



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 87 OF 2018

JULIUS KIBIWOTT TUWEI.....PLAINTIFF

VERSUS

REUBEN ARGUT1ST DEFENDANT

STANLEY CHERUTICH CHEPSANT.....2ND DEFENDANT

JOEL DIRERE MBATA.....3RD DEFENDANT

SETTLEMENT FUND TRUSTEE.....4TH DEFENDANT

COMMISSIONER OF LANDS..... 5TH DEFENDANT

COUNTY LAND ADJUDICATION

OFFICER, TRANS NZOIA.....6TH DEFENDANT

COUNTY LAND REGISTRAR,

TRANS NZOIA COUNTY.....7TH DEFENDANT

THE HON ATTORNEY GENERAL.....8TH DEFENDANT

RULING

1. This Ruling is in regard to an application for adjournment of this suit from today’s hearing. The hearing date was fixed on the **15/6/2021** in the presence of my brother Justice Njoroge, in absence of the plaintiff and the 3rd defendant. From the record, the 3rd defendant had been served with summons earlier on but never entered appearance. It is clear from the record that, as evidenced by the affidavit of service sworn on **4/8/2021** by Fredrick Musungu Advocate and filed in this court on **10/8/2021**, that the plaintiff and his counsel were well aware of today’s hearing date.

2. This matter has been called out today in open court and the plaintiff, although represented by Mr. Kitembe Advocate who is holding brief for Mr. Musungu Advocate, is absent. The presence of Mr. Kitembe Advocate who is holding brief for the plaintiff’s counsel is confirmation that even though the hearing date was taken in absence of the plaintiff and counsel, the date was communicated to him or his counsel.

3. This court is thus obligated to consider the merits of the application for adjournment by the plaintiff and the prayers by the defendants for dismissal of the plaintiff's suit. In so doing this court is enjoined to take into account the interests of justice for all the parties to this suit, and on that basis this court proceeds to consider the issue that have been placed before it this morning.
4. Counsel for the plaintiff sought an adjournment of this suit on account of the fact that Counsel Mr. Musungu is unwell. He indicated that the communication about counsel's indisposition was communicated to counsel for the defendants in good time.
5. Counsel for the 1st and 2nd defendants opposed the application on account of the fact that counsel for the plaintiff was misleading the court by the indication of the indisposition of the plaintiff's counsel. He indicated that counsel for the plaintiff, Mr. Musungu, had called him the previous day to indicate that he had been mistaken that the matter would not proceed to hearing since there was a transfer of the then Judge sitting in Kitale and that he thought the matter would be before the Deputy Registrar for directions. He also indicated that counsel, Mr. Musungu, had emailed him the previous day, indicating that he would not be attending court for reason of inability to travel from Nairobi. He further indicated to court that he had informed counsel that he would not be acceding to the matter being adjourned.
6. Counsel for the 4th to 8th defendants agreed with the submissions by counsel for the 1st and 2nd defendants.
7. Upon these contending arguments the court delve, into the responsibility of discerning the truth and giving justice to all parties.
8. **Order 12(3) (twelve Rule 3) of the Civil Procedure Rules [2010]** as amended in **2020** provides that where on the date fixed for hearing only the defendant attends, and the matter is called outside court, and defendant does not admit any part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.
9. In regard to today's proceedings, not only has the matter been called out in court and the plaintiff is absence but also his counsel present has also confirmed the same. This court could have proceeded to dismiss the suit on that account. However, the court is called upon to consider "good cause" in order to spare the suit from dismissal.
10. In the present circumstances, it has not been explained to court why the plaintiff as a party is not in court. But since he "sent" counsel to adjourn the matter, the court has to consider whether the reasons given by counsel for his absence is good cause for adjourning the suit.
11. It must be recalled that counsel is an officer of the court. He, just as anyone else who attends court, ought to be candid at all times to the course of justice. Hence when counsel presents his/her client's case he/she is enjoined by the calling to uphold justice - this has always been part of the oath taken by counsel when being called to the Bar - to speak the truth at all times so as not to mislead the court. This is even when speaking the truth is likely to prejudice his client's case because in so doing the truth shall have prevailed.
12. Counsel herein, Mr. Kitembe, informed the court that Mr. Musungu is unwell. Granted that Mr. Musungu is unwell, this court would adjourn this matter so as not to deny the plaintiff the right to representation by reason of absence of counsel who is unable to attend court due to illness. But how about a situation, as the present one, where counsel intimated to another in writing that he is unable to travel to court because of lack of means and not illness? That may be good cause if only it is weighed against many factors such as the transport means being hindered by other circumstances. That is not what has been advanced by counsel. Moreover, counsel holding brief today has said that counsel who briefed him this morning is unwell and not that he is not able to travel for reason of lack of transport means.
13. It is this court's view that counsel for the plaintiff is intent on misleading the court. It goes against counsel's calling, to lie to the court so as to achieve a certain or desired goal.

14. I have perused the court record. I note that the plaintiff through counsel has not attended court on a number of times while he himself has not attended when required, specifically on **12/11/2020** and **16/6/2021**. I have also noted from the course list that this matter was not fixed before the Deputy Registrar for directions or hearing. For those reasons I find that no good cause has been shown that I can record that would justify this matter not to be dismissed. Shifting of goal posts is not good cause. I therefore dismiss it with costs to the defendants.

DATED, SIGNED AND DELIVERED AT KITALE ON THIS 23RD DAY OF SEPTEMBER, 2021.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.