



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 19 OF 2019 (OS)

KANGA MWIRABUA.....1ST PLAINTIFF
MBIUKI MWIRABUA.....2ND PLAINTIFF
CIAMBERE KANGANGI.....3RD PLAINTIFF
CIAMUI KANGANGI.....4TH PLAINTIFF
JOHN MUTEGI KANGANGI.....5TH PLAINTIFF
KABURU KANGANGI.....6TH PLAINTIFF
KAARI KANGANGI.....7TH PLAINTIFF
CIAMBAKA KANGANGI.....8TH PLAINTIFF
NYAGA MPUNGU.....9TH PLAINTIFF
KAGENDO CIAMBAKA.....10TH PLAINTIFF
KITHINJI KABURU.....11TH PLAINTIFF
MUTHONI MUTEGL.....12TH PLAINTIFF

VERSUS

NDEREBA NAICHU.....RESPONDENT

RULING

1. The applicant says that he has brought this application to court under Article 50 and 159 (2) (d) of the Constitution of Kenya, Section 146 (4) of the Evidence Act, sections 1A(1) and 1 B(1) (b) of the Civil Procedure Act and order 18 Rule 10 of the Civil Procedure Rules.

2. The application seeks the following orders:

1.That this application be certified as urgent and service be dispensed with in the first instance.

2.That the Honourable court be pleased to review and vary its orders issued on 24th February 2020, and re-open the case to allow the defendant to cross-examine the plaintiffs and their witnesses who testified on 24th February 2020, and also testify in support of his case.

3.That the Honorable court do order that the plaintiffs and their witnesses who testified on 24th February 2020, be recalled for cross-examination on a date to be determined by the court.

4.That the costs of this application be in the suit.

3. The application has the following grounds:

1.THAT the honorable court proceeded with the hearing of the case on 24th February 2020 in the absence of the defendant and subsequently closed both the plaintiffs' case and defendant's case.

2.THAT out of oversight, the defendant's advocate inadvertently mis-diarized the matter for hearing on 26th February 2020 instead of 24th February 2020.

3.THAT it is only upon being served with the orders issued on 24th February 2020, that the defendant's advocate discovered the mistake in the diary.

4.THAT the defendant/applicant stands to be greatly prejudiced if he is not offered the opportunity to cross-examine the plaintiffs' and their witnesses and to testify in defence of the suit.

5.THAT the subject matter is land which is an extremely emotive subject matter which needs to be handled with utmost care.

6.THAT it will be in the interests of justice to allow the case to be re-opened and the plaintiffs and their witnesses recalled for cross-examination.

DATED at MERU this 26th day of February, 2020.

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For: KAUMBI & CO.

ADVOCATES FOR THE DEFENDANT/APPLICANT

4. The application was buttressed by the affidavit of **NDEREBA NAICHU** sworn on **26th February, 2020** which states as follows:

SUPPORTING AFFIDAVIT

I, **NDEREBA NAICHU** of P.O. Box 79 Chuka, in the Republic of Kenya do hereby make oath and state as follows:-

1. **THAT** I am the defendant/applicant herein therefore competent to make and swear this affidavit.
2. **THAT** this matter commenced for hearing on 26th November 2019 and proceeded on 9th December 2019 wherein a total of 4 plaintiffs testified.
3. **THAT** on 9th December 2019, the matter was again slated for hearing on 24th February 2020, however out of inadvertence, my advocate diarized the same for hearing on 26th February 2020.
4. **THAT** because of the said oversight, neither myself nor my advocate was in court on 24th February 2020.
5. **THAT** I will be greatly prejudiced if I am not offered the opportunity to cross-examine the witnesses who testified on 24th February 2020, or give evidence in defence of the suit.
6. **THAT** the subject matter is a piece of land measuring in excess of 18 acres therefore I stand to suffer irreparably should I lose the case on a technicality.
7. **THAT** I am advised by my advocate on record which advise I deem sound that the oxygen rules under the Civil Procedure Act, the provisions of the Constitution of Kenya and the Evidence Act, allow the court to exercise its discretion to ensure that substantive justice is meted on the litigants.
8. **THAT** it will also in the interest justice that the court is furnished with all evidence and materials to enable it reach a fair and just determination.
9. **THAT** the plaintiffs shall not suffer any prejudice as they reserve the right of re-examination upon cross -examination, and the right to cross-examine me.
10. **THAT** what is stated above is true and to the best of my knowledge information and belief save where otherwise stated.

SWORN at MERU by the said NDEREBA NAICHU this 26th day of February, 2020

5. The application was canvassed by way of written submissions.

6. The defendant/applicant's submissions are reproduced herebelow in full without any alterations whatsoever:

Defendant/applicant's submissions on the application dated 26th February, 2020

Your Honour, the applicant submits as hereunder;

The defendant/applicant's application dated 26th February, 2020 seeks that this honorable court do review and vary its orders issued on 24th February, 2020 and re-open the case to allow the defendant to cross examine the plaintiff and their witnesses who testified on 24th February, 2020 and also testify in support of his case that the witnesses be recalled for cross-examination on a date to be determined by the court.

The matter was heard on 24th February, 2020 in the absence of the defendant or his counsel and subsequently the honourable judge closed both the plaintiffs and defendant's case. However, the defendant's counsel out of an oversight, inadvertently mis-diarized the matter for hearing on 26th February, 2020 instead of 24th February, 2020 which explains the absence of the defendant and his counsel in court. The error made by the defendant's counsel was neither intentional nor evasive but rather a mistake that should not be visited on an innocent litigant.

In Tana & Arthi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others (2015) eklr, the court observed as follows:

“From past decisions of this court, it is without doubt that it will readily excuse a mistake of counsel if it affords a justiciable, expeditious and logistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that the counsel's duty is not limited to his client, he has a corresponding duty to the court in which he practices and even to the other side”.

Your honour, this application was filed without delay upon being served by the orders issued on 24th February, 2020. The application is based on Article 50 of the Constitution that outlines the right of fair hearing and specifically the right to be present when being tried or to have an advocate present. In addition, article 159 (2) (d) provides that justice shall be administered without undue regard to the procedural technicalities. The interest of justice warrants this court's intervention by allowing the defendant/applicant to recall the witnesses for cross examination as he stands to be greatly prejudiced by the orders given by this court on 24th February, 2020.

In Maina vs. Muriuki, HCCC No. 1079 of 1980 Okubasu J quoted with approval the case of Patel vs. E.A. Cargo Handling Service Ltd (1974) E.A which found that ... ***“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as are just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules...”***

Additionally, in CMC Holding Ltd vs. James Mumo Nzioki (2014) eklr it was observed that, “the discretion that a court has in deciding whether or not to set aside ex-parte order such as before us was not meant to ensure that a litigant does not suffer injustice or hardship as a result of amount other things an excusable mistake or error. It would in our mind not be proper use of use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.

In the foregoing, we urge the court to exercise its discretion in reviewing and varying its orders issued on 24th February, and grant the applicant an opportunity to cross-examine the plaintiff's witnesses and allow the trial to proceed to its logical conclusion on merit.

We remain most obliged.

Dated at Meru on this 26th day of June, 2020

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FOR: KAUMBI & Co.

ADVOCATES FOR THE DEFENDANT/APPLICANT

7. The plaintiffs' submissions are reproduced herebelow without any alterations whatsoever:

PLAINTIFFS SUBMISSION ON THE APPLICATION DATED 26TH FEBRUARY 2020.

Your Lordship, the defendant's application dated **26th February,2020** is essentially seeking Orders for the review of your Order issued on **24th February,2020.**

Rules for review are donated by **section 80 of the Civil procedure Act,Cap.21 laws of Kenya** and **Order 45 rule 1 of the civil procedure rules** .The applicant's application falls short of the threshold required for the review of orders.

Your Lordship, the counsel's misdiarizing of his diary cannot be a ground for the absenteeism of his client in court when the case is called

out for hearing. My lordship, kindly look at paragraph 3 & 4 of the supporting affidavit where the defendant does:-

“3. **THAT** on the **9th December, 2019**, the matter was slated for hearing on **24th February, 2020**.

However, out of inadvertence, my advocate diarized the same for hearing on 26th February, 2020. The undertaking is mine.

“4. **THAT** because of the said oversight, neither myself nor my advocate was in court on **24th February, 2020**.

My lord, a party cannot fail to attend court because of his advocate’s misdiarizing his diary. This court my lord is also a court of equity. It is trite rule of equity that anyone seeking equity should go to equity with clean hands. He is seeking equity with very dirty hands. He is deliberately making an affidavit on oath knowing very well that he is not telling the truth.

My Lord, the counsel for the applicant has not attached copies of his diary showing or indicating the misdiarizing or at all. He has not sworn any affidavit to that effect. The defendant cannot swear matters of fact on behalf of his/her counsel. Such averments as appearing from the supporting affidavit should be expunged altogether.

Finally my lord, the basis for the exercise of your discretion has not been laid by the defendant/applicant who is inviting the court to exercise its discretion. The defendant has not satisfied the threshold by providing a rational basis for the court to allow reopening of the case.

The plaintiffs wish to support their case with the authority of the case of **ODOYO SODO V/S RAEL OBARA OJUOK & 4 OTHERS(2017)eKLR** copy of the same is attached.

We urge this Honourable Court to find that the application before the court has no merit and the same be dismissed with costs to the plaintiffs.

Dated at Meru this.....30thday of.....September,....2020

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A.G RIUNGU

ADVOCATES FOR THE PLAINTIFFS

8. I have considered the pleadings and the submissions proffered by the parties in support of their diametrically divergent positions. The plaintiffs have proffered one case in support of their submissions. The defendants did not proffer any authority.

9. The authority of Rael Obara Ojuok & 4 others (2017) eKLR is only partially relevant in that in that case both parties had been heard and it is only the counter claim that the defendants wanted to belatedly canvass. In this case the defendants were not heard at all.

10. I agree with the plaintiffs’ advocate that misdiarizing a hearing date by a party’s advocate is NOT a good ground for review of court’s orders. In all cases, suits belong to the parties. It is for this reason that order 12 talks about attendance by the parties and not their advocates. It is always the parties’ responsibility, nay duty, to follow up developments concerning their cases. Having said that, I will decline to reopen the plaintiff’s case and for that reason, I will dismiss this application.

11. In the greater interest of justice, although rather unorthodoxically, I will allow the defendants to present their case based on the pleadings they have filed. Of course the plaintiffs’ advocate will be at liberty to cross-examine the defendants’ witnesses.

12. In the circumstances, I issue the following orders:

a) The defendants are allowed to give their evidence on a date to be agreed by the parties or to be given by the court on the day this ruling will be delivered.

b) Costs for this application are awarded to the plaintiffs.

Delivered in open Court at Chuka this 18th day of November, 2020 in the presence of:

CA: Ndegwa

Mark Murithi h/b Kaumbi for Defendant/Applicant

Ndereba Naichu – Defendant

P. M. NJOROGE

JUDGE