



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 226 OF 2018**

**AGNES RIMANDO LEMOMO.....PLAINTIFF**

**VERSUS**

**ANN WANJIKU LEMOMO**

**LEONARD LEMOMO LEMEMPASA**

**SIMON MTUKEI SILILI LEMOMO.....DEFENDANTS**

**RULING**

1. By the Notice of Motion dated 21<sup>st</sup> November 2019, Simon Mtukei Silili Lemomo (the 3<sup>rd</sup> Defendant/Applicant) prays for orders: -
  2. *That this Honourable (Court) be pleased to review its ruling delivered (on) 22<sup>nd</sup> October 2019 by reinstating the Applicant's defence and Counterclaim;*
  3. *That the Applicant be allowed to prosecute its Defence and Counterclaim on the earliest opportunity possible; and*
  4. *That the costs of this application be provided for.*
2. The application which is supported by an affidavit sworn by the 3<sup>rd</sup> Defendant is premised on the grounds inter alia;
  - i) *That this matter was fixed for hearing on 22<sup>nd</sup> October 2019 when the matter was heard and the defence and Counterclaim was dismissed on the absence of the 3<sup>rd</sup> Defendant and his Advocate;*
  - ii) *That on the said date the Defence Counsel received a hearing notice but failed to attend Court and also failed to advise the 3<sup>rd</sup> Defendant of the said hearing date;*
  - iii) *That the Applicant was not aware of the hearing date but only came to know when he visited his then Advocates office and went on to peruse the Court file; and*
  - iv) *That it is in the interest of justice that the Defence be given an opportunity to defend its case.*
3. The application is however opposed. In a Replying Affidavit sworn by her Advocate on record Esther Nyagah and filed herein on 22<sup>nd</sup> January 2020, Agnes Rimando Lemomo (the Plaintiff) avers that she had brought up this suit against her mother and step brother who have unlawfully laid claim against her property.
4. The Plaintiff avers that on the date the matter came up for hearing, the Defendants' Advocates were present having been notified of the date and that their request for adjournment was declined by the Court. The Plaintiff avers that the Defendants' Counsel deliberately refused to participate in the proceedings after the Court declined the request for an adjournment and it is therefore an outright lie for the Applicant to purport that their Advocate was not in Court.
5. I have perused and considered the Motion by the 3<sup>rd</sup> Defendant and the response thereto by the Plaintiff. I have similarly perused and considered the rival submissions and authorities as placed before me by the Learned Advocates for the parties.

6. The application before me is expressed to be brought by the 3<sup>rd</sup> Defendant who has sworn an affidavit in support thereof. It is expressed to be brought under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act as well as under 22 Rule 22, Order 42 Rule 6 of the Civil Procedure Rules and Article 50 of the Constitution of Kenya 2010.

7. It was submitted by the Applicant that he had previously instructed Messrs M.K. Mulei & Company Advocates to act for himself in the matter and that the said Advocates were served with a hearing notice but failed to attend Court or to notify the Applicant of the date for hearing. The 3<sup>rd</sup> Defendant/Applicant avers that it is only when he visited the Court to peruse the Court file after his Advocates refused to communicate with him that he realized their Defence and Counterclaim had been dismissed.

8. The provisions cited by the 3<sup>rd</sup> Defendant in his prayers did not appear to me to be very helpful to him. Sections 1A and 1B and 3A of the Civil Procedure Act while emphasizing on the overriding objectives of this Court to do justice to the parties equally make reference to the need for an expeditious and affordable resolution of civil disputes. Sections 80 as well as order 22 Rule 22 and Order 2 Rule 6 did not appear to me to have any bearing to the orders sought by the Applicant herein.

9. From a perusal of the record herein, the said Messrs M.K. Mulei & Company Advocates previously appeared for all the three Defendants herein. A perusal of Paragraph 8 of the Defendants Statement of Defence and Counterclaim reveals that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the biological parents of the Plaintiff as well as the 3<sup>rd</sup> Defendant. The Plaintiff herself describes the 3<sup>rd</sup> Defendant as a younger step-brother.

10. While the Defendants had filed a joint defence, the Applicant herein makes no mention of whether or not his parents were served with the hearing notice on the date fixed for hearing. And while he asserts that he perused the Court record and realized that their Advocate did not attend Court on the date scheduled for hearing, it is evident from a perusal of that record that on 22<sup>nd</sup> October when the suit came for hearing, their Advocate sent a representative who applied for an adjournment on account that he had no communication with his clients and hence he intended to file an application to cease acting for the Defendants.

11. That application was heard and was rejected by the Court as being insufficient to warrant an adjournment. The case was then fixed for hearing at 11.30 a.m. At the appointed time, neither the Defendants nor their Advocates representative was in Court and that was the reason the Defence and Counterclaim was dismissed after the Court had heard the Plaintiff's testimony.

12. As was stated in *Shah –vs- Mbogo & Another (1967) EA 116*:

***“...the Court's discretion to set aside an ex parte Judgment is intended to be exercised to avoid an injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice....”***

13. While I was not persuaded that the Applicant had demonstrated the existence of any excusable mistake or inadvertence herein, I note from the record that by an application dated 18<sup>th</sup> October 2019 and filed herein on 23<sup>rd</sup> October 2019, the Defendant former Advocates M.K Mulei & Company sought to withdraw from acting for the Defendants on account that communication between them had broken down. That could lend credence to the Applicant's position that he was unaware of the hearing date and could not therefore have been in Court when the matter came up for hearing.

14. That being the case and given that the dispute herein relates to a parcel of land currently in occupation of the Defendants, I think it is only fair that they be afforded a hearing before their rights and/or interests thereon are determined.

15. In the premises, I hereby allow the 3<sup>rd</sup> Defendants application in terms of Prayers 2 and 3 thereof but on the condition that he pays the Plaintiff's thrown away costs which I assess at Kshs 30,000/- within 30 days from today. In default of payment of the said sum within the said 30 days, the application shall stand dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.**

**J.O. OLOLA**

**JUDGE**