



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 104 OF 2010**

**EZEKIEL KIRWA**

**MZEE ARAP KITUR**

***(On their own behalf and on behalf of 13 Others.....)* PLAINTIFFS**

**VERSUS**

**MICHAEL KIPRUTO MISOI.....1<sup>ST</sup> DEFENDANT**

**NIXON KIPSANG.....2<sup>ND</sup> DEFENDANT**

**JONATHAN SERONEI.....3<sup>RD</sup> DEFENDANT**

**JOSEA KAPTICH KIRWA.....4<sup>TH</sup> DEFENDANT**

**JOSEPH CHERUIYOT KUTUNY.....5<sup>TH</sup> DEFENDANT**

**NOAH K. BARNG'ETUNY.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The application made for adjournment today is opposed. I have considered the reasons given for the adjournment being sought herein. I have also considered that the plaintiffs are in court although their counsel is not but has instructed Miss Ruto to hold his brief. This is an old matter. At one time it was dismissed and reinstated applied for and was granted. Thereafter the matter has not taken off for one reason or other. Today the adjournment has been sought on account of bereavement of counsel for the plaintiff. While the court is alive to the fact that bereavement is part of the course of nature that no man can control, the least that counsel would have done was to notify the defence counsel that that is the issue. That would have made counsel to arrange not to have all his witnesses in court since it's an expensive affair. But since the plaintiffs are entitled to representation and they have not withdrawn instructions from Mr. Magut, I will reluctantly grant the adjournment but mark it as the last one on that part of the plaintiffs. The plaintiffs will pay costs.

2. One thing remains to be addressed. The State Counsel who appears for the 7<sup>th</sup> - 9<sup>th</sup> defendants has stated that to date, summons to enter appearance and indeed any other service has never been effected on the 7<sup>th</sup> - 9<sup>th</sup> defendants. He has moved the court to dismiss the case against his clients.

3. I have perused the court file. I notice that the Ruling that led to the enjoinder of the 7<sup>th</sup> - 9<sup>th</sup> defendants was delivered on **29/5/2020**. By it, the plaintiffs were given **14 days** to file and serve the Amended Plaintiff on all parties. The 7<sup>th</sup> - 9<sup>th</sup> defendants having been introduced or added to the suit ought to have been served with summons to enter appearance. From the record, the Amended Plaintiff was filed on **2/12/2020**. But the record shows further that the orders of the court of **29/5/2020** were extracted and duly received by Mr. Magut Advocate on **3/7/2020**. He signed on the back of the court copy. Summons to enter appearance on the part of the Attorney General were extracted on **3/12/2020**, a day after filing of the Amended Plaintiff.

4. It appears also parties moved the court on **12/11/2020** when Mr. Magut Advocate prayed the court for leave to deem the Amended Plaintiff duly filed and that he serves it within a certain period. The court directed that the Amended Plaintiff be served within **seven (7) days**. On **2/2/2021** the court directed that the defendants' reply to the Amended Plaintiff before **24/2/2021**. The question that arises is, when was the Amended Plaintiff filed? Also, for what was extension that was sought by Mr. Magut Advocate on **12/11/2020**?

5. By **12/11/2020** the plaintiffs had not filed their Amended Plaintiff. Thus they misled the court about a document that was to be deemed duly filed being on record. The Amended Plaintiff that was dated **2/7/2020** was filed on **2/12/2020** and paid for on same date. Summons to enter

appearance were extracted the following date. Therefore since the orders of the court on **12/11/2020** were directed at a non-existent Amended Plaintiff: they are of no effect.

6. The question then that arises, is, did the plaintiffs comply with the orders of the court of **29/5/2021**? The answer is that they did not. That means that the Amended Plaintiff that was filed on **2/12/2020** was filed without the sanction of the court. It is improperly on record and counsel can only move the court appropriately if he so desires. Thus, for avoidance of doubt, as at today there is no case against the 7<sup>th</sup> - 9<sup>th</sup> defendants. Further, the position and status of the Amended Defence and Counter-claim thus needs to be relooked at in case the defendants wish to pursue their counterclaim.

7. Lastly, on the issue of striking out or dismissing the 7<sup>th</sup> - 9<sup>th</sup> defendants from the record, for reasons given above, I am unable to do so because that would mean issuing orders in vain or against a non-existent fact.

It is so ordered.

Ruling delivered in the presence of all counsel and parties present.

**DATED, SIGNED AND DELIVERED AT KITALE THIS 27TH DAY OF OCTOBER, 2021.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**