REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 70 OF 2012

ODOYO OSODO …………………….…………..……..…PLAINTIFF

VERSUS

RAEL OBARA OJUOK ……………………………..…1ST DEFENDANT

BENARD OPIYO OJUOK ………………………….....2ND DEFENDANT

MOSES OCHIENG MATINDE OJUOK ……………3RD DEFENDANT

ELLY MATINDE OJUOK ………………………..… 4TH DEFENDANT

DICKENCE ONYANGO MATINDE …………………5TH DEFENDANT

R U L I N G

1. On 7th October 2015 I directed that this suit that was partly heard before **Hon. Justice Okong'o** do proceed from where he had left. **Okong'o, J.** had heard and completed the plaintiff's case on 8th December 2014 when the plaintiff closed his case. The matter was fixed for defence hearing before me on 3rd March 2016 when the 3rd defendant testified on behalf of himself and the other defendants. Mr. G. S Okoth advocate for the defendants closed the defence case after the witness testified and was cross examined by Mr. O. M Otieno advocate for the plaintiff. After the close of the defence case the court gave directions for the parties to file their final written closing submissions within 60 days from the date thereof. The plaintiff's submissions dated 29th April 2016 were filed on 6th May 2016 and the defendant's submissions dated 18th May 2016 were filed on 19th May 2016.

2. In the meantime before the court could prepare judgment, the defendant on 9th May 2016 filed a Notice of Motion dated the same date expressed to be brought under Section 1A, 1B(a), 3A and 63(e) of the **Civil Procedure Act** and Order 51 Rule (1) and rule 10 (2) and Order 8 and sought the following orders:-

> **1. The honourable court be pleased to re-open the case of the defendants in order to take evidence on the counterclaim.**
>
> **2. The honourable court be pleased to allow the counter claimants to summon the district land adjudication officer and the district land registrar in charge of Suba/Mbita district to adduce evidence in the case.**

3. The costs of the application be in the cause.

3. The application was supported on the grounds set out on the face of the application the gist whereof is that it is necessary to have the evidence of the land adjudication officer and the land registrar adduced given the roles they played to assist the court in properly adjudicating on the matter. The defendants/applicants contended that no prejudice would be caused to the plaintiff since the counter claim was pleaded and replied to and evidence to be adduced by the said land officers would be applicable to both parties. The application is further supported on the grounds set out on the affidavit of George S. Okoth Advocate dated 9th May 2016 which essentially reiterates the grounds set out on the body of the application.

4. Mr. Ouma Maurice Otieno advocate for the plaintiff swore a replying affidavit dated 9th June 2016 in opposition to the defendants' application. The plaintiff contends that there is no basis whatsoever for re-opening the case to enable the defendants to adduce evidence in support of their counterclaim when they closed their case on their own volition. The plaintiff states the defendants ought not to be allowed to reopen the case to call evidence in support of their case when they had the opportunity to do so in the cause of the trial. The plaintiff argues that the evidence the defendants now wish to adduce was always available and should have been adduced before the close of the defence hearing. The plaintiff further contends there are no compelling reasons to warrant the court to exercise its discretion to have the case reopened. The plaintiff avers that the application constitutes an attempt on the part of the defendants after discovering gaps in their case, to attempt to fill in those gaps and they ought not to be allowed to do so.

5. The parties argued the defendants' application dated 9th May 2016 by way of written submissions. The defendants in support of the application have submitted vide submission field on 26th September 2016 that the defendants counterclaim was not appropriately dealt with during the hearing and there was need therefore for the case to be reopened to enable the land adjudication officer and the land registrar to give evidence respecting the process of land adjudication and land registration following the adjudication process. The defendants argue that providing the further evidence will enable the court adjudicate on the suit and the defendants counter claim on merit on the basis of the evidence to be adduced.

6. The defendants/applicants invokes the provision of Section 63 (a) of the Civil Procedure Act which gives the court the discretion of making such interlocutory orders as may appear to the court to be just and convenient and further seeks solace in Section 3A of the Civil Procedure Act which permits the court to exercise its inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The applicants further urge the court to be guided by the provisions of Section 1A of the Civil Procedure Act which enjoins the court to give effect to the overriding objective of the Act by facilitating the just, expeditious, proportionate and affordable resolution of civil disputes. The applicants thus urge the court to administer substantive justice by allowing the application to enable further evidence to be adduced by the defendants in support of the counterclaim which they state was omitted through oversight.

7. The plaintiff has vehemently opposed the defendants' application and by his submissions filed on 26th September 2016 the plaintiff contends that the defendants had all the opportunity to present all the evidence they had on 3rd March 2016 when the defence case was heard. The plaintiff submits the defendants application is an afterthought and that the real objective is to have the case re-opened so that they can fill gaps in their case which have been exposed more particularly by the plaintiff's filed final submissions where the plaintiff has pointed out the defendants have not tendered any evidence in proof of their counter claim and neither have they adduced any adequate evidence to prove any fraud against the plaintiff. The plaintiff further submits the defendants have not laid any basis to enable the court to exercise its discretion to allow the reopening of the case in their favour and that the application is a clear example of abuse of the due process of the court.

8. Quite clearly the issue for the court to determine in the instant matter is whether the defendants have provided a reasonable and justifiable basis for the court to exercise its discretion to allow them to re-open the case for the defence which they had closed and parties have filed their final submissions on the basis

of the evidence adduced at the trial. The discretion of the court cannot be exercised whimsically but ought only to be exercised judicially and judiciously. A basis for the exercise of discretion has to be laid by the party inviting the court to exercise its discretion. In the present case the question for the court to answer is whether the defendants have satisfied the threshold by providing a rational basis for the court to allow the reopening of the defence case and calling of further evidence.

9. After a careful consideration of the defendants' application, the record and the parties rival submission, I am not persuaded the defendants deserve to have the discretion of the court exercised in their favour. The plaintiff in the instant case closed his case way back in December 2014. On 3rd March 2016 when the matter was listed for defence hearing counsel for the defendants clearly indicated he would only call the 3rd defendant as the sole defence witness. The defendants elected to close their case after the evidence of this witness. The evidence the defendants now wish to adduce was always available during the trial and no explanation has been tendered as to why it could not be adduced before the close of the defence case. Unless the defendants realized their case had gaps which they needed to fill up, the defendants application cannot be explained in any other manner. The court cannot allow the re-opening of a case so that a party can fill the gaps in his evidence as that definitely would be prejudicial to the opposing party.

10. In the case of **Samuel Kiti Lewa –vs- Housing Finance Co. of Kenya Ltd & Another [2015] eKLR**, **Lady Justice Mary Kasango** while considering a somewhat similar application where the plaintiff sought to have his case reopened so that he could recant the evidence adduced by one of the defence witnesses, the judge in dismissing the application stated as follows:-

> **"The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence."**

In the case the judge went on to observe thus:-

> **"…In my view if the plaintiff was allowed to re-open his case to so prove it (that a document produced by the defendant was different to the one he had) would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants."**

11. In the case of **Hannah Wairimu Ngethe –vs- Francis Ng'ang'a & Another [2016] eKLR, Lady Justice Achode** declined to allow a petitioner in a succession cause to reopen the case to adduce further evidence. The judge in the case inter alia stated:-

> **"This court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has always had the advantage of counsel from the inception of this case."**

In the case **Lady Justice Achode** observed that in making the application the petitioner was attempting to have a second bite at the cherry and she held that would amount to allowing him to fill the gaps in his evidence after having heard the objector's case and that would be prejudicial to the objector.

12. In the present application before me, the defendants having been served with the plaintiff's submissions which perhaps laid bare the gaps in the defence case and now wishes to be allowed to adduce evidence to fill those gaps. That definitely would be prejudicial to the plaintiff who has already filed his final submissions on the basis of the evidence on record.

13. The defendants counsel has urged the court to allow the reopening of the case to enable the defendants to adduce the evidence in support of the counterclaim which was not adduced owing to what counsel terms as an oversight by counsel. The defendants counsel in effect is owning up that he was less than careful or diligent while prosecuting and/or presenting the defendants case. Counsel urges the court not

to visit the mistake of counsel on the litigant and to, in the interest of justice, allow the application and have the case reopened. While I have sympathy for the litigants (defendants in this case) I fail to understand how it could be an oversight to adduce evidence which was always available. The defendants must all along been aware of the case they were facing from the plaintiff and in that regard filed a defence and counterclaim. The defendants had a whole day scheduled for defence hearing and in preparing for the hearing must have determined the evidence that they would require. It defeats logic how the defendants who all along were represented by counsel could overlook evidence that was necessary for their case. There is no case of genuine mistake or error on the part of counsel which perhaps could invite sympathy of the court. The defendants and their counsel appear to have treated the matter with a lot of casualness such that they only realized the lacuna in their case when the plaintiff served upon them the plaintiff's final written submissions.

14. Justice cuts both ways. The plaintiff deserves justice as well as the defendants. Each of the parties was afforded the opportunity to present their case. **Ringera, J.** (as he then was) in the case of **Omwoyo –vs- African Highlands & Produce Co. Ltd [2002] 1 KLR** while considering an application for transfer of a suit from a court that had no jurisdiction to one that had jurisdiction and where counsel had conceded it was his mistake stated as follows:-

> **"The plaintiffs advocate has made a passionate plea to this court that to dismiss the application would be tantamount to punishing the plaintiff for the mistakes of his advocate. That may very well be so. However, I am of the opinion that if a court has no jurisdiction to do something it cannot do so in what is said to be the interest of justice. The interests of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court."**

15. The Judge in seeking to draw a distinction between negligence, pure and simple and a genuine error or mistake on the part of an advocate referred to the case of **Mawji –vs- Lalji & Others [Civil Application No. 236 of 1992]** where **Kwach, J. A** cited with approval the dicta of Lord Griffins in the case of **Kettleman –vs- Hansel Properties Ltd [1998] 1ALL ER38 at P. 62**, where the learned Lord of Appeal said:-

> **"Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings."**

16. The passage aptly mirrors what so often happens in our jurisdiction. Lawyers time and again will plead with the courts not to punish litigants for their mistakes. When it is a genuine mistake or error on the part of the lawyer the court may overlook in the interest of justice. However in the instant matter I am not persuaded there was any genuine mistake and/or error. Lack of diligence and/or casualness or sloppiness cannot be equated to genuine mistake or error. They are conduct for which the counsel and his client should take responsibility and bear the consequences. Not even the overriding objective principle under Sections 1A and B of the Civil Procedure Act in my view can come to the aid of the applicants. The cardinal tenents of the overriding objective principle are justice delivered in an efficient and expeditious manner. The conduct of the applicants herein run counter to these tenents as it is evident the conduct militates against the efficient and expeditious finalization of the present matter.

17. In the premises and for all the above reasons, I find no merit in the defendants' application dated 9th May 2016 and the same is dismissed with costs to the plaintiff. As the parties have already filed their final submissions in this matter, the court will prepare a judgment for delivery on 7th April 2017.

18. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 17th day of February, 2017.

J. M. MUTUNGI

<u>JUDGE</u>

<u>In the presence of:</u>

Mr. Omolo for the plaintiff

N/A for 1st, 2nd, 3rd, 4th and 5th defendants

Milcent Court assistant

J. M. MUTUNGI

<u>JUDGE</u>