



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA
ELC CASE NO. 320 OF 2013
FITZGERALD MURIITHI MAHUTHU (Administrator of the
Estate of ARTHUR MAHUTHU MINJIRE.....PLAINTIFF
VERSUS
KENTHILL HEIGHTS LTD.....DEFENDANT

RULING

The plaintiff/applicant citing the provisions of **Order 8 Rule 3 and Order 10 Rule II of the Civil Procedure Rules** has moved this court seeking the following orders:-

- 1. That this Court do order that this case proceeds for hearing notwithstanding the failure of the defendant to comply with Order II Civil Procedure Rules and this Court do dispense with the requirements of compliance***
- 2. Costs be provided for.***

The application which is supported by the plaintiff/applicant's affidavit is based on the main grounds that although the Court on 18th July 2012 ordered the defendant to comply with **Order II Civil Procedure Rules** and although another order was given on 3rd July 2014 giving the defendant 30 days to comply, that has not been done thus delaying this suit.

The application is not opposed and although the hearing of the same was fixed in the registry by consent on 4th May 2015, there was no appearance by either the defendant/respondent or his advocate when the application came up for hearing on 14th July 2015.

I have considered the application, the supporting affidavit and the record herein.

The applicant cited **Order 8 Rule 3 and Order 10 Rule II of the Civil Procedure Rules** as the basis of this application and it is doubtful if those provisions apply to this application. **Order 8 Rule 3 of the Civil Procedure Rules** deals with amendment to proceedings while **Order 10 Rule II** concerns itself with setting aside judgments. However, an application shall not be defeated simply because the wrong provision of the law has been cited. Counsels must however invoke the correct legal provisions while filing applications.

Having said so, I notice from the record that way back on 8th July 2012 when this matter came up for

hearing before Ong'udi J. in Embu, Mr. Njiru advocate for the defendant/respondent sought an adjournment on grounds that the defendants have not complied with the Civil Procedure Rules and he was given 30 days within which to do so. There was no compliance and when the matter came up for before me on 26th August 2013, I directed that the defendant be given time to comply. This matter was again mentioned on 31st July 2014 and there was still no compliance and Mr. Njiru requested to be given one month to do so. There was still no compliance by 1st October 2014 and on 24th November 2014, Ms Thungu for the plaintiff asked the Court to give Mr. Njiru a last chance and the Court gave the defendant another 30 days to comply. To-date, there is still no compliance hence this application.

Order II of the Civil Procedure Rules provides for pre-trial Directions and Conferences. This is meant to further the expeditious disposal of cases by, among other things, exploring ways of settling contested issues, narrow down issues and generally create a time table for the proceedings. This is in order to achieve the overriding objective of the **Civil Procedure Act and Rules**. Counsels, as officers of the Court, are obliged to assist the Court in achieving this objective. Clearly, the defendant's counsel, from the record that I have produced above, is not assisting the Court in that regard. Instead, by not complying with the law, the defendant is delaying the determination of this suit. The plaintiff filed his issues way back on 26th August 2013.

Upon considering this application, I find it is well merited. I grant the orders sought therein and direct that the trial of this suit do proceed in accordance with the issues as framed by the plaintiff on a date to be fixed in the registry.

Costs in the cause.

B.N. OLAO

JUDGE

17TH JULY, 2015

17/7/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Mwai for Thungu for Plaintiff – present

Defendant – absent

COURT: Ruling delivered this 17th day of July 2015.

Mr. Mwai for Ms Thungu for Plaintiff/Applicant present

No appearance for Defendant/Respondent.

B.N. OLAO

JUDGE

17TH JULY, 2015

