same succeeds in part. Accordingly, the court makes the following orders for disposal thereof:

- (a) The suit shall proceed for hearing or further hearing before any available Environment and Land Court Judge.*
- (b) The Deputy Registrar shall ensure that the proceedings are typed within the next 30 days.*
- (c) The suit shall be mentioned on 4<sup>th</sup> May, 2021 for directions on the trial of the action.*
- (d) Costs of the application shall be in the cause.*

**RULING DATED AND SIGNED IN CHAMBERS AT NYERI THIS 10TH DAY OF MARCH, 2021** and delivered via Microsoft Teams platform in the presence of Mr. Mwanzia for the Plaintiff and in the absence of the Defendant.

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**HON. Y. M. ANGIMA**

**JUDGE**