



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 226 OF 2016

WILFRED NG'ANG'A NGARUIYA.....PLAINTIFF

VERSUS

REGISTERED TRUSTEES OF FAITH MISSION CHURCH.....1ST DEFENDANT

VICTOR WAHOME KARIUKI.....2ND DEFENDANT

IBRAHIM SAKWA MZEE.....3RD DEFENDANT

JOSPHAT MUSYOKA NDAMBUKI.....4TH DEFENDANT

HARUN NGUGI NDUNG'U.....5TH DEFENDANT

ISAAC MASILA MUTUA.....6TH DEFENDANT

FABIAN CHIMAKATI.....7TH DEFENDANT

MOSICA PROPERTIES LIMITED.....8TH DEFENDANT

MWANGANGI MUTULA MUTUA.....9TH DEFENDANT

JOSEPH WAWERU CHEGE.....10TH DEFENDANT

JOSEPH MUTINDA MUTUKU.....11TH DEFENDANT

RULING

1. This Ruling relates to the Application by the Defendants dated 13th December, 2019 seeking for the following reliefs.

a) Spent.

b) The 1st, 3rd, 5th, 6th, 7th, and 11th Defendants/Applicants be granted leave to file their Defence, list of witnesses, list of documents and witness statements out of time.

c) The Defence list of witnesses, list of documents and witness statements annexed to this Application to be deemed as properly on record.

d) The cost of this Application to be in the cause.

2. The Application is supported by the Affidavit of the 5th Defendant who has deponed that this suit was filed in the year 2015; that the 1st, 3rd, 5th, 6th, 7th and 11th Defendants/Applicants instructed two law firms to represent them; that the said law firms did not file any Defence and that the matter was set down for hearing in the absence of the Applicants' Defence.

3. The 5th Defendant deponed that when the matter came for hearing, the suit proceeded and the Plaintiff's witnesses were heard and closed their case and that the Defence case is coming up for hearing.
4. It was deponed by the 5th Defendant that there would be no prejudice occasioned if the Application is allowed and that the failure to file a Defence is as a result of the negligence of their advocates; that the mistake of the advocate ought not to be visited on an innocent client and that the Application should be allowed.
5. In response to the Application, the Plaintiff deponed that the Applicants are in the habit of abusing the process of this Honourable Court by applying delay tactics; that it is grossly pretentious for the Applicants to blame their advocates for not filing a Defence and that when the matter was first filed, the Applicants engaged the firm of Rombo and Company Advocates who entered appearance on their behalf but did not file any documents.
6. The Plaintiff deponed that later on, the Applicants engaged the firm of Sharpley Barret and Company who also did not file a Defence; that the Applicants later on sought to act in person and filed a Notice to act in person and that even after filing the Notice to act in person, the Applicants did not file a Defence.
7. It was deponed by the Plaintiff that the Applicants have not given any justifiable reason for failing to file their Defence; that his case proceeded with sufficient notice to the Applicants and that if the intended Defence is allowed at this point in time, he will suffer great prejudice because he has already testified and his case closed.
8. The Plaintiff deponed that he is the legitimate proprietor of the suit property and that the Applicants herein have since the year 2015 illegally occupied his property; that the Applicants are now employing delaying tactics with the intention of continuing to deny him his right to peaceful possession of the suit property and that the Applicants are in breach of the provisions of Order 7 Rule 5 of the Civil Procedure Rules requiring parties to furnish their evidence in advance before the commencement of trial.
9. The Application was canvassed vide written submissions. Counsel for the Applicants submitted that the 1st, 3rd, 5th, 7th and 11th Defendants are the absolute owners of part of the property known as L.R. No. 12715/155 (*"the Suit Property"*) having purchased various plots of the suit property on or about 2007/2008 from the 8th Defendant.
10. It was submitted that the Applicants are unable to continue with these proceedings because they have not filed a Defence; that justice should be administered without undue regard to technicalities and that the failure to file a Defence was not occasioned by the Applicants. Counsel relied on numerous authorities which I have considered.
11. In reply, counsel for the Plaintiff/Respondent submitted that the instant suit has been in the judicial system since the year 2016; that the Plaintiff herein is the absolute owner of the property known as L.R. No. 12715/155, which is the suit property, having acquired the same from Syokimau Farm Limited by virtue of a transfer registered on 8th June, 1993 and that the Plaintiff took over possession of the suit property immediately he acquired it.
12. The Plaintiff's advocate submitted that the suit property was invaded by unknown persons in the year 2012; that the Plaintiff reported the matter to Kiambu Police Station and that in the year 2014, the Defendants started putting up structures on the suit property without the Plaintiff's knowledge or authority.
13. The Plaintiff's advocate submitted that having already closed his case, the Plaintiff will certainly suffer great prejudice if the instant Application is allowed; that the Plaintiff has always ensured proper service of all mention dates upon the Defendants/Applicants and that the Applicants did not put in any effort to comply with laid down rules and procedures. Counsel relied on authorities which I have considered.
14. I have carefully considered the Applicants' Application as well as the Affidavit evidence in support and the Affidavit in reply. I have also read the written arguments of both counsel as well as the cited authorities.
15. The perusal of the court record shows that this suit was filed on 14th December, 2016 against the 1st to 7th Defendants. On 3rd December, 2016, the firm of Rombo & Company Advocates entered appearance for all the Defendants.
16. The record shows that on 13th February, 2017, the 8th Defendant filed an Application to be enjoined in this suit as the 8th Defendant. On the same date, the 1st, 3rd, 4th, 5th and 6th Defendants appointed the firm of Sharpley Barret & Company advocates to act for them instead of the firm of Rombo & Co. Advocates.
17. Alongside the Notice of Change of Advocates, the 1st, 3rd, 4th, 5th and 6th Defendants filed an Application dated 13th February, 2017 to be granted leave to enjoin more parties as Defendants in the suit. The Application was allowed on 30th March, 2017, and the Plaintiff was duly amended enjoining the 8th to 11th Defendants in the suit on 4th May, 2017.
18. The 8th and 10th Defendants' advocate entered appearance on 14th June, 2017 while the 9th Defendant's advocate entered appearance on 16th June, 2017. On 13th July, 2017, the 11th Defendant filed his Defence.
19. The record shows that the firm of Sharpley Barret were served with the Amended Plaintiff together with Summons to Enter Appearance on 29th May, 2017 which they duly received. Indeed, the said firm filed a joint Defence on behalf of the 1st, 3rd, 4th, 5th, 6th and 7th Defendants on 27th September, 2018. The record further shows that the 8th, 10th and 11th Defendants filed their respective witness statements on 5th December, 2018 and 24th May, 2017 respectively.

20. After the closure of pleadings, this matter came up for directions on numerous occasions. On all those occasions, the Defendants' advocates were duly served with mention notices. When the matter came up for hearing on 5th September, 2019, the advocate for the 1st, 3rd, 4th, 5th, 6th and 7th Defendants/Applicants sought for adjournment, which Application was dismissed by this court. The advocate for the 11th Defendant was not in court.

21. Although the current Application is seeking for leave for the 1st, 3rd, 5th, 6th, 7th and 11th Defendants/Applicants to file their Defence and witness statements out of time, the record shows that the Applicants' Defences are indeed on record. Other than the 11th Defendant, it would appear that the rest of the Applicants have never filed their respective witness statements and documents as required by the law.

22. The Plaintiff having testified and closed his case, and the Defendants/Applicants having had ample time since the year 2018 when they filed their joint Defence to file their witness statements and documents, it will be prejudicial to the Plaintiff to allow the Defendants/Applicants (*except the 11th Defendant whose witness statement is on record*) to file their respective witness statements and documents.

23. In any event, no good reason has been given as to why the Defendants/Applicants never filed their witness statements and documents alongside their Defence on 27th September, 2018 or immediately thereafter. Considering that it is a litigant who gives his advocate instructions in a matter pending before the court, the Defendants/Applicants cannot be heard to blame their advocate for having failed to comply with the law.

24. In any case, the fact that the Defendants/Applicants herein have had on record more than four (4) firms of advocates to represent them, starting with the firm of Rombo & Company Advocates; Sharpley Barret & Company Advocates; MMA Advocates and now Nyongesa Nafula & Company Advocates shows that they are to blame for not giving timely and proper instructions to their advocates.

25. That being the case, this court will not allow to be taken in a circus by allowing the Defendants to file their statements and documents late in the day, thus delaying the hearing and finalization of this matter.

26. For those reasons, I dismiss the Application dated 13th December, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE