



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 145 OF 2015

KITALE CHEPKOROK FARM.....PLAINTIFF

VERSUS

PETER NASASA.....1ST DEFENDANT

HASSAN NDAMWE.....2ND DEFENDANT

ANDREW GUTITILA.....3RD DEFENDANT

DEPUTY COUNTY COMMISSIONER, TRANS NZOIA.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Background

1. On **6/10/2020** the defendant's counsel were absent and this court adjourned the hearing of the main suit to **15/10/2020**. On the latter date one defence counsel and the plaintiff's counsel were present and the court adjourned the matter to **26/1/2021**. On the latter date there was no appearance for the **4th** and **5th** defendants but Ms. Ruto held brief for Mr. Khakula for the **1st - 3rd** defendants while Mr. Kiarie appeared for the plaintiff. The court heard that Mr. Khakula was not ready to proceed as he was engaged in another matter elsewhere. The plaintiff's witnesses were said to be in court on that morning. This court declined Ms. Ruto's application for an adjournment and ordered that in view of the need to clear the backlog of cases this being among them, the hearing should proceed. After **PW1** testified, Ms. Ruto informed the court that she was unable to cross-examine him because she had no instructions to do so, her instructions having been only limited to seeking an adjournment; Ms. Ruto stated that Mr. Khakula would only be available at **2:00 pm** to proceed with the matter. This court, holding that it was improper for counsel holding brief to attend court with such limited instructions, disallowed the application for adjournment and ordered Ms. Ruto to cross-examine the witness in the stand. Ms. Ruto indicated that she was "*not in a position to cross examine the witness.*" In another appalling revelation she stated that she did not have the case file on that day, a day set aside for the hearing. At that juncture, Mr. Kiarie proceeded to close the plaintiff's case after which Ms. Ruto gathering rather phenomenal temerity ventured again to seek an adjournment yet again to enable the defence proceed on another date which application this court declined. Ms. Ruto stated while seeking the adjournment that she did not know whether the defendants' witnesses were within the court precincts. After the application to adjourn the hearing to another date was declined Ms. Ruto, goldenly capping her rather bold exploits of the day, applied to have the matter heard in the afternoon of the same day. The court declined that application for adjournment also. It deemed the cases of all the defendants as closed and ordered the parties to file submissions. It set a mention date of **1/3/2021** to confirm compliance.

2. This court never sat on **1/3/2021** but the plaintiff filed submissions on the suit on **18/2/2021**. Notably, Mr Khakula appears to have finally gotten back to his office and instead of filing submissions on the main suit as ordered by the court, the defendants lodged the instant application through his office.

The Application

3. The instant application is dated **8/2/2021** and it was filed in court on **9/2/2021**; it has been bought under **Section 1A** and **3A** of the **Civil Procedure Act**. By it the **1st, 2nd** and **3rd** defendants seeks the following orders:-

(1) That this honourable court be pleased to grant the defendants/applicants opportunity to be heard on their defence.

(2) That costs of this application be in the cause.

4. The application is supported by sworn affidavit on **8/2/2021** by **Peter Nasasa** the **1st** defendant, with permission from **2nd** and **3rd** defendants. The grounds upon which the application is made are that it would be in the interest of justice to grant the applicants an opportunity to be heard on their defence; that the applicants have a solid defence and that the suit land is currently occupied by more than **856** people and the order sought by the plaintiff against the **1st**, **2nd** and **3rd** defendants would be of no value at all.

The Reply

5. The plaintiff through **Fredrick Kipkemboi Biwott**, one of its directors filed a replying affidavit sworn on **4/5/2021**. He depones that he is one of the directors of the plaintiff company; that the defendants were given ample time to be heard on their defence; that counsel for the defendants was granted an opportunity to cross-examine **PW 1** and later applied for an adjournment twice which applications were refused; that the defence case was validly closed and filing of submissions ordered by the court; that the suit was filed in **2015** and it is only fair that litigation comes to an end.

Submissions

6. The **1st**, **2nd** and **3rd** defendants filed their written submissions on **4/6/2021**. The plaintiff filed its submissions on **7/6/2021**.

Determination

7. The main issue that arises in the instant application is whether the applicants deserve the ordered sought. This would involve the reopening of the defence case which was deemed as closed by this court on **26/1/2021**.

8. The defendants state that the court should hear them and aver that their counsel was involved in a murder trial on a date that was set by the court in **Bungoma HC Cr case no 17 of 2020**. They maintain that this court should uphold the principles of natural justice, but acknowledge that adjournment of a hearing is at the discretion of a court. They state that in the circumstances that prevailed on the date of hearing, they should have been accorded the benefit of the court's discretion.

9. The respondent submitted that the applicants were afforded every opportunity to be heard in their defence and that they failed to call their evidence, and so they do not deserve the discretion of the court in their favour. They cite the case of **Jane Cherutich Maswai Vs Samuel Kiplagat Misoi Kitale Environment and Land Case No. 44 of 2011** in which this court declined to adjourn the hearing though an application for cessation from acting had been filed by counsel in the matter on the morning of the date of hearing. An application brought to review the court's decision in that cited case was also dismissed.

10. I have considered the application and the response. The cause list for **26/1/2021** in the Bungoma High Court listed **HCC CR No. 17 of 2020 R vs Cyrus Kibulo Rambanya and John Rambanya and 5 others** as one of the matters coming up for hearing before Hon. Justice S. Riechi. This was the cause list Ms. Ruto failed to avail on the date of the hearing and this court was not inclined to adjourn the matter on mere verbal information that Mr. Khakula was attending such a hearing and could not thus attend to the hearing of this suit. Hearing dates once taken, must be taken seriously and if adjournments are sought the party seeking them must demonstrate sufficient cause and where necessary avail evidence.

11. I find it quite odd that Mr. Khakula would presume that the court would automatically grant Ms. Ruto an adjournment as of right by virtue of the mere invocation of a hearing before another court of equal status to the point of failing to avail the case file to Ms. Ruto to prepare for any eventuality. It is unsafe for any counsel to make such a presumption on any given day since the court usually presumes that the counsel holding his brief has full instructions in the matter save in very extreme situations.

Conclusion.

12. Having perused the instant application and the response, I find that the defendants should be given their day in court. Consequently I allow the application dated **8/2/2021** and I order that the costs thereof which I assess in the sum of **Kshs. 10,000/=** shall be borne by the applicants jointly and severally within **3 days** of this order in default of which the orders granted shall be deemed automatically vacated and the matter shall go to judgment.

13. The suit shall be mentioned on **19/7/2021** by way of teleconference to fix a fresh hearing date for the defence case in the event the applicants will have complied with the foregoing terms.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF JULY, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.