



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC MISCELLANEOUS APPLICATION NO. 10 OF 2021

ALBAN NJOKA KAMUNDI.....APPLICANT

VERSUS

GEORGE MUNENE MBARE.....1ST RESPONDENT

EDWIN MURITHI KINYUA.....2ND RESPONDENT

RULING

1. Before this court is an application dated on 27th October, 2021 under certificate of urgency and wherein the applicant prayed for orders:
 - i. That the instant application be certified urgent and be heard on priority basis.
 - ii. That pending the Interpartes hearing of this application, further proceedings and delivery of judgement on 12th November 2021 in Chuka C.M.C E.L.C Case No.51 of 2019 (George Munene Mbare &Ano. Versus Alban Njoka Kamundi) be stayed.
 - iii. That CHUKA C.M.C E.L.C Case No.51 of 2019 (George Munene Mbare & Ano. Versus Alban Njoka Kamundi) be called to this court for purposes of this application.
 - iv. That the order made on 8th October 2021 closing the defence case and ordering filing of written submissions be revised and the applicant herein Alban Njoka Kamundi be granted an opportunity to tender his defence in Chuka C.M.C E.L.C Case No.51 of 2019
2. The application is supported by the affidavit of ALBAN NJOKA KAMUNDI and is premised on the following grounds;
 - a) That the applicant herein is the defendant in CHUKA C.M.C E.L.C Case No.51 of 2019(George Munene Mbare & Ano versus Alban Njoka Kamundi.)
 - b) That in the said matter the plaintiffs testified on 3rd September 2021 and closed their case on the same day.
 - c) That after the closure of the plaintiff's suit the defence case was set for 22nd September 2021.
 - d) That on 22nd September 2021 the defendant in CHUKA C.M.C E.L.C CASE NO 51 of 2019 was ill and not able to attend court for the defence hearing.
 - e) On 22nd September 2021 counsel for the defendant in CHUKA C.M.C E.L.C Case No. 51 of 2019 notified the court of the defendant's illness and the court granted an adjournment and listed the case for defence hearing on 29th September 2021.
 - f) That the defendant in CHUKA C.M.C E.L.C CASE NO.51 of 2019 visited the hospital on 24th September 2021 and the doctor advised him to have bed rest on the same day which lasted until 4th October 2021 for he suffers from high blood pressure and diabetes.
 - g) That the defendant in CHUKA C.M.C E.L.C CASE NO.51 of 2019 was advised to go for review on 4th October 2021.
 - h) That on the said date,29th September 2021 the defendant in CHUKA C.M.C E.L.C CASE NO.51 of 2019 was again not able to attend court for he was gravely ill and under bed rest which had been prescribed to him and his counsel on record also notified the trial court that the defendant therein had not recovered fully and the court adjourned the matter to 6th October 2021.Counsel for the

defendant also notified court that it was difficult for him to contact the defendant in CHUKA C.M.C E.L.C CASE NO.51 of 2019 for the defendant's phone was off as he had been advised by his doctor to rest and these particulars were well known by the plaintiff's counsel on record.

i) That on 4th October 2021 when the defendant in CHUKA C.M.C E.L.C CASE NO.51 of 2019 visited the doctor for review he was advised to have a further bed rest until 11th October 2021.

j) That on 6th October 2021 the defendant in CHUKA C.M.C E.L.C Case No. 51 of 2019 did not show up in court for defence hearing for he was under bed rest and on that day the court directed that it would deliver a ruling on 8th October 2021 on whether to order closure of defence case or not.

k) That on 8th October 2021 the court sui moto closed the defence case despite strenuous opposition by the defendant's counsel.

l) That it was neither deliberate nor intentional on the part of the defendant therein and the applicant herein to have the matter adjourned for several times but it was due to his health conditions and complications.

m) That the applicant herein is apprehensive that if the judgement in CHUKA C.M.C E.L.C Case No.51 of 2019 is delivered having not tendered his defence he stands to be prejudiced.

n) That the defendant further feels that it is against the principles of natural justice and against the provisions of the Constitution of Kenya 2010.

o) That if the orders sought are not granted the applicant herein and the defendant in CHUKA C.M.C E.L.C CASE NO.51 of 2019 stands to suffer prejudice which cannot be compensated by way of damages and he stands to lose his land.

p) The orders sought are meant to meet the ends of justice.

3. The Applicant has annexed copies of pleadings in CHUKA CMC ELC CASE NO.51 OF 2019 and copies of medical documents.

4. The application is opposed. The Respondents filed a replying affidavit on 16.11.2021 sworn by Edwin Murithi Kinyua, the 2nd Respondent on 9th November, 2021.

5. It is the Respondents contention that the application is ill-advised, is in bad faith and the same is lodged in sheer and blatant abuse of the court process and that the applicant is a frivolous and vexatious litigant who has come to the court with unclean hands and therefore, not entitled to the grant of the prayers he is seeking.

6. The respondents aver that CHUKA CHIEF MAGISTRATE'S ELC CASE NO.51 OF 2019 was filed under a certificate of urgency and a notice of motion dated 16th September, 2019 whereby the matter was fixed for hearing on 2nd October, 2019. That the applicant entered appearance through his advocates, David John Mbaya & Co. on 1st October, 2019.

7. The Respondents aver that they instituted the proceedings in CHUKA CHIEF MAGISTRATE'S ELC CASE NO.51 of 2019 because the Applicant had constructed illegal structures on an access/road reserve leading to their parcels of land thereby blocking access and making it impossible for the respondents herein to develop their properties and rendering the construction materials they had procured into waste, theft and/or losses due to frustrations occasioned by the Applicant who has adamantly either refused, failed, declined and or neglected to remove the illegal structures blocking the access.

8. The respondents aver that the applicant has been mischievously employing unorthodox means to frustrate the matter from being heard and determined such as frequent changing of advocates and lodging of myriad applications. They aver that a perusal of the lower court file will reveal this sorry state of affairs that has been stagnating the matter from moving on.

9. It is stated that the Applicant has been represented in the matter in the lower court by DAVID JOHN MBAYA & CO; ELIJAH K. OGOTI & CO; MUTHOMI GITARI & CO; not to mention the many times the applicant has sought to act in person, which manifestly, has been a way of either stalling or frustrating progression in the matter.

10. The respondents aver that frustrated with the Applicant's schemes, they made an application dated 16th July, 2021 seeking to have the matter heard and determined expeditiously on priority basis to forestall further and/or accumulating losses that they have been suffering endlessly. That the Application dated 16th July, 2021 was allowed and the matter was set for hearing on 4/8/2021, 3/9/2021, 22/9/2021, 29/9/2021 and 6/10/2021. That during the last two hearings the Applicant mysteriously decided not to appear in court without even alerting his advocate who tried frantically to reach him but the Applicant had switched off his phone. That there is no reason why the Applicant could not alert his advocate if truly he was indisposed.

11. That after the Applicant willfully defaulted to appear for the proceedings, the plaintiffs' case was closed. That the Applicant was duly given the opportunity to be heard and to present his defence but for reasons better privy to himself he decided not to seize that opportunity, yet the court and the process could neither wait nor stay in abeyance endlessly forever. That at no time did the applicant and/or his advocate mention or notify to court that the applicant was indisposed and was unable to attend court.

12. The respondents state that the medical documents/treatment notes produced by the Applicant in support of his application are suspicious,

as their date manifest, have no connection to and have no bearings to the dates that the matter came up for hearing and cannot be relied on to grant the Applicant's prayers.

13. The respondents state that their advocate had confided to the 2nd Respondent that at no time was he or the court ever been notified about the applicant's purported health and all manifestations and that the Applicant was at all material times deliberately dodging or avoiding attending court. That further protracted stay of this matter that was brought under a certificate of urgency is a serious violation of the rules governing the time frames within which matters must be concluded.

14. The respondents aver that it is unfair to them and a fragrant abuse of the court process to allow the Applicant to continue playing with the court process for no good reason and/or justifiable adding that the applicant has come to this court with unclean hands, and cannot therefore be granted the prayers sought herein.

15. The Respondents pray that the application be dismissed with costs and the lower court be allowed to render judgement in the matter.

16. The matter was canvassed by written submissions which were also highlighted. The applicant cited the case of CMC Holdings Ltd vs James Mumo Nzioka in which the Court of Appeal held inter alia:-

“The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error”.

17. The applicant has also cited section 3A of the Civil Procedure Act which 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.”**

18. The applicant submitted that it is the fundamental duty of the court to do justice between the parties and 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 and it is a 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. The applicant prayed for the application to be allowed.

19. The respondents in their submissions dated **26th November, 2021** have vehemently opposed the application and reiterate the averments and contents of their replying affidavit and invite the court to look at and consider the veracity of those averments.

20. The Respondents submitted that the failure to tender defence by the Applicant was solely to be blamed on and is attributed to the Applicant's deliberate, willful and advertent acts schemed and planned to frustrate the proceedings and determination of the suit upon the Applicant's realization and knowledge that he did not have a good case.

DETERMINATION

21. I have considered the application, the grounds upon which it is based, the affidavit in support of and in opposition thereto as well as the submissions made.

22. In the application herein, the Applicant is mainly seeking orders of the revision of the orders made on **8th October, 2021** by the subordinate court in Chuka CMC ELC Case No. 51 of 2019 ordering the closing of the defence case and for the applicant to be granted an opportunity to tender his evidence.

23. First and foremost, it is clear to me that what is being challenged is a court decision arising from certain proceedings. In this application, the impugned decision arose from a decision that was made by the learned magistrate in CMC ELC Case No. 51 of 2019. In my understanding, whenever a party is dissatisfied with a court decision, it is trite law that any aggrieved party may either appeal against the said decision, or apply for a review of the same. What is before this court is a miscellaneous application. The Applicant has not approached this court by way of appeal or even an application for Judicial Review. What the applicant is complaining about is in fact a denial of an application for adjournment. That the decision whether or not to grant an adjournment is an exercise of Judicial discretion cannot be in doubt. Where a discretion has been exercised by a court, whether wrongly or rightly, it is my view that such exercise of discretion unless is shown to be illegal, irrational or unreasonable, goes to the merit of the decision and ought not to be made the subject of an application such as the one before court. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify to be interfered with in the manner urged by the applicant herein.

24. Having considered the foregoing, it is my view that whereas the applicant's complaints may be a basis for an appeal, the said complaints do not warrant the grant of the orders sought herein in the manner that the applicant has urged the court to do. It is therefore my finding that the application before me is incompetent.

25. Accordingly, I find no merit in the notice of motion dated **27th October, 2021**, which motion is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY DECEMBER, 2021 IN THE PRESENCE OF:

C/A: Martha

KIRIMI FOR RESPONDENTS

MUTHOMI FOR APPLICANT

C. K. YANO,

JUDGE.