REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 43 OF 2013

PENINA CHEPKEBIS MAKONA..1ST PLAINTIFF

BRIAN MAGOBA MAKONA...2ND PLAINTIFF

MICHAEL MAGOBA...3RD PLAINTIFF

VERSUS

CHARLES JOSEPH EGESA MAKONA...............................1ST DEFENDANT

WEST KENYA SUGAR CO. LTD...2ND DEFENDANT

RULING

1. By a motion on notice dated 27th February, 2018 filed by the 2nd defendant – **WEST SUGAR KENYA SUGAR CO. LTD** – on 28th February, 2018, the court is implored to hear PW2 and PW3 afresh and to afford opportunity to 2nd defendant to cross-examine them. The application is expressed to be brought under Order 12 rule 2, Order 51 rule 1 and 15 of Civil Procedure Rules, 2010, Section 3A of Civil Procedure Act (cap 21) and all other enabling provisions of the law.

2. The motion came with five (5) prayers but some prayers, specifically prayers 1 and 2, are moot now, having been meant for consideration at the exparte stage. The prayers for consideration are therefore three (3) – prayers 3,4, and 5 – and they are as follows:

> *Prayer 3: The exparte orders issued on 15/9/2016 and 27/7/2017 allowing the plaintiff to proceed exparte with the hearing of his case where PW2 and PW3 testified in default of attendance by 2nd defendant/applicant and/or its counsel and all consequential proceedings and orders be set aside unconditionally.*
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> *Prayer 4: Upon granting Order 3 above, the court be pleased to reopen the plaintiff's case and recall PW2 and PW3 for purposes of tendering their evidence afresh and subsequently cross-examined by the 2nd defendant/applicant.*
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> *Prayer 5: Costs of this application be provided for.*

3. The justification for the application and/or the orders sought is to be found both in the grounds on which the application is anchored and the accompanying supporting affidavit. The substance of both is broadly similar, with the gist being that the absence of the 2nd defendant when PW2 and PW3 testified was due to non-service and therefore was not intentional and/or deliberate.

4. Both the plaintiff and the 1st defendant opposed the application by filing grounds of opposition. The 1st defendant filed his grounds of opposition on 24th April, 2018. He averred that the application lacks merit, is an abuse of court process, and is meant to circumvent quick disposal of the suit. The plaintiffs filed their grounds of opposition on 7th February, 2019. They accused the 2nd defendant of latches and viewed the application as an abuse of the court process. It was stated that the 2nd defendant has not demonstrated absence of service.

5. The application was canvassed by way of written submissions. The 2nd defendant filed submissions on 13th June, 2019. It was reiterated that there was no service and there was therefore no knowledge on the part of the 2nd defendant that the matter was coming up for hearing. Consequently, the hearing that took place was said to violate the 2nd defendant's right to be heard. It was emphasized that "*courts should always endeavor to determine disputes on merits and that lapses ought not necessarily debar a litigant from pursuing his/her rights*".

6. The plaintiff's submissions were filed on 30th May, 2019. He submitted, interalia, that no evidence has been proffered to prove lack of service. The 2nd defendant, plaintiff further submitted, "*was duly served with the hearing notice thus his (sic) decision not to attend court*

was best known to him (sic) and he (sic) should therefore not lay the blame on the respondents".

7. The application was also said to have been filed after expiry of a long period, alleged to be three and a half years, which is indicative of inordinate delay and indolence on the part of 2nd defendant. The court was asked to dismiss the application with costs.

8. The 1st defendant's submissions were filed on 24th September, 2018. He submitted, interalia, that the "*court proceeded to hear the witnesses present upon being satisfied with the service upon the defendants*."

9. I have considered the application, the responses made, rival submissions, and the record of proceedings generally. The record of proceedings show that PW2 was heard on 15th September, 2016. The matter was first called out in court at 9.33am. All the parties were present. It is clear that the court indicated its readiness to proceed. At or around 11.37am on the same day, the matter was called out again, this time with the intention of proceeding. But the defendants were absent, though having been there earlier. It is in those circumstances that the court elected to proceed. And proceed it did. Question is: All the defendants, including, of course 2nd defendant, were present. If no service had been done, how did 2nd defendant or its representative happen to be present?

10. Another question: How can the defendants, or any of them, purport to have good excuse for not being present on 15th September, 2016 when their presence when the matter was first called out is clearly shown on record and their absence when the matter was called out the second time is also clearly captured on record? Who is fooling who here? The behavior of the 2nd defendant on this date is clearly not excusable by this court. The 2nd defendant caused its own problems and is now trying to blame others for it.

11. PW3 was heard on 27th July, 2017. According to the 2nd defendant, no service had been done. Counsel for 2nd defendant says she perused the record and there was no evidence of service. The truth of the matter is that there was service. There is an affidavit of service dated 26th July, 2017 sworn by one **SEBASTIAN TIKOLO** showing that the firm of advocates representing 2nd defendant was served on 21st July, 2017. A copy of hearing notice was availed showing such service. It is duly stamped as confirmation of service with the date shown as 21st July, 2017 and the time of service indicated as 2.30pm. When counsel for 2nd defendant therefore says there was no service, he is lying through the teeth.

12. When one therefore considers the application and the 2nd defendant's submissions, one clearly notice falsehoods. The application is actually founded on a lie. The submissions themselves are couched in admirable legalese but is actually based on the same lie. The truth of this matter is that the suit herein is old, having been filed way back in 2013. The behavior of the 2nd defendant on the two occasions that the matter was heard in its absence was clearly an obstacle to expeditious hearing of the matter. It cannot be excused. And as pointed out by the plaintiff, this application itself was filed after a long period of time and it further serves to delay the matter. The plaintiffs did not file their case intending that it stays in court forever. They obviously want it concluded. The second defendant is an impediment to that conclusion.

13. Given all this, I hold, without equivocating, that the application is completely devoid of merits. I hereby dismiss it with costs.

Dated and signed at Kericho this 8th day of July, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 22nd day of July, 2020.

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A. OMOLLO

JUDGE