



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 651 OF 2017**

**BARRACK ODHIAMBO ODERO.....PLAINTIFF**

**VERSUS**

**EZEKIAH KINYANGI BUSAKA.....DEFENDANT**

**RULING**

1. On 2<sup>nd</sup> July 2019, Mr. Agure Odero learned counsel for the plaintiff orally sought leave of the Court to file a proper document namely a copy of land sale agreement dated 1st September, 1986. He did so immediately after the close of the defendant's case on even date.
2. Counsel submitted that he filed an agreement dated 1<sup>st</sup> September 1986 (DExhibit 1) in lieu of the one he is seeking leave to file and serve. That his failure to file the proper agreement was an error which can be cured under Article **159 (2) (d) of the Constitution of Kenya, 2010**. That the evidence of PW1 conforms with its contents and is indicated on document No. 4 in the plaintiff's list of documents dated 29<sup>th</sup> May, 2017.
3. Mr. Abisai, learned Counsel for defendant opposed the plaintiff's application. He did submit that the order sought goes to the root of the case and it is not a technical one. That the document sought to be filed and served was not served on them. That the document is strange and that the defendant's case has been closed.
4. I have considered the arguments by counsel for the respective parties in this application. So, is the plaintiff's application merited in the circumstances?
5. It is notable from the plaintiff's list of documents dated 29<sup>th</sup> May 2017, that the agreement sought to be filed and served appears under the document (s) listed as number 4 thereof. PW1 referred to the agreement in his testimony, too. However, the plaintiff's counsel contended that the non production of the same was a curable error under **Article 159 (2) (d) (supra)**.
6. From the record in the instant suit, the defendant's case was closed on 2<sup>nd</sup> July 2019. The defendant's counsel asserted that failure to produce the agreement is not a technical lapse.
7. This court is aware of Article **159 (2) (d) (supra)** on disregarding technicalities of procedure. **Articles 50 (1) and 23 (c)** of the same Constitution provide for uncurtailed right to fair hearing.
8. The main concern of this Court is to do justice to the parties. It is within the discretion of the court to grant the orders sought. See **Patel vs= East African Cargo Handling Services Ltd (1974) EA 76**.
9. It is trite law that mistake of counsel should not be visited upon a client; see **Shabir Din vs= Ram Parkash Anand (1955)EACA Vol. 22 page 48**.
10. In the case of **Kanwal Sarjit Singh Dhiman vs= Kashavji Jivraj Shah (2015) eKLR**, it was held that the Courts exist for purposes of dispensing justice. That the sword of justice cuts both ways and that the court has to balance the two divergent interests.
11. Borrowing from the foregoing authorities coupled with the nature of the application and being mindful of the overriding objective under **Section 3 of the Environment and Land Court Act, 2015 (2012)**, I find that the application is full of merit. It is not thwarted by the defendant's opposition thereto hence bound to succeed.
12. Wherefore, I allow the application by the plaintiff's counsel to file and serve a copy of an agreement dated 1<sup>st</sup> September 1986 referred

to in the testimony of PW1 and as shown in the plaintiff's list of documents dated 29<sup>th</sup> May 2017 within the next 45 days from this date. The parties are at liberty to recall PW1, PW2, PW3, DW1 and DW2 to adduce evidence only with regard to the said agreement.

13. Further hearing fixed for **25<sup>th</sup> November, 2019**

It is so ordered

**DELIVERED, SIGNED and DATED in open court at MIGORI this 10<sup>th</sup> day of July, 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of :-**

Mr. Agure Odera learned Counsel for plaintiff

Mr. Abisai learned Counsel for the defendant

Tom – Court Assistant