



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO. 293 OF 2013**

**KIPTANUI ARAP KOGO (DECEASED).....PLAINTIFF**

**VERSUS**

**KIBOR ARAP ROTICH.....DEFENDANT**

**AND**

**WILSON KIPROTICH TANUI.....APPLICANT**

**RULING**

This ruling is in respect of an application by the plaintiff/applicant dated 28<sup>th</sup> January 2020 seeking for the following orders:

- a) Spent
- b) This Honourable Court be pleased to issue temporary stay of orders of eviction issued on 22<sup>nd</sup> December 2020 to Eshikoni auctioneers,
- c) Spent
- d) This Honourable Court be pleased to grant leave to the applicant herein WILSON KIPROTICH TANUI the son of the plaintiff to substitute the plaintiff herein KIPTANUI ARAP KOGO who died on 29<sup>th</sup> January, 2020.
- e) The Honourable court be pleased to stay execution of the eviction orders dated 22<sup>nd</sup> December 2020 and be pleased to re-open the plaintiffs case to be decided on merit.
- f) Costs of this application be provided for.

The application for the firm of ROTICH LANGAT & PARTNERS ADVOCATES to come on record for the applicant in place of BARTAMUTTA SANG & SANG ADVOCATES after entry of judgment was allowed. Counsel had agreed to canvas the application by way of written submissions but the applicant did not file any submissions. The court will therefore rely on the affidavit on record.

**APPLICANT'S CASE**

It was the applicant's case that the plaintiff died on 29<sup>th</sup> January 2020 while judgment was delivered on 23<sup>rd</sup> April 2020 and annexed the grant of letters of administration ad litem dated 11<sup>th</sup> January 2021, a copy of death certificate, copy of judgment, decree, eviction order and urged the court to allow the application for substitution.

The applicant further submitted that it was unjust for the court to enter judgment and issue a decree and eviction orders against the plaintiff posthumously and if the stay of the eviction orders is not issued the applicant will be evicted.

It was the applicant's case that the respondent misled the court on service as the affidavit of service on 19<sup>th</sup> November 2019, was served upon the same defendant and not the deceased plaintiff as per the annexed affidavit of service. The applicant also stated that the plaintiff's counsel also passed on. The applicant therefore urged the court to allow the application as prayed.

## RESPONDENT'S SUBMISSIONS

Counsel gave a brief history of the case and submitted that the plaintiff filed this suit against the defendant and in response the defendant filed a defence and a counter-claim against the plaintiff.

Counsel further submitted that the plaintiff was represented by the firm of Sang and Company Advocates before the suit was heard but Mr. Sang advocate passed on and to enable the suit to proceed, the court directed that the plaintiff be served with a hearing notice in person.

It was counsel's submission that the plaintiff was served at his home on the suit land in Kongoro Area and that the person referred to in the affidavit of service is the plaintiff to whom the hearing notice is addressed. The plaintiff did not attend court when the suit was heard. And in accordance with the provisions of Order 12 Rule 3 of the Civil Procedure Rules the plaintiff's suit was dismissed and the defendant's counterclaim was heard.

Counsel submitted that the plaintiff died on 29<sup>th</sup> January 2020, which was long after the case was heard by the court and no explanation has been offered as to why he failed to attend court at the time of hearing after being served as per the affidavit of service. Further that the deceased had an opportunity to be heard and failed to show up in court

Counsel therefore urged the court dismiss the application with costs.

## ANALYSIS AND DETERMINATION

Two limbs of this application are not opposed by the respondent, name allowing counsel to come on record after judgment and the application for substitution of the deceased plaintiff. Therefore, these two issues are settled. What is in issue is the re-opening of the case and the application for stay of orders of eviction.

It should be noted that the death certificate shows that the plaintiff died on 29<sup>th</sup> January 2020 and the Judgement was delivered on 23<sup>rd</sup> April 2020 two months after the demise of the plaintiff. This was brought to attention of the court.

The issue for determination is whether the plaintiff was properly served with a hearing notice to attend court to prosecute his case. The affidavit of service that was filed in court when the matter proceeded that convinced the court that there was proper service is the same that has been annexed for re-opening the case and stay of the eviction order. There is no new evidence that has been brought forth to enable the court to reconsider.

Order 12 Rule 1 provides that :

*"1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit."*

Order 12 Rule 7 of the Civil Procedure Rules provides that where Judgment has been entered or the suit has been dismissed (for non-attendance) on Application, the court may set aside or vary the Judgment or Order upon such terms as may be just. The law relating to setting aside of an Order or Judgment has been settled. In the case of **Patel vs. EA Cargo Handling Services Limited (1974) E.A 75**, the court held that there are no limits or restrictions on a Judge's discretion except that if he/she does vary the Judgment on terms as may be just. The court further held as follows:

*"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules..."*

The application for setting aside judgement is discretionary and the judge must exercise such discretion judiciously taking into account the circumstances of each case and the explanation given for non-attendance on the date set for hearing. In the case of **Shah -v- Mbogo (1967)EA 116**, it was stated:

*"This discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."*

The applicant has also not sought for review or setting aside of the judgment. The court will allow substitution of the plaintiff to allow for further actions either in this court or in the Court of Appeal. The plaintiff died after the case was heard and was just awaiting judgment and no explanation has been given why he did not attend court on the date set for hearing. The court exercising its discretion in favour of the applicant would amount to miscarriage of justice.

I have considered the applicant's supporting affidavit as the applicant did not file submissions as directed by the court and the submissions by the respondent and find that the application is devoid of merit therefore is dismissed with costs to the respondent.

**DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF JULY, 2021.**

**M. A. ODENY**

**JUDGE**