



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 320 OF 2017

(Formerly Machakos ELC Case No. 33 of 2013)

WIKIO INVESTMENT COMPANY LIMITED.....PLAINTIFF

VERSUS

PURITY KIMWATI IKAYO.....1ST DEFENDANT

JULIUS KIPOLONKO MULEI.....2ND DEFENDANT

RULING

By a Notice of Motion Application dated the 16th October, 2019, brought pursuant to section 1A, 1B and 3 of the Civil Procedure Act as well as Order 40 (1) (a) of the Civil Procedure Rules, the Defendants seeks the following orders:

1. Spent
2. That this Honourable Court be pleased to allow the Applicant herein to recall the Plaintiff's witnesses for cross examination.
3. That the Plaintiff herein be recalled to produce all exhibits pertaining to the matter herein.
4. That the costs of this application be in the cause.

The application is based on the grounds that the Applicants have an arguable case with a high probability of success. Further, if the order is not granted, the Applicants will suffer irreparable loss and will be highly prejudiced.

The application is supported by the affidavit of JULIUS KIPOLONKA MALEI where he deposes that he learnt on 3rd October, 2019 that this matter was listed for judgment. He confirms that together with the 1st Defendant they have never appeared in court for hearing of this matter. He denies being served with a hearing date at any particular time and perceives this to be a gross violation of their rights. He claims land parcel number Kajiado/ Kitengela/ 35845 is restricted by the Plaintiff without justifiable reasons despite the fact that they are in possession of it.

The Plaintiff did not file a response to oppose the application.

The Defendants filed submissions to canvass the application.

Analysis and Determination

Upon consideration of the Notice of Motion Application dated the 16th October, 2019 including the supporting affidavit and submissions, the only issue for determination is whether the Plaintiff's witnesses should be recalled for cross examination and production of exhibits.

The Defendants claim they were not served with a Hearing Notice when the suit was scheduled for hearing but only learnt on 3rd October, 2019 that this matter was listed for judgment. Further, they have not been accorded the right to cross examination, thereby denying them their right to be heard. They have relied on Article 50 of the Constitution, Order 19 Rule 2 (1) and (2) of the Civil Procedure Rules as well as the case of **Oriental Five and General Assurance Ltd V Gorinder & Others CA 39/1968 (1969) EA 116** to support their arguments. From the Court Record, I note interlocutory judgment was entered against the Defendants on 29th January, 2015 before this matter was transferred

to Kajiado ELC from Machakos ELC. The matter proceeded for formal proof on 11th June, 2018 in the absence of the Defendants. The Defendants claim they learnt on 3rd October, 2019 that this matter was listed for judgment and yet their Counsel had attended Court on 10th December, 2018 and sought to file written submissions in a matter they had not participated in. They are seeking to recall the Plaintiff's witnesses for cross examination.

Order 18, rule 10 of the Civil Procedure Rules provides that: **'The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.'**

Section 146 (4) of the Law of Evidence Act provides that: **' The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of further cross – examination and re – examination respectively.'**

Further, Order 10 Rule 6 which stipulates thus: **' Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.'**

While Order 10 Rule 9 provides that: **' Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.'** With Order 10 Rule 10 of the Civil providing that: **' The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.'** Further Order 10 Rule 11 stipulates thus: **' Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.'**

I note in the current scenario, interlocutory judgement had already been entered against the Defendants on 29th January, 2015 and the matter proceeded for hearing in their absence. I note they filed a Statement of Defence on 10th December, 2018 after the matter had proceeded for hearing without leave of court. Based on the legal provisions cited above, I opine that instant application is premature as the Defendants as there is already an interlocutory judgment against the Defendants. I advise that the Defendants need to apply to set aside the said Interlocutory Judgment, file their Defence, Witness Statements and Documents to enable the Plaintiff file its response, before they can lodge an application to recall the Plaintiffs' witnesses.

It is against the foregoing that I find the application dated the 16th October, 2019 unmerited and will proceed to dismiss it with costs.

Dated, Signed and Delivered via email this 14th of May 2020

CHRISTINE OCHIENG

JUDGE