



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 25 OF 2013

FATUMA MOHAMMED ALI.....PLAINTIFF/APPLICANT

VERSUS

BORU DIKA.....1ST DEFENDANT

HENRY KIMATHI.....2ND DEFENDANT

ADAM GITONGA NYAGA

(Sued as the legal representative

of the Estate of FESTUS NYAGA KABERIA).....3RD DEFENDANT

RULING

1. Before me is a notice of motion dated 23rd October 2020 brought pursuant to Order 10 Rule 11, Order 40 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules, Section 3 & 3A of the Civil Procedure Act, Section 13 of the Environment and Land Court Act 2011, as well as Article 159 of the Constitution of Kenya 2010. The plaintiff applicant prays for the following orders;

1) Spent

2) That this Honorable Court be pleased to review and/or set aside the ex-parte hearing and the resultant orders and all consequential orders made thereafter issued on 22/10/2020 in its entirety.

3) That all the consequential orders emanating from the ex-parte judgment be reviewed and/or set aside and the plaintiff's claim against the 1st and 3rd defendants be reinstated for hearing on a priority basis.

4) Spent

5) Spent

6) That the cost of this application be provided for.

2. The application is based on the grounds on the face of it and on the supporting affidavit of **Fatuma Mohammed Ali** the plaintiff/applicant, who avers that she has been attending court without fail since the institution of this suit and the plaintiff's case was closed in April 2018. Since then, the matter has been pending for defence hearing and it is therefore misleading for the 1st and 3rd defendants' counsel to intimate to the court that she has not been keen in prosecuting her claim. Indeed all parties have closed their cases.

3. She further states that at no time has the matter been adjourned at her instance and her advocate was never served with hearing notices, hence they were not aware of the said hearing date. Further the advocate for the 1st and 3rd defendants misled the court by stating that they were not informed of the plaintiff's intention to adjourn when they had been called and this issue had been communicated.

4. In her submissions, the plaintiff reiterated her averments set out in her supporting affidavits, while placing great emphasize on the difficulties her advocate encountered in travelling to Meru at the time of Covid pandemic. It was submitted that the Court has inherent powers to make such orders as may be necessary for the ends of justice and to prevent abuse of the court process.

5. The applicant relied on the following cases; **Shah V Mbogo & Another (1967), Mansion Oyongo Nyamweya V Kithure Kindiki**

6. The application is supported by the 2nd defendant vide a replying affidavit dated 19/11/2020, averring that the outcome of this application will affect him as he bought the suit land from the 3rd defendant. He contends that no prejudice will be suffered by any party to this suit if the application is allowed.

7. The application is opposed by the 1st defendant vide a replying affidavit dated 25/01/2021, averring that the application is an afterthought, lacks merits, it is not properly supported or proved, and it is fatally defective and an abuse of the court process. The 1st defendant contends that the application is tainted with inconsistencies and misrepresentations. It is averred that when the matter came up on 22.10.2020, plaintiff's advocate was represented by Miss Atieno, thus the plaintiff cannot argue that the orders were issued unopposed. It is averred that all parties were served with the hearing notices as noted by the court.

8. The 1st defendant further states that the plaintiff ought to have preferred an appeal in the Court of Appeal against this court's orders. He further states that this is an old matter and he has not been able to use the suit land since the institution of this suit and prays that the application be dismissed with costs.

9. It was submitted for the 1st and 3rd defendants that the plaintiff has failed to meet the threshold as set out in Order 45 Rule 1 of the Civil Procedure Rules and as such, she is undeserving of the orders sought, she has been sleeping on the injunction orders and delaying to prosecute the matter. The application should be dismissed with costs, but in the event that the court is inclined to allow the plaintiff's application, the plaintiff should be ordered to pay the 1st and 3rd defendants getting up fee for the date the suit was dismissed of Kshs. 100,000.

10. The 1st and 3rd defendants relied on the following cases; Francis Njoroge V Stephen Maina Kamore [2018]eKLR, Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 Others [2016]eKLR, Karuthu Magiri V John Kaburu Magiri & 3 Others [2020]eKLR, Gladys Njeri Kirugumi vs. Langata development Co ltd & Another (2016) eKLR.

11. I have carefully perused the court file, the application, the affidavits both in support and in opposition thereof as well as the submissions filed by the parties. This court rendered a decision on the issue of service in the ruling dated 22.10.2020, hence the court cannot revisit that issue all over again. Nevertheless, this court has to examine the circumstances of the matter to make a determination as to whether the orders sought are deserved.

12. In the case of Gladys Njeri Kirugumi –Vs- Lengata Development Co Ltd & Another [2016] eKLR, the court quoted Shah –Vs- Mbogo case where it was held;

“The exercise of the discretion of the court to set aside ex parte order is to avoid an injustice or hardship resulting accident, inadvertence or excusable mistake or error and not otherwise to delay justice.”

13. In Wachira Karani v Bildad Wachira [2016] eKLR, it was stated inter alia that;

“Section 3A of the Civil Procedure Act[21] provides that ‘Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.’

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justitiae, to have any determination which affects him set aside.”

See also Consolidated Bank of Kenya Limited v Jared Otieno Ochungo t/a Girth Construction & 2 others [2014] eKLR

14. Thus the court retains the inherent power to do justice to all the parties who appear before the court. In the instant case, the court made a finding on 22.10.2020 that the plaintiffs were aware of the hearing date. However, the court has taken into consideration that the cases of the plaintiff as well as that of the 2nd defendant were closed way back on 16.4.2018. The case of 1st and 3rd defendants was also heard at length on the same date such that only one witness was remaining to testify. In short the case was at the tale end of litigation when the court proceeded to dismiss plaintiff's case as against the 1st and 3rd defendants.

15. In light of the foregoing I am inclined to partially allow the application as follows:

(1) The orders of 22.10.2020 dismissing the plaintiff's claim against the 1st and 3rd defendants are hereby set aside and the said case is reinstated.

(2) The plaintiff is condemned to pay the costs of the said application.

(3) Other prayers in the application are hereby dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JULY, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 10.3.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE