



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E072 OF 2021

VIJAY MORJARIA.....PLAINTIFF

-VERSUS-

PROFESSOR ROBERT OBWOCHA.....1ST DEFENDANT

LAND REGISTRAR MACHAKOS.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE DIRECTOR SURVEYOR.....4TH DEFENDANT

THE ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1.By Notice of Motion dated 18th October, 2021, the 1st Defendant sought the following orders;

a. Spent.

b. Spent.

c. That pending the heavy and determination of the application this Honourable court be pleased to stay the Ruling of the application dated 15th July, 2021 stated for Ruling on 28th day of October 2021 to allow the 1st Defendant/Applicant respond to the application dated 15th day of July 2021.

2.The application is supported by grounds on its face together with the affidavit sworn by the 1st Respondent. The Applicant stated that he instructed the firm of Ongegu & Ongegu Associates to represent him in this matter. That the Applicant made inquiries from the said firm on whether a response was filed, but he got no answers from the said firm. That the 1st Respondent learnt from the court registry that no response was filed by the firm of Ongegu & Ongegu Advocates which prompted this application.

3.The Applicant also stated that unless the orders sought are granted, he may suffer immense prejudice and irreparable harm as he was issued with allotment letters in the year 1993 and paid premiums of Kshs. 179,800/- in the year 2017. That he should be allowed to challenge the application dated 15th July 2021 by filing a reply thereto.

4.The Application is opposed. The Plaintiff/Respondent filed his Replying affidavit sworn on 1st November, 2021, where he stated that service of summons together with the application dated 15th July 2021 was effected on all the Defendants in this matter between 16th July 2021 and 21st July 2021. That the 1st Defendant was served on 21st July 2021. That the application came up for hearing on 27/7/2021 and the 1st Defendant was ably represented and his Counsel sought for time to file a response to the application, whereof the court granted him 14 days within which to comply and the matter was fixed for mention on 4/10/2021.

5.That when this matter came up on 4/10/2021, Mr. Ongegu Advocate who was holding brief for Mr. Bosire Counsel for the 1st Defendant, informed court that they had not filed a replying affidavit as they had instructions to allow prayer 4 of the application so that the matter can proceed to full hearing. That this proposal was rejected by Counsel for the Plaintiff who asked for all the orders sought in the application. That the 1st Respondent had close to 4 months to respond to the matter but failed to do so.

6. The Plaintiff/Respondent further averred that a party is bound by the actions of his Advocate and that the Applicant has not denied instructing Ongegu & Ongegu Associates to represent him. That the Applicant has not complied with Order 7 rule 1 of the Civil Procedure Rules, and hence should not be indulged by the court. That the failure to file a response to the application is not excusable and that Sections 1A and 1B of the Civil Procedure Act provides for overriding objective, whose intention is for expeditious determination of a case. That the draft Replying affidavit does not raise any triable issue, as the Plaintiff is the registered proprietor of the suit land. That the application seeks to obstruct the cause of justice and is an abuse of the court process, frivolous, vexatious and incompetent and the same ought to be dismissed.

7. I have considered the application, the affidavit in support as well as the Replying affidavit. The issue that arise for determination is whether the Applicant deserves the orders sought. The application is brought under Section 1, 1A, 1B, 3, 3A, and 63 of the Civil Procedure Act Cap 21 Laws of Kenya, Order 51 Rules 1 and 4 of the Civil Procedure Rules and Section 19(1) of the Environment and Land Court Act. The orders sought are discretionary. The Applicant blames his Advocate for not filing a response to the application dated 15/7/2021. He indicates that he made inquiries severally on whether a response was filed but received no answer. This was between 21st July 2021 and 18th October 2021. He argues that a mistake of Counsel should not be borne by an innocent client. In the exercise of the court's discretion, I must consider whether the Applicant who seeks to approach the court under the Provisions of the overriding objective is deserving of such orders.

8. Section 1A and 1B of the Civil Procedure Act provides for overriding objective of the Civil Procedure Act and states as follows:

1A(1) **“The overriding objective of this Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act.**

(2) The court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in Sub-section (1).

(3) A party to Civil Proceedings or an Advocate for such party is under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.

1B For the purposes of furthering the overriding objective specified in Section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:-

(a) The just determination of the proceedings;

(b) The efficient disposal of the business of the court;

(c) The efficient use of the available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and,

(e) The use of suitable technology.”

9. In essence, the overriding objective provisions enjoins the court to give effect to overriding objective in the interpretation of its provisions. In the case of *Madison Insurance Company Limited vs. David Wambua, Jackson Mulinge Maingi & Another (Interested Party)* [2021 eKLR], the court cited with approval the holding of Lord Woolf in *Swain vs. Hillman* [200] 1 All ER 91:

“It saves expenses; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice.”

10. In the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & Others* [2013] eKLR, the court of Appeal had this to say concerning application of the overriding objective principles;

“On the applicability of the overriding objective principle in the Appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. See the case of *City Chemist (NRB) Mohamed Kasabuli suing for and on behalf of the estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application Number Nai 302 of 2009 (UR 199/2008)*. The aim of the overriding objective principle is to enable the court achieve fair, just, speedy, proportionate time and cost saving disposal of cases before it. (see the case of *Kariuki Network Limited & Another versus Daly & Figgs Advocates Civil Application No. Nai 293 of 2009*); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (see the case of *Kariuki (Supra)*: that in applying or interpreting the law or rules made thereunder, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals.”

11. I have considered the Applicants reasons for not complying with the directions of the court made on 27th July 2021. The Applicant blames his Counsel for failure to file a response to the application of 15th July 2021 between 21st July 2021 and 18th October 2021, a period of close to three months. The Applicant has not demonstrated the reasons why it took him three months to instruct a new Advocate to appear for him. In addition, there is no material before court to show that indeed the Applicant made such inquiries to his Advocate. It is my view that the conduct of the Applicant does not assist the court to further the overriding objective of the Civil Procedure Act. Until now the

Applicant has not filed defence, witness statements or bundle of documents to intimate his intentions of challenging this suit.

12. While every party to a suit is entitled to have their day in court, that does not mean that it should be at the expense of the other parties in the suit or for abuse of the process of court or merely aimed at wasting the court's resources. Every person involved in litigation, whether it a party, an advocate or the court, is enjoined by Sections 1A and 1B of the Civil Procedure Act, to ensure that interests of justice are achieved through a just determination of the proceedings, efficient disposal of the court's business, efficient use of the available judicial and administrative resources and the timely disposal of proceedings at an affordable cost. In the case of **Muchanga Investments Ltd vs. Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR** it was held as follows;

“In our view, the other quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time.

Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

13. The upshot of the above is that the 1st Defendants application dated 18/10/2021, lacks merit and I dismiss the same with costs.

14. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF NOVEMBER 2021.

A. NYUKURI

JUDGE