



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 346 OF 2016 (OS)**

**JEREMIAH KIPTUM KIMAIYO....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**STANLAUS MUTAL.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**RAI PLYWOODS (K) LIMITED.....DEFENDANT/APPLICANT**

**RULING**

**[NOTICE OF MOTION DATED 25<sup>TH</sup> JULY, 2019 BY DEFENDANT]**

1. The Defendant moved the Court through the Motion dated the 25<sup>th</sup> July, 2019 seeking for the proceedings and or orders of 25<sup>th</sup> July, 2019 and all consequential orders thereof to be set aside, and the application dated the 13<sup>th</sup> May, 2019 be fixed for interpartes hearing. The application also seeks for costs and is based on the twenty (20) grounds on its face and supported by the affidavit sworn by **Alfred King'oina Nyairo**, the Counsel for the Defendant, on the 25<sup>th</sup> July, 2019. It is the Defendant's case that Plaintiffs' application that was to be heard on the 23<sup>rd</sup> July, 2019 was dated the 13<sup>th</sup> May, 2019 and was served upon the Defendant's advocate on 3<sup>rd</sup> July, 2019. That the Defendant's Counsel diarized it for the 23<sup>rd</sup> July, 2019. That the Defendant's Counsel diarized it for the 23<sup>rd</sup> July, 2019 and Mr. Mukabane Advocate attended Court on that date but learnt the application had been heard exparte on the 22<sup>nd</sup> July, 2019. That they had filed a reply in opposition on the 19<sup>th</sup> July, 2019 and it is only fair that the exparte proceedings and order of 22<sup>nd</sup> July, 2019 be set aside for the application to be heard interpartes.

2. The application is opposed by the Plaintiffs through the replying affidavit sworn by Silas Kibii, Counsel for the Plaintiffs, on the 28<sup>th</sup> November, 2019. That it is the Plaintiff's case that the Plaintiff's application dated the 13<sup>th</sup> May, 2019 and filed on the 4<sup>th</sup> June, 2019 was served upon the Defendant's Advocates on the 3<sup>rd</sup> July, 2019. That the application was indicated to be for hearing on the 22<sup>nd</sup> July, 2019 when it proceeded exparte, after the Defendant failed to attend, though served. That the hearing date of the application dated the 13<sup>th</sup> May, 2019 attached to the Defendant's Motion has been altered from 22<sup>nd</sup> July, 2019 to read 23<sup>rd</sup> July, 2019. That the Plaintiffs have never been served with the Defendant's response to their Motion dated the 13<sup>th</sup> May, 2019 and it therefore stood as unopposed.

3. The learned Counsel for the Defendant and the Plaintiffs filed their written submissions dated the 3<sup>rd</sup> July, 2020 and 3<sup>rd</sup> February, 2020 respectively.

4. The following are the issues for the court's determinations;

**(a) Whether the Defendant has reasonably explained his failure to attend Court on the 22<sup>nd</sup> July, 2019 when the application dated the 13<sup>th</sup> May, 2019 was heard and allowed exparte.**

**(b) Whether the defendant has made a reasonable case for the exparte proceedings, and order of 22<sup>nd</sup> July, 2019, to be set aside.**

**(c) Whether the Plaintiffs' Motion dated 13<sup>th</sup> May, 2019 for leave to amend pleadings should be set down for interpartes hearing.**

**(d) Who pays the costs of the Motion?**

5. The Court has after considering the grounds on the Motion, affidavit evidence filed, the learned Counsel's written submissions, the superior court's decisions and the law cited therein come to the following determinations;

(a) That the record confirms that the Plaintiffs' Motion dated the 13<sup>th</sup> May, 2019 was filed in Court on the 4<sup>th</sup> June, 2019 vide receipt No. A0107605 of the same date. That the record further shows that on the same date, 4<sup>th</sup> June 2019, one Miso of the Plaintiffs' Counsel's chambers had the application dated the 13<sup>th</sup> May, 2019 fixed for hearing on the 22<sup>nd</sup> July, 2019. That further, the proceedings of 22<sup>nd</sup> July, 2019 confirms that the Counsel for the Plaintiffs was present and after addressing the court, the following order was made;

**“Application dated 13<sup>th</sup> May, 2019 was served. It is not opposed. The same is allowed in terms of a, b, c. Costs in the cause.”**

(b) That though the Defendant's position is that they had filed their response to the application on the 19<sup>th</sup> July 2019, the counsel for the Plaintiffs has disputed that claim and added that he is yet to be served with any reply. That prove of service of court processes, unless conceded, is through affidavits of service in accordance with **Order 5 Rule 15 of Civil Procedure Rules**. That the Court has perused the record and there is no affidavit of service filed in respect of the service upon the Plaintiffs of the replying affidavit or other documents filed on 19<sup>th</sup> July, 2019 in respect of the Motion dated the 13<sup>th</sup> May, 2019. That the Court has traced in the record a loose copy of replying affidavit sworn by **Philip Varghese** on the 19<sup>th</sup> July, 2019 and filed on the same date, responding to the Motion dated the 13<sup>th</sup> May, 2019. That however, no explanation has been tendered as to why it had not been filed and served **“not less than three clear days before the date of hearing”** as required under **Order 51 Rule 14 (2) of the Civil Procedure Rules**. That the Plaintiffs' Counsel cannot therefore be faulted for moving the Court to have the Motion dated the 13<sup>th</sup> May, 2019 heard exparte on the 22<sup>nd</sup> July, 2019 in view of the provision of **Order 51 Rule 14(4) of Civil Procedure Rules** if the hearing date is found to have been 22<sup>nd</sup> July, 2019 and **not** 23<sup>rd</sup> July, 2019.

(c) That while the Defendant's position is that the copy of the Motion dated 13<sup>th</sup> May, 2019 served upon their Counsel on 3<sup>rd</sup> July, 2019 had a hearing date of 23<sup>rd</sup> July 2019, the Plaintiffs insist the date was 22<sup>nd</sup> July, 2019 and that the copy exhibited by the Defendant's Counsel has been altered for 22<sup>nd</sup> to read 23<sup>rd</sup>. That the parties have not enlisted the services of a qualified document examiner to help the Court with a report thereof. The best the Court can do, and is entitled to do so, is to make its own deductions and or conclusions on the two documents presented marked **“AKNN1”** and **“SK1(a)”**. That indeed, the two documents have the same details except the date **“22<sup>nd</sup>”** in **“SK1(a)”** and **“23<sup>rd</sup>”** in **“AKNN1”**. That both carries the stamp and signature of **“NYAIRO & COMPANY ADVOCATE”** at the bottom, which the Court takes to have been affixed when acknowledging receipt of service on the 3<sup>rd</sup> July, 2019. The Defendant's Counsel has not disputed having affixed their stamp and signature on the copy exhibited by the Plaintiff and marked **“SK1(a)”**. That in view of the confirmation from the record that hearing date fixed on the 4<sup>th</sup> June, 2019 for the Motion dated the 13<sup>th</sup> May 2019, was the 22<sup>nd</sup> July, 2020 the Court finds the explanation given by the Plaintiff more probable that the copy exhibited by the Defendant's Counsel, and marked **“AKNN1”**, carries an alteration of the hearing date from **“22<sup>nd</sup>”** to **23<sup>rd</sup>”**.

(d) That the Motion dated the 13<sup>th</sup> May 2019 that was allowed exparte on the 22<sup>nd</sup> July, 2019 resulted to only altering or changing the name of the 1<sup>st</sup> Plaintiff from **“JEREMIAH KIPTUM KIMAIYO”** to **JOSEPH KIPTUM KIMAIYO”**. That **Order 8 Rule (3) and (4) of Civil Procedure Rules** and **Section 100 of Civil Procedure Act Chapter 21 of Laws of Kenya** provides for amendment of pleadings and there is no evidence presented to show that the Defendant will stand to suffer any prejudice due to the change of name of the 1<sup>st</sup> Plaintiff, that cannot be addressed through amending the documents filed in replying.

(e) That in view of the foregoing, the Court finds no merit in the Defendant's Motion dated the 25<sup>th</sup> July, 2019 and filed on the 26<sup>th</sup> July, 2019. The application is therefore dismissed with costs.

Orders accordingly.

**Delivered virtually and signed at Eldoret this 7<sup>th</sup> day of October, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiffs: None.

Defendant: None.

Counsel: M/s Kosgei for Kibii for Plaintiffs.

M/s Wahome for Odwa for Defendant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.