



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 117 OF 2012**

**PETER MACHARIA KARIUKI.....RESPONDENT**

**VERSUS**

**JAMES KIBARA.....1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated **28/1/2020** and filed in court on **29/1/2020** has been brought by the 2<sup>nd</sup> defendant seeking the following orders:
  - (i) **That the order or directions given on 24/10/2019 be stayed and delivery of judgment be arrested forthwith pending hearing and determination of this application.**
  - (ii) **That the proceedings and directions made herein on 24/10/2019 when the court directed that the 2<sup>nd</sup> defendant's case and counterclaim be closed be reviewed, set aside and or vacated forthwith.**
  - (iii) **The court do re-open the 2<sup>nd</sup> defendant's case and recall the plaintiff and 1<sup>st</sup> defendant for cross-examination by the 2<sup>nd</sup> defendant/applicant and allow the 2<sup>nd</sup> defendant to avail their witnesses to testify.**
  - (iv) **That costs of this application be in cause.**
2. The application is brought under **Article 47 and 159 (2) of the Constitution, Sections 1, 1A, 1B, 3, 3A and 80 of the Civil Procedure Act Cap 21 and Order 12 Rule 7, Order 45 Rule 1 of the Civil Procedure Rules (2010)**. The application is supported by the affidavit of **Peter Kuria**, State Counsel, sworn on **28/1/2020**
3. The 2<sup>nd</sup> defendant seeks that his case be re-opened on the ground that the he was condemned unheard in violation of **Article 47** of the **Constitution** and rules of natural justice. Mr. Kuria, State Counsel has explained in his supporting affidavit that though he has the conduct of the matter his colleague, Mr. Wabwire, Senior State Counsel, appeared in court when the matter was mentioned on **19/9/2019** when the same was set down for hearing on **24/10/2019**. However Mr. Wabwire is said to have inadvertently failed to note down the new date taken in the office manual diary and as a consequence Mr. Kuria did not know that the matter was scheduled for hearing on **24/10/2019**. It is urged that the failure to attend court is excusable in the circumstances.
4. Mr. Kuria avers that the counsel's inadvertent mistake should not be visited on his innocent client as he had a counterclaim that raised pertinent issues regarding ownership of the suit land, and that it is therefore in the interest of justice that this court should consider the 2<sup>nd</sup> defendant's defence and counterclaim filed on **10/4/2014** herein which substantively responds to the issues raised in the plaint. This consideration, counsel states, would finally and effectually determine the suit on merits. He also avers that there is an error apparent on the face of the record that warrants this court to review, set aside or vacate the proceedings and directions of **24/10/2019** and admit on record the defence and counterclaim and list of documents filed herein in default of which prejudice is likely to be occasioned to the 2<sup>nd</sup> defendant.
5. The plaintiff filed a replying affidavit sworn on **13/2/2020**. In that affidavit he objects to the instant application on the basis that the date was taken by consent; that the suit is old; that submissions on the main suit have already been filed and served; that the delay in lodging the application has not been explained at all; that the supporting affidavit is fatally defective; that there is no error on the face of the record and no explanation has been given for the absence of the defence witnesses on the hearing date. He also objects to the application on the basis of the expected expense in rehearing of the case if the orders sought were granted.

6. No submissions for or against the application were filed.

7. I have considered the application and the response.

### **Determination**

8. The main issue that arises for determination in the instant application is whether the proceedings and directions given on **24<sup>th</sup> October 2019** ought to be vacated to pave the way for the reopening of the 2<sup>nd</sup> defendant's case and the recalling of the witnesses who have already testified for their cross examination.

9. The principal ground relied on is the failure to diarise the hearing date. It is averred that this was an inadvertent omission by counsel who appeared at the mention when the date was set, who is not the same counsel who is in conduct of the matter. There is nothing in the replying affidavit to show that this failure to diarise was not a mere inadvertent omission. The annexures to the supporting affidavit are copies of the electronic and manual diaries of counsel for the 2<sup>nd</sup> defendant. This suit does not appear among the cases listed therein.

10. In several other previous cases the courts have granted lenience in deserving cases where a *bona fide* mistake on the part of counsel was bound to occasion some injustice to a client. (see the cases of **Philip Keiptoo Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492**, **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [eKLR]**, **Lucy Bosire -vs- Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR** and **Sheikh t/a Hasa Hauliers v Highway Carriers Ltd [1988] eKLR**.)

11. In addition I have noted that there is a counterclaim in this matter. This court has been in the past reluctant to dismiss suits for want of prosecution where a counterclaim has been lodged. In fact it may appear that the failure to grant a counterclaimant who has approached the court for the setting aside of directions such as those made in this case the orders he seeks is tantamount to striking out the counterclaim on a procedural technicality.

12. In **Kitale Land Case No. 108 of 2016 - Esther Njeri Chege Vs Jamen Kiyagi Amaingu 2019 eKLR** this court stated as follows:

**“The other concern that a court must always harbour in its mind is that whenever the striking out of any claim or pleading on any ground without according the party a substantive hearing on the merits is the probability of violating the principles of natural justice hovers around it and any slip may occasion irreparable harm to a party. Our Civil Procedure Act Cap 23 of the Laws of Kenya appears to have recognized this a long time ago and appropriate provisions were included which constantly call upon the court to do what may be just to the parties in all circumstances. In the case of Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR Mativo J. had this to say:**

**“Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties.[31] It was this strictness of having due regard to the rules of Civil Procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice.**

**The overriding concept however came to cure this. Michael Howard ..... defines the Overriding Objective “as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.”**

13. In this matter, I find no proof of error on the face of the record as alleged in the application.

14. Regarding the delay alleged by the plaintiff, it is clear that the 2<sup>nd</sup> defendant was only jolted into the realization that the suit had been heard when submissions were served upon his office on **21/11/2019** and time must be computed from that date and omitting the Christmas period from the computation is a must. As the application was filed on the **29/1/2020**, a rough calculation shows that the ensuing delay was no longer than one and a half months. Consequently I find that the delay in lodging the instant application is not inordinate.

15. The upshot of the foregoing is that I find that the application dated **28/1/2020** has merit and the same is granted in terms of **Prayer Nos. (ii) and (iii)** to the extent that the directions of this court made on **24/10/2019** closing the defendant's case and dismissing the 2<sup>nd</sup> defendant's counterclaim are hereby vacated, and the plaintiff's and the 1<sup>st</sup> defendant's cases are re-opened only for the purpose of cross-examination and re-examination of the witnesses who have testified and have not yet been cross-examined. In addition, the 2<sup>nd</sup> defendant's defence case and counterclaim are reopened and he is hereby allowed to call his witnesses to testify. This matter shall be mentioned on the **17<sup>th</sup> September, 2020** for issuance of a hearing date.

It is so ordered.

**Dated, Signed and Delivered via electronic mail at Kitale on this 30<sup>th</sup> day of July, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE**