



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 19 OF 2012

ELISHAPHAN OMOLO NYASITA PLAINTIFF/RESPONDENT

VERSUS

JOHN OJOWI ONUKO DEFENDANT/APPLICANT

RULING

1. Before me for determination is the defendant/applicant's application dated 22nd May 2015 brought under sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. The application seeks inter alia the following orders:-

- a. **That the Honourable court be pleased to set aside ex parte proceedings of 1st December 2014 which led to the close of the defence case.**
- b. **That the honourable court be pleased to reopen the defence case and the defendant be allowed to testify together with all his witnesses.**
- c. **That costs of the application be provided for.**

The application is premised on the grounds that appear on the face of the application. The principal ground is that the defendant/ applicant's counsel **Mr. S. M. Sagwe** was on the material date engaged in the hearing of a murder case No. 97 of 2012 (Kisii High Court) where he was appearing for the accused person. The defendant's counsel states that Mr. Ochwang'i counsel for the plaintiff was equally holding a watching brief in the murder trial but avers that Mr. Ochwang'i after placing himself on record in court No. 1 where the murder trial was going on left the court and came to the Environment and Land Court and proceeded with the hearing of the defence case without informing the court that Mr. Sagwe the defence counsel was held up in court No. 1 in a matter that was proceeding. The plaintiff avers that non attendance of his counsel during the hearing was not deliberate and in the premises he should be accorded an opportunity to reopen the defence case and to present his case. Mr. Samson Manti Sagwe Advocate for the defendant has sworn an affidavit in support of the defendant's application dated 22nd May 2015 in which he reiterates the grounds set out on the body of the application.

2. The plaintiff's advocate, Mr. Philemon Nyaachi Ochwang'i has sworn a replying affidavit dated 10th June 2015 in opposition to the defendant's application. Mr. Ochwang'i advocate depones that on 20th May 2014 after the plaintiff closed his case, the parties fixed the suit for defence hearing by consent on 1st December 2014. He further depones that on 1st December 2014 both counsel were present when the matter was called out and with the consent of both counsel the matter was allocated hearing time at 12.30pm. Counsel for the plaintiff states that Mr. Sagwe advocate for the dependant did not state he would be engaged in any other court so that the court could indulge him with an alternative time or date for presentation of the defence case.

3. Counsel for the plaintiff further avers that he was not participating in Kisii HCCR Case No. 97 of 2012 as alluded to by the defendant's counsel and asserts that there is no evidence that Kisii HCCR Case No. 97 of 2012 was infact scheduled for hearing on 1st December 2014 as no cause list or proceedings for the day have been exhibited. The plaintiff's counsel further states the defendant's non-attendance as a party with his witnesses on the date for the hearing of the defendant's case has not been explained and in those circumstances the defendant cannot be entitled to the exercise of the court's discretion in his favour. The plaintiff further argues that the defendant's application has not been brought without unreasonable delay and states that should disentitle the defendant of the court's discretion on the basis of the old adage that **"delay defeats equity"**.

4. The parties have filed written submissions to canvass the defendant's application dated 22nd May 2015. The defendant filed their submissions on 12th October 2015 while the plaintiff/respondent had filed their submissions on 9th September 2015. I have reviewed the application and the affidavit filed in support and in opposition and the submissions by the parties and really the only issue for determination is whether the defendant is entitled to have the order by the court of 1st December 2014 closing the defendant's case for non attendance of the defendant for defence hearing set aside and the defendant allowed to present the defence case. In other words, is the defendant entitled to have the court exercise its discretion to set aside the ex part order exercised in his favour?

5. The facts giving rise to the instant application are rather straight forward. The present suit was part-heard on 20th May 2014 when the plaintiff testified and closed his case. The defence hearing was adjourned by consent of the parties to 1st December 2014 when both Mr. Ochwang'i Advocate for the plaintiff and Mr. Sagwe advocate for the defendant appeared in court and had the case allocated time for hearing at 12.30pm. the defendant's counsel states on the 1st December 2014 he had three matters listed in his diary namely Environment and Land Court No. 19 of 2012; Murder case No. 97 of 2012 and Environment and Land Court Case No. 45 of 2013 (NTSC) and has annexed a copy of his diary to illustrate this fact. Although the plaintiff avers that there is no evidence to show that Mr. Sagwe advocate was engaged in a murder criminal trial namely HCCR Case No. 97 of 2012 there is no reason to doubt that he was so engaged. I take judicial notice that advocates particularly in this station are routinely engaged at various different courts on the same day with different matters and it is not unusual to receive requests for a matter to be placed aside as the advocate is before a judge in another court room.

6. While it is not something to be encouraged it is a reality that the court cannot ignore. The court nonetheless would like to emphasize that parties should not take scheduling of their cases for hearing for granted and parties must be ready to proceed with the hearing of their cases as scheduled noting that cases are scheduled for hearing on the basis of availability of dates and once allocated on a particular date or time that denies and/or precludes the court the opportunity of allocating another case on the allocated date or time. Given the backlog of pending cases it is undesirable for a party to take a hearing date of a case and fail to proceed with the hearing especially where the court has confirmed and allocated time for the hearing of the case.

7. The plaintiff has vehemently submitted that the conduct of the defendant's counsel and the defendant should disentitle the defendant of the court's discretion in the defendant's favour as no reasonable explanation or sufficient cause has been offered for the failure by the defendant and his counsel to be present in court. The plaintiff cites the case of **Chemwolo & Another –vs- Kubende [1986] KLR** in support of his submissions that the defendant was required to offer a reasonable explanation and/or sufficient cause for failure to attend court. The plaintiff also cites the case of **Daniel Kimani Njihia –vs- Francis Mwangi Kimani & Another, Supreme Court C.A No. 3 of 2010 [2015] eKLR** to underpin the grounds and circumstances upon which the discretion of the court may be exercised.

8. There cannot be firm and strict conditions upon which the discretion of the court may be exercised. While the discretion of the court must always be exercised judiciously having regard to the peculiar circumstances of each case, the court in exercising its discretion must in all cases be alive to the requirement to meet the ends of justice in the matter. The peculiar circumstances of each case must be taken into account.

9. In the present matter the defendant has filed a defence and has furnished statements of 3 witnesses. The defence as pleaded raises triable issues whether or not there exists a boundary dispute between the plaintiff and the defendant and/or whether indeed the defendant is in trespass onto the plaintiff's plot as claimed by the plaintiff. In the court's view in the face of the defendant's filed defence, the court will be denied the opportunity of evaluating the totality of the evidence if the defendant is shut out and not allowed to present his evidence. The defendant equally will feel that he has not been accorded justice if he is not allowed to present his evidence. While I agree reopening the case to enable the defendant to testify will prolong the finalization of the case to the prejudice of the plaintiff, my view is the ends of justice will be better served if the defendant is allowed to present his evidence. The plaintiff will not save for the delay that will be occasioned not be prejudiced as he will have an opportunity to cross examine the defendant and his witnesses. Any prejudice that the plaintiff would suffer can be compensated by an award of damages.

10. Section 1A and 1B of the Civil Procedure Act and Article 159 (2) of the Constitution embody the concept of rendering substantive justice in a just and expedient manner as does section 3 and 19 of the Environment and Land Court Act No. 19 of 2011. In the present matter though the conduct of the defendant's counsel was somewhat wanting in that he appeared to have taken the matter casually, I am in the interest of justice and on the basis that the defendant's counsel was properly engaged before a court of equal status prepared to exercise my discretion in favour of the defendant. I nonetheless will not shy away from admonishing the defendant's counsel for the casual manner he has displayed in the conduct of this matter. Quite clearly he would have somehow conveyed his inability to be available at the time allocated for the hearing of the case. Further he ought not to have waited for nearly 6 months to bring the instant application particularly when he was aware he was instrumental for the turn the matter took on 1st December 2014. For that reason, the counsel will be condemned to personally meet the cost of the instant application.

11. For the reasons I have given above, I allow the defendant's application dated 22nd May 2015. I award costs for the application which I assess at kshs. 5,000/= to the plaintiff to be personally paid by the defendant's counsel within the next 60 days from the date of this ruling.

Ruling dated, signed and delivered at Kisii this 6th day of November, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

Mr. Ochwang'i for the plaintiff

N/A for the defendant

J. M. MUTUNGI

JUDGE