



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 3 OF 2017

AUGUSTINE BARASA KHISA NAWANJE.....PLAINTIFF

VERSUS

EUNICE MUGURE MUCHORI

(Sued as an administratrix of the estate of the late

JOHN MUCHORI BAIYA).....DEFENDANT

RULING

1. The defendant filed an application dated **19/2/2020** on the same date, seeking the following orders:

1. ...spent

2. That the order of this honourable court made on 30/1/2020, closing the defence case herein be reviewed varied and/or set aside.

3. That the defence case be reinstated.

4. That the costs of this application be provided for.

2. The application is brought under provisions of **Judicature Act Cap 8, High Court (Practice and Procedure Rules) Part 1 rule 3, Sections 80 of the Civil Procedure Act, Cap 21, Order XV1 Rule 2(1), Order XL1V Rules 1, 2 and 3 and Order L Rule 1 of the Civil Procedure Rules.**

3. The grounds on the face of the application are that the counsel to the applicant “*gave instructions to her clerk to place the file aside for 30 minutes to enable the counsel find out the true position of the client*”; that the defendant is ailing and had flown to India for treatment; that it would be just and fair that the mistake on our part should not be visited upon the applicant herein and that this application has been made without unreasonable and/or undue delay.

4. The application is supported by the affidavit of the defendant sworn on **19/3/2020**.

5. The plaintiff filed grounds of opposition dated **2/3/2020** on the same date opposing the application on the following, among other grounds:-

(1) The application dated 19/2/2020 is misconceived, incompetent, fatally defective and an abuse of the court process.

(2) The application is scandalous, frivolous and vexation and embarrasses the due process of justice hence the same should be dismissed with costs.

(3) The application does not meet the threshold for review as provided under Order 45 of the Civil Procedure Rules.

(4) The application is based on falsehood and the same should be dismissed with costs.

(5) The application is a delay tactic employed by the applicant who is already in possession of the suit land to the detriment of the plaintiff.

(6) The plaintiff has already filed submission on record and the matter is pending judgment and it is only fair and just that this matter do proceed to judgment.

6. In effect there is no replying affidavit responding to the facts claimed in the supporting affidavit. The plaintiff filed his submissions on 29/4/2020. The defendant filed her submissions on 3/6/2020.

8. I have considered the application and the grounds of opposition and the submissions. The issues that arise for determination in the application are as follows:

(1) Whether the orders of this court issued on 30/1/2020 closing the defence case and that parties do file submissions should be set aside and the defence case be reopened for hearing.

(3) Who should bear the costs of this application?

8. The issues are discussed as hereunder.

(1) Whether the orders of this court issued on 30/1/2020 closing the defence case and that parties do file submissions should be set aside and the defence case be reopened for hearing.

9. The application before me is premised on the claim that the defendant had travelled to India for medical attention by the time the suit came up for hearing. A copy of the air ticket and passport have been attached to the supporting affidavit. For that reason she was not therefore in court on the date of the hearing.

10. However she is represented by an advocate who is the deponent of the supporting affidavit. Counsel explains that she sent her “clerk to place aside the file for 30 minutes” to enable her communicate with her client as she had not arrived. When she came back to court later she found that the matter had been called out and that the plaintiff’s counsel had applied for closure of the defence case.

11. It can not be understood how the clerk could be expected to place aside the file for 30 minutes since clerks do not address courts. What counsel for the defendant should have done was to seek a qualified advocate to hold her brief in order to explain her predicament.

12. Be that as it may, I have noted that the defendant in this matter had participated in the preparation of this matter for hearing and had filed her amended defence and bundle of documents.

13. The information that counsel has brought forth before court, to the effect that the defendant had flown to India on medical grounds is credible. On the basis of that information this court is willing to set aside its orders so as to allow the defendant prosecute her case when she is in better health.

14. Mr Teti has in his submissions on the plaintiff’s behalf faulted the defendant’s reliance on **Order 45** of the **Civil Procedure Rules** and urged this court to proceed to judgment. Regarding the law, I have noted that this is principally an application for setting aside an order closing the defence case in the absence of the defendant. In the circumstances that the defendant has outlined herein above and which have been accepted by this court to be credible, this court prefers to hold in higher esteem the constitutional provisions in **Article 50** that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

and **Article 159(2)(d)** to the effect that:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a)

(b).....

(c).....

(d) justice shall be administered without undue regard to procedural technicalities;

15. I therefore find that it would be in the interests of justice to grant the orders sought.

(2) Who should bear the costs of this application?

16. The plaintiff did his part in prosecuting his case and seeking the closure of the defence case. The defendant was absent, which occasioned the need for the application. The defendant therefore should bear the costs of the application.

Conclusion

17. I therefore grant the application dated **19/2/2020** in terms of **prayer 2 and 3** thereof. The defendant shall bear the costs of the application.

Dated, signed and delivered at Kitale via electronic mail on this 30th day of June, 2020.

MWANGI NJORGE

JUDGE, ELC KITALE.