REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 99 OF 2012.

(Formerly CIVIL SUIT NO. 56 OF 2002)

HENRY WAMBETSA MUTONDO (Substituted by HELLEN KOMBO

MAKOMERE).....PLAINTIFF

VERSUS

MOSES JEMINI BARASA .....DEFENDANT

R U L I N G

If there were **OSCAR AWARDS** for the best actor in the category of ***"HOW TO SCUTTLE AND STALL PROCEEDINGS,"*** the defendant herein would certainly be among the leading contenders.

This suit was filed on 19th April 2002 by **HENRY WAMBETSA MUTONDO** who passed away on 28th November 2003 and has since been substituted by his daughter **HELLEN KOMBO MAKOMERE** as plaintiff. The suit seeks against **MOSES JEMINI BARASA** an order for the transfer of land parcel **NO BUNGOMA/NAITIRI/517** to the plaintiff's names.

The trial commenced before **MUKUNYA J** on 4th December 2017 when the plaintiff testified and closed her case. The defendant who was then acting in person also testified in his defence after which the record shows that he addressed the Court as follows: -

"I have no witnesses."

MUKUNYA J directed that submissions be filed by 19th December 2017.

Meanwhile however, the defendant appointed the firm of **J. S. KHAKULA & COMPANY ADVOCATES** to act for him and so when the matter came up on 19th December 2017, **MR KHAKULA** informed the Court that he had just been appointed and had filed an application to re – open the defence case. The Court directed that the said application which is dated 15th December 2017 and is the subject of this ruling be heard on its merits. That is the application that was placed before me on 15th July 2019. Meanwhile, the plaintiff has already filed her submissions to the main suit.

The application dated 15th December 2017 is not anchored under any provisions of the law. However, it seeks the main prayer that the Court be pleased to re – open the defence case to enable the defendant present his witnesses.

The gravamen of the application which is premised on the grounds set out therein and also supported by the defendant's affidavit is that it is in the interest of justice to do so and the plaintiff will not suffer any prejudice. The defendant also avers that he did not know that the plaintiff's case would be heard and closed on 4th December 2017. And that although he testified, his witnesses were not present and so he closed his defence prematurely. He has therefore consulted his lawyer who has advised him to apply for the re – opening of the case.

The application is opposed and by a replying affidavit dated 19th August 2020, the plaintiff has averred, inter alia, as follows: -

- **That the defendant did not have or call any witnesses nor seek an adjournment.**

- **That this is an old case filed in 2009 and the delay has always been caused by the defendant.**

- **That this application was not even served upon her Counsel who only found it in the case file and this application should be dismissed with costs.**

The application has been canvassed by way of written submissions which have been filed both by **MR J. S. KHAKULA** instructed by the firm of **J. S. KHAKULA & COMPANY ADVOCATES** for the defendant and by **MR D. L. OMUKUNDA** instructed by the firm of **OMUKUNDA AND COMPANY ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and the submissions by Counsel.

While I have no doubt in my mind that the Court retains inherent jurisdiction to re – open a case, the discretion to do so must be exercised judiciously and for sound reasons. It cannot be an open-ended jurisdiction. Litigation cannot continue ad infinitum. It must come to an end at some stage and the current constitutional mandate under **Article 159 2(b)** is that justice shall not be delayed. And among the overriding objectives of the **Civil Procedure Act and Rules** is that there must be timely disposal of the proceedings. Having said so, does the defendant's application warrant the exercise of my discretion in his favour? I do not think so for the following reasons: -

Although in his submissions Counsel for the defendant has stated that this Court should invoke the maxim ***"AUDI ALTERAM PARTEM"*** (hear the other side), the record is clear that the defendant was heard 3 years ago in his defence and informed the Court that he had no witnesses to call. He cannot be heard to say that he was not given an opportunity to prosecute his defence. He did not seek an adjournment to call his witnesses, if any.

The application itself, though filed on 15th December 2017 was not even served and Counsel for the plaintiff only saw it in the file. And although the defendant's Counsel has submitted that the failure to prosecute this application for 2½ years should be placed at his door, the Court would have expected an explanation for that delay which is no doubt in – ordinate. No explanation has been offered.

An in order to ensure a seamless trial, the Court should also have expected that the defendant would have annexed the statements of his witnesses in keeping with the prevailing practice so that the plaintiff can know what case she has to meet. No such statements have been filed and the result is that the plaintiff will be ambushed with defence witnesses whose number or evidence has not been disclosed. The defendant's Counsel has submitted that although this suit was filed in 2002, the plaintiff did not prosecute it until 2018. That may be so but nothing stopped the defendant from applying for it's dismissal.

The defendant has been in the driving seat for long enough and has been driving these proceedings in the wrong direction and at a pace that is not in tandem with the expeditious disposal of cases. It is now time to remind him, as **NYAMU JA** did in the case of **STEPHEN BORO GITIHA .V. FAMILY FINANCE BUILDING SOCIETY & OTHERS C.A CIVIL APPLICATION No 263 of 2009 [2009 eKLR]** that: -

> ***" ..... Courts are now on the driving seat of justice and the Courts in my opinion have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner."***

Ultimately therefore and having considered the defendant's Notice of Motion dated 15th November 2017, I make the following orders: -

1. **The application is dismissed with costs.**

2. **The defendant to file and serve his submissions on or before 5th November 2020.**

3. **Judgment shall be delivered on 19th November 2020 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.**

Boaz N. Olao.

J U D G E

22nd October 2020.

Ruling dated, signed and delivered this 22nd day of October 2020 at **BUNGOMA** by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines as was advised to the parties via our letter dated 7th October 2020.

Boaz N. Olao.

J U D G E

22nd October 2020.