



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC SUIT NO.310 OF 2017

CHRISTINE MUTUNGI MUSANGOPLAINTIFF/RESPONDENT

-VERSUS-

1. MUSANGO MUTUNGA MBUSUS

2. FRANCIS N. MWEU

3. MUENDO KINAI

4. ANDREW MULWA

5. JOHN SILA.....DEFENDANTS/APPLICANTS

RULING

1. What is before the Court for ruling is the 2nd to 5th Defendants'/Applicants' application expressed to be brought under Sections 3, 1A and 1B of the Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules and all other enabling provisions of the law for orders: -

1) Spent.

2) That this Honourable Court be pleased to set aside the order made on 29th April 2019 striking out the Defence of the 2nd – 5th Defendants and the same be reinstated.

3) That this Honourable Court be pleased to grant leave to the 2nd – 5th Defendants/Applicants to defend this suit.

4) That the costs of this application be in the cause.

2. The application is dated 21st May, 2019 and was filed in court on 23rd May, 2019.

3. It is predicated on the grounds that the delay in filing defence was partly because the 2nd to 5th Defendants/Applicants have never been served with the Amended Plaint filed herein on 1st September, 2017, that the 2nd to 5th Defendants/Applicants have a solid defence to the Plaintiff's/Respondent's claim as contained in the draft defence attached hereto, and will suffer irreparably if the matter is concluded without their tendering evidence, that it is fair, just and expeditious that the application herein be allowed at this point in the proceedings.

4. It is also supported by the affidavit of Andrew Mulwa, the 4th Defendant/Applicant herein sworn at Nairobi on 21st May, 2019.

5. The Application is opposed by the Plaintiff/Respondent through the replying affidavit of Evans Muli, the Advocate for the Respondent practicing as an associate in the law firm of Andrew Makundi & Co. Advocates. The other affidavit was sworn at Machakos on 20th September, 2019 and filed in court on 23rd September, 2019.

6. The 4th Defendant/Applicant has deposed in paragraphs 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 13 of his supporting affidavit that they were served with summons to enter appearance in this matter and they instructed the firm of Kalinga & Company Advocates to enter Appearance on their behalf and the said law firm duly entered appearance on 26th July, 2017, that there was slight delay in giving instructions to their advocate on their defence as the Applicants were trying to establish the status of two other cases they knew had been previously filed by the

Plaintiff/Respondent before the High Court in Machakos over the same subject matter herein and when they got the details of the cases and their status, in early September, 2017 they instructed their advocate on their defence, that their advocates informed them that when their clerk went to file the defence, they were informed that an amended plaint had been filed on 1st September, 2017 and he was instructed not to file the defence so that they could file one all-inclusive defence once the amended plaint had been served, that the Applicants checked severally with their advocate to see if the amended plaint had been served, and all the time they checked, the same had not been served leading them to conclude that the Plaintiff/Respondent had abandoned his case since the Applicants knew of similar pending cases, that on 22nd April, 2019, the 4th Defendant/Applicant learnt that the matter was coming up in court on 29th April, 2019, an issue that surprised him since they had not been served with the amended plaint, that the 4th Defendant/Applicant immediately called their advocate on record, who proceeded to peruse the court file and established that the matter was coming up for pre-trial directions. The advocate made copies of the amended plaint from the court file and proceeded to file a defence thereto on 26th April, 2019 while explaining to the Applicants that a defence was admissible at any time before entry of judgement, that to their advocate's surprise as well as the Applicants' surprise, they learnt that the Plaintiff/Respondent had applied for the defence to be struck out which the advocate holding brief for their advocate could not respond due to limited instructions, that while admittedly the Defendants/Applicants took long to file their defence, the Plaintiff/Respondent nevertheless contributed by his failure to serve the amended plaint upon either themselves or their advocate on record, that it is evident from the annexed draft defence which is similar to the one that was struck out that they have a very good defence which raises triable issues and it is only fair that it be admitted so that the Court can take into consideration all the issues in determining the matter and that if the Defendants/Applicants are not granted leave to defend the matter, they stand to suffer irreparable loss.

7. On the other hand, Mr. Evans Muli has deposed in paragraphs 4, 5, 6, 7, 8, 9 and 12 of his replying affidavit that the Applicants have not tendered any tangible reasons as to why the application should be allowed and their defence reinstated, that the application is fatally defective as the deponent of the affidavit purports to have authority of his co-applicants which authority is not in writing and is not annexed to the application contrary to the express provisions of Order 1 Rule 13 of the Civil Procedure Rules, that in paragraph 2 of the supporting affidavit, the deponent has stated that on service of summons, they instructed their advocate on record to file a memorandum of appearance on 26th July, 2017 whereas this matter came up on the 29th April, 2019 when the Court perused the file and no memorandum of appearance was on record and in any event if the same had been filed as alleged, then the same is amenable to being struck out as it has not been served upon the Respondent's advocate within the prescribed period, that the issue of failure to be served with the amended defence (sic) as alleged cannot hold water since the Defendants/Applicants have not explained why they did not file a defence to the initial suit which was served upon them together with the summons, that the delay to file defence for a period of over two years cannot be excused notwithstanding the fact that a defence can be filed with leave at any time before judgement, that the defence sought to be reinstated raises no triable issues and that if the Court is persuaded to allow the application, the Applicants should pay Kshs.150,000/= being throw away costs.

8. The application was disposed off by way of written submissions.

9. In her submissions, the Counsel for the 2nd to 5th Defendants/Applicants began by pointing out that the amended plaint dated 01st August, 2017 and filed in court on 01st September, 2017 has to date never been served upon the Defendants/Applicants. The Counsel added that if the Court were to truly correct the mistakes of delay and omission in a manner that is manifestly impartial, it would start by ordering the Plaintiff/Respondent to serve the Defendants/Applicants with the amended plaint as is required by law.

10. The second issue that the Defendants'/Applicants' Counsel raised is that they filed the memorandum of appearance dated 26th July, 2017 and it bears the court stamp of the same date. The Counsel pointed out in the absence of the evidence to the contrary, it can only be presumed that the memorandum of appearance was duly filed on the said date. The Counsel went on to add that while the record of the court shows that the Court did not trace the memorandum of appearance in the court file on 29th April, 2019, the Court will recall that it did not readily locate the said document in the court file on 23rd September, 2019 even though it was actually in the file. The Counsel went on to state that this issue is raised because the Court will note from the application that there was no mention of it in the application and for that reason the Counsel stated in court on 23rd September, 2019 that she had no knowledge that the issue of memorandum of appearance had been raised in court on 29th April, 2019.

11. Regarding the application, the Defendants'/Applicants' Counsel submitted that the defence raises triable issues.

12. The Counsel went on to submit that the Defendants/Applicants have stated in their defence that they are bona fide purchasers for value without notice and as such, their rights are protected. The Counsel further submitted that this is a matter that would require the Court to receive evidence in order to judiciously determine the suit.

13. It was also submitted that the right to be heard is fundamental and ought not to be denied except in the clearest of circumstances. In support of her submissions, the Counsel relied on the case of **Patriotic Guards Ltd vs. James Kipchirchir Sambu [2018] eKLR** where the Court of Appeal highlighted diverse principles applicable in an application of this nature as follows: -

“And in **Mbaki & Others vs. Macharia & Another [2005] EA 206**, at page 2010 this Court stated as follows;

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

The Court went on to state that;

“In the circumstances of this case, there was no reason grave enough that would warrant the locking out of the Appellant from pursuing its defence and counterclaim and allowing the trial to proceed to its logical conclusion. The interest of justice warrants this Court's intervention.”

14. The Counsel further submitted that in the instant case, it is clear that the Defendants'/Applicants' defence was struck out not just because it was filed without leave, but also because, and perhaps principally so, the Court took it that it had been filed without the Applicants ever having entered appearance. The Counsel pointed out that had the Court seen the memorandum of appearance, it would have been inclined to preserve the defence on record.

15. Regarding the replying affidavit filed by the Plaintiff/Respondent, the Applicants' Counsel pointed out Order 1 Rule 13 of the Civil Procedure Rules referred to by the Plaintiff/Respondent is in respect of one party entering appearance on behalf of other parties which is not the case in the instant case where the applicants are represented by an advocate.

16. The Counsel went on to submit that even though it is conceded that the memorandum of appearance was not served upon the Plaintiff's/Respondent's advocate, it is not a reasonable ground to allege that the same is amendable to being struck out. The Counsel pointed out as long as the memorandum of appearance remains on record, then the advocate is properly on record.

17. As for the Plaintiff's/Respondent's claim that allowing the application will cause delay in this matter, the Counsel pointed out that it is worth noting that already without the Applicants participation, the matter only came up for pre-trial directions on the 29th April, 2019 which is almost two years from the date of filing in July, 2017.

18. As for the throw away costs of Kshs. 150,000/= that the Plaintiff/Respondent seeks, the Counsel submitted that it amounts to rewarding her for her failure to serve the amended plaint.

19. The Counsel for the Plaintiff/Respondent submitted that the plaint dated 10th July, 2017 and the amended plaint dated 01st August, 2017 were all served upon the Defendants/Applicants. The Counsel pointed out the Defendants/Applicants chose not to respond to the plaint and the amended plaint.

20. Regarding the defence which the Applicants served on 29th April, 2019, the Counsel submitted that it was filed out of time and that there was nothing to show that the firm of Kalinga & Co. Advocates were on record for the Applicants resulting in the same being struck out. The Counsel went on to submit that if indeed it is true that a memorandum of appearance was filed on 26th July, 2017 the stipulated time to file a defence lapsed on the 09th August, 2017 which was almost a month before the amended plaint was filed. The Counsel added that if indeed the Applicant came across the amended plaint when they perused the court file, they did not produce any receipt since perusal of files is chargeable.

21. It was further submitted that the application is fatally defective in that the deponent of the affidavit in support of the application purports to have authority of his co-applicants which authority is not in writing.

22. Regarding service of memorandum of appearance filed by the Defendants/Applicants, the Counsel for the Plaintiff/Respondent cited Order 10 Rule 3 of the Civil Procedure Rules which provides that the Court may strike out such a memorandum or statement of defence in the event that the same was not served within the stipulated time.

23. It was also submitted that the orders sought being equitable and discretionary in nature, are not available to the Applicants herein who are guilty of laches in that they failed to file their defence for approximately two (2) years. The Counsel termed the Applicants' actions as clear abuse of the court process.

24. The Counsel relied on the case of **Joseph Kangethe Kabogo & Another vs. Michael Kinyua Ngari [2012] eKLR** where E.K.O Ogola dismissed an application to appeal out of time by stating thus;

“it is not demonstrated what the Applicants were doing during these 90 days. If the Applicants had brought the application within 30 days on the receipt of notice of judgement, that would have been late enough, but could be considered.”

25. Having read the application, the replying affidavit and having considered the submissions filed by the Counsel on record for the parties herein, my finding is as follows: -

a) Firstly, on the 29th April, 2019, the Defendants'/Applicants' defence dated 25th April, 2017 and filed in court on 26th April, 2019, was struck out by this Court on the ground that the defence was filed without the Applicant's Counsel first filing a memorandum of appearance. That was an error on the part of the Court in that there is a memorandum of appearance dated 26th July, 2017 and filed in court on even date by the firm of Kalinga & Co. Advocates on behalf of the Defendants. On that ground alone, the Court should not have been quick to strike out the defence dated 25th April, 2017 notwithstanding the fact that the Defendants'/Applicants' Counsel has conceded that they did not serve the memorandum of appearance upon the Plaintiff's/Respondent's Counsel. I would agree with the Counsel for the Defendants/Applicants that as long as the aforementioned memorandum of appearance remains on record, then the advocate is properly on record. It is not lost on this Court that the Plaintiff/Respondent is yet to serve her amended plaint and in my view it would be a draconian act to punish the Defendants/Applicants and leave out the Plaintiff/Respondent who is guilty of non-service of the amended plaint.

b) The above being the case, the Defendants were at liberty to file their defence at any time before judgement but it was not prudent for them to wait to be served with an amended plaint before filing their defence which in any case was ready for filing. The Defendants/Applicants cannot be entirely absolved from the situation that they find themselves in as they have not disclosed who advised them not to file their defence when they arrived at the court's registry with the said defence.

c) Secondly, it is not in dispute that the Plaintiff/Respondent is yet to serve the 2nd to 5th Defendants/Applicants with the amended plaint dated 01st August, 2017 as there is no affidavit of service on record. But as earlier on observed, it was incumbent upon the Defendants/Applicants to respond to the plaint dated 10th July, 2017 and filed in court on even date without waiting to be served with the amended plaint. Be that as it may, the Plaintiff/Respondent has no reason why she is yet to serve the said amended plaint.

d) Thirdly, the application is not fatally defective contrary to what the Plaintiff/Respondent would want this Court to believe. As was correctly submitted by the Counsel for the Defendants/Applicants, Order 1 Rule 13 of the Civil Procedure Rules does not apply herein as the 4th Respondent did not enter appearance on behalf of his co-applicants when he filed the instant application. Consent of his co-applicants would have been necessary if he were suing on their behalf. I am satisfied that in paragraph 2 of the supporting affidavit, the 4th Defendant/Applicant has deposed that he has the consent of the 2nd, 3rd and 5th Defendants/Applicants. In my view, therefore, it was not necessary for the consent to be in writing.

e) Fourthly, I have looked at both the defence dated 25th April, 2019 that was struck out on 29th April, 2019 as well as the annexed draft defence to the Defendants'/Applicant's application and it is clear to me that the two raise triable issues one of them being that the Defendants/Applicants are purchasers for value and without notice of portions of all that parcel of land known as Makueni/Kako/170. The interest of justice demands that the Defendants/Applicants be granted the opportunity to present their evidence before the Court makes its determination. To deny the Defendants/Applicants their right to be heard would therefore prejudice their chances of presenting the defence that they have against the Plaintiff's/Respondent's claim. An issue that has come out clearly in this application is that both parties herein are not entirely absolved from the predicament that they find themselves in. It would therefore not be proper to condemn one party to pay costs to the other. Be that as it may, the upshot of the foregoing is that the application has merits and I hereby proceed to allow it in terms of prayers 2 and 3. Each party to bear their own costs.

Signed, dated and delivered at Makueni via email this 21st day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi