



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 5 OF 2018

JUMA MOHAMED MWACHIHI PLAINTIFF

-VERSUS-

SAMUEL HEZRON KAMUNYA & 8 OTHERS.....DEFENDANTS

RULING

(Application by 2nd defendant seeking to arrest a judgment and have the case re-opened for hearing; applicant and his counsel not availing themselves at the hearing date; applicant stating that the matter ought not to have proceeded as the 1st defendant is deceased and that he was not informed if the matter would proceed virtually or in open court; suit against 1st defendant having been withdrawn thus cannot be basis for re-opening the case; applicant and his counsel not attending either virtually or in court so no reason for absence; additional reasons given from the bar that matter was not diarized cannot be considered; no basis upon which the court ought to allow the application on the grounds given; however, court in own discretion so that the applicant is not shut out allowing the application but subject to payment of throw away costs)

1. The application before me is dated 10 February 2021, filed by the 2nd defendant. It is brought pursuant to the provisions of Section 3 and 3A of the Civil Procedure Act, and Order 22 Rule 22, Order 24 of the Civil Procedure Rules. This matter proceeded for hearing on 2nd and 4th November 2020 in the absence of the applicant, and was scheduled for delivery of judgment on 14 April 2021. In this application, the applicant seeks to have the judgment arrested and to have orders re-opening the case. The application is based on the following grounds :-

(a) That this suit was purportedly fixed for hearing on 6 March 2020 and purportedly served on 29 March during Covid-19 period and is not clear how it proceeded whether in the open court or virtual.

(b) That the suit was fixed prematurely as the 1st defendant is deceased and no amendment has been done to reflect that position.

(c) The 2nd defendant has come to learn about the date of judgment of 14 April 2021, through a judgment notice dated 29 January 2021, and has acted promptly to inform the court that the 2nd defendant wants to defend the suit fully.

2. The application is supported by the affidavit of Samuel Mwangi Mburu, the 2nd defendant. He has deposed that he was informed by his advocates on record that the suit proceeded for hearing on 2 November 2020 in his absence. He has stated that having been a Covid-19 period, his advocates were not notified on how matters for that date were to proceed, either in open court or virtually. He has further contended that the suit proceeded prematurely as one of the defendants has died and no amendments done to reflect this position. He wants the delivery of the judgment to be stayed and the case to be heard afresh.

3. The plaintiff has sworn a replying affidavit to oppose the application. He has deposed that after he learnt of the death of the 1st defendant, he withdrew the case against him, through a notice of withdrawal of suit dated 4 November 2019. He adds that the withdrawal of suit against the 1st defendant does not in any way affect or prejudice the 2nd defendant's defence. He has further deposed that counsel on record for the 2nd defendant, M/S Mburu Nyamboye and Company Advocates were served with the Notice of withdrawal of suit on 11 November 2019. He has averred that apart from filing a defence, the 2nd defendant has never participated in the proceedings, and has never filed any statements or documents. He has deposed that the matter was fixed for hearing on 2 November 2020 with the hearing notice being served on 9 March 2020. He has averred that the 2nd defendant's counsel failed to appear at the hearing and also failed to appear at the next hearing of 4 November 2020 when he (as plaintiff) testified and closed his case. He has deposed that counsel for the applicant was served with a mention notice on 26 November 2020 for the mention date of 3 December 2020, but he failed to appear, and the matter fixed for judgment on 14 April 2020. He has deposed that on 1 February 2021, a judgment notice was served. He adds that he served counsel for the 2nd defendant with his submissions on 30 November 2020 and there was no response. He asserts that counsel for the 2nd defendant was duly notified of the hearing date and other subsequent proceedings and is guilty of indolence and laches. He does not believe that this application has been

brought in good faith and has stated that he stands to suffer prejudice if the application is allowed.

4. At the hearing of the application, Mr. Nyamboye, learned counsel for the applicant, submitted that he was not aware of the hearing date. He referred to the replying affidavit, which deposes that his firm was duly served, and he stated that it appears that he did not diarise the matter. He submitted that he came to know that the matter proceeded after receiving the judgment notice. He stated that he is only asking to cross-examine the plaintiff and avail his witness. He submitted that this is a mistake of counsel.

5. Mr. Maundu, learned counsel for the plaintiff, on his part, inter alia, relied on the replying affidavit. He pointed out that counsel for the applicant was duly served and no reason given for failing to attend court. He submitted that the reasons now being given are from the bar and should be disregarded. He pointed out that the defendant has not filed a witness statement nor demonstrated any intention that he wished to testify.

6. I have considered the application. It is apparent that the case against the 1st defendant was withdrawn on 5 March 2020. The applicant cannot therefore hinge his application on the fact that the 1st defendant died. Although in his submissions, Mr. Nyamboye stated from the bar that he did not diarise the matter, this is nowhere in the supporting affidavit nor the grounds upon which the application is based. It is clearly an afterthought aimed at currying favour with the court. I am unable to consider these new grounds put forth from the bar. If this was why counsel and his client failed to attend court, then these should have been the grounds upon which the application is based and an affidavit to that effect ought to have been sworn. The application is in fact founded on a very baseless ground, that it was not clear whether the matter would proceed in open court or virtually. The applicant and his counsel do not say that they appeared virtually, or in open court, so either way, they absented themselves from the hearing of the case. The applicant through his counsel was also duly served with the mention notices after the hearing of the suit. They never attended. This to me is the classical case of a party that has been given an opportunity to be heard but has proceeded to completely ignore the same. Such party cannot now seek to derail all the efforts made by the plaintiff to complete his case. There is really no basis upon which this application should be allowed.

7. However, I have said before, and I will repeat it here, that I wouldn't want to shut any party out, if I can avoid it. Purely out of my discretion, and not because of the frivolous and baseless grounds put forth by the applicant, I will re-open the case, but this will be subject to some penalty in the form of costs. The applicant does not deserve this grace and will certainly put the plaintiff into considerable prejudice, both in terms of time and cost. I will re-open the case, but this will be subject to the applicant paying, throw away costs of Kshs. 50,000/= to the plaintiff, within the next 14 days. If these costs are paid, I will give further directions on the hearing of the case. However, if the costs are not paid as ordered, the matter will proceed from where it had reached, meaning that this court will proceed to fix a date for judgment.

8. Orders accordingly.

DATED AND DELIVERED THIS 10TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA