



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT CHUKA

ENVIRONMENT AND LAND CASE (OS) NO. 15 OF 2019

JOSEPH KIBAARA M'ICUGA.....PLAINTIFF/RESPONDENT

VERSUS

M'CHABARI KINORO.....DEFENDANT/APPLICANT

RULING

1. This application states that it has been brought to court under Section 1A, 1B & 3A of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules 2010.

2. The application seeks the following orders:

1. THAT this application be certified urgent, service be dispensed with and heard ex-parte in the 1st instance.
2. There be a stay of the proceedings and the subsequent orders of court made on 14th October, 2020 pending the hearing and determination of this Application.
3. That this honorable court be pleased to discharge, review, vary or set aside the ex-parte proceedings made on 14th October, 2020 and resultant orders thereon and the matter be heard on merit.
4. That the costs of this application be in the cause.

3. This application is buttressed by the affidavit of Murimi Murango, the applicants advocate which states:

I, Murimi Murango of Post Office box Number 82-60400 Chuka do hereby make this affidavit and states that: -

1. I am an Advocate of the High court of Kenya and thus competent to swear this affidavit.
2. I am the advocate for the Respondent/Applicant with conduct of this matter.
3. That the hearing date was taken and I was not served with a hearing Notice or have any information that the matter was coming for hearing on 14th October, 2020.
4. The matter proceeded for hearing on 14th October, 2020 exparte.
5. On the same date, my assistant one, Patrick called me late afternoon and informed me that the present matter had proceeded for hearing upon getting information from the registry.
6. On peruse (Sic) of the court file, indeed the matter had proceeded for heard (sic) exparte.
7. Being very honest and candid to the court I was not aware of the hearing date and or any orders of court issued previously in this present suit.
8. Setting aside is the discretion of the court and main concern of the court is to do justice to the parties before it.

9. The court should be mindful of the Covid 19 pandemic which has greatly affected court proceedings and the advocates' diaries.
10. The Applicant will suffer great prejudice if not granted a chance to file a replying affidavit and defend himself on this dispute of adverse possession.
11. That the Applicant is ready to abide by the orders of this court upon grant of the orders sought in this Application.
12. That it will be in the interest of justice that the orders sought herein be granted.
13. That the Respondent will not suffer any prejudice if the orders sought herein are granted.
14. What is deposed to herein above is true to the best of my knowledge and belief.

SWORN at NAIROBI by the said

MURIMI MURANGO

This 22nd day of October, 2020

4. The Plaintiff opposed this application vide Grounds of opposition dated 30th October, 2020 which are in the following format:

A STATEMENT OF GROUNDS OF OPPOSITION Under Order 51 Rule 14 (1)(c) of the Civil Procedure Rules, 2010

TAKE NOTICE that the Respondent/Applicant herein shall oppose the Notice of Motion Application dated the **22ND OCTOBER, 2020** on the following grounds:-

1. The Applicant was made aware of the court's directions by its ruling delivered on the **5th day of MAY 2020**.
2. By those directions, the counsel for the Respondent/Applicant was directed to fully comply with Order 11 of the Civil Procedure Rules within 30 days.
3. The Respondent/Applicant blatantly failed to comply with those directions and did not attend court for the main hearing on the **14th OCTOBER, 2020**.
4. The hearing date was never taken by any of the parties herein but was fixed by the court in its said ruling.
5. Even before the hearing of the main suit precisely on the **24TH SEPTEMBER, 2019** the court had directed that all parties to comply with Order 11 and the Respondent be served and this was done and an affidavit of service filed in court.
6. On the **11TH DECEMBER, 2019** the Respondent/Applicant was once again directed to comply with Order 11 within **Thirty (30) days** but he still failed to do so.
7. To allege therefore that he was not aware of what has been transpiring in the court is being economical with the truth and this frivolous application is designed to delay this matter.
8. The Respondent/Applicant should not attempt to hide under the Covid -19 pandemic as an excuse to stay and to set aside the proceeding herein and justice is not meant for one party.
9. Review cannot be done under the sections cited in the Application.
10. Setting aside ex-parte proceedings cannot be done **Under Order 12 Rule 7** of the Civil Procedure Rules.
11. There is no real or imagined prejudice that shall be suffered by the Respondent/Applicant if this application is dismissed with costs.
12. The Respondent/Applicant does not deserve the court's discretion because of his dishonesty and insincerity.
13. This application lacks merit and should be dismissed.

DATED AT NANYUKI THIS.....30TH.....DAY OF..OCTOBER.....2020

BWONWONGA & CO.

ADVOCATES FOR THE APPLICANT/RESPONDENT

5. During the interpartes hearing of the application on 23rd November, 2020, Mr. Guantai, the applicant's/defendant's advocate told the court that he wished to apologize to court on behalf of his client. He attributed the hearing of this suit in the absence of the defendant to the carelessness of the defendant's former advocate, Murimi Murango, who had not pursued this matter diligently and who had not advised the defendant regarding the hearing date. He undertook to pursue the matter diligently if the court exercised its unfettered discretion to have the matter heard on its merit.

6. Mr. Bwonwonga, the Plaintiff's advocate, opposed the application. He told the court that the defendant had serially ignored orders, including an order to fully comply with order II, CPR. He pointed that there was no prayer in the application to file a replying affidavit to oppose the OS. He wondered what would happen if the court set aside the proceedings. Mr Bwonwonga also argued that setting aside of proceedings could not be done under order 12 Rule 7 of the Civil Procedure Rules. He opined that the cumulative effect of all the infractions attributable to the defendant led to the conclusion that the application was fundamentally defective and ought to be dismissed.

7. I have considered the pleadings and the submissions proffered by the parties to buttress their veritably incongruent assertions.

8. I agree that the defendant ought to have known the date the hearing of this case was to take place. Blaming his advocate is not enough. A litigant remains at all times the owner of his case. His advocate is only an agent, albeit a very important one. I opine that the defendant did not diligently follow up the happenings in his case.

9. I agree with the plaintiff's advocate that setting aside of proceedings cannot be done under Order 12 Rule 7 of the Civil Procedure Rules. Order 12 Rule 7 of the Civil Procedure Rules only applies where a judgment has been entered or a suit has been dismissed. This is not the case in the present circumstances.

10. The above notwithstanding, I opine that there is always merit for all parties in a suit being heard. In this case, the defendant accepts blame even though he ascribes it to his former advocate. In the greater interest of justice, I am inclined to allow the defendant to be heard. However, by not following up his case diligently, he had greatly inconvenienced the plaintiff and the court. As any carelessness as a choice has consequences, I will condemn the defendant to pay costs for the advocate, the plaintiff and his witnesses for the day this suit was heard in his absence.

11. The following orders are issued:

- a. Prayers 2 and 3 in the application are granted.
- b. To expedite the hearing and determination of this suit, the defendant, and the plaintiff if he finds it necessary, to concurrently fully comply with Order 11, CPR within 30 days of today.
- c. Costs for the advocate, the Plaintiff and his witnesses for the proceedings which took place on 14th October, 2020 are awarded to the Plaintiff and are to be in the cause.
- d. Parties are directed to come to court on 25/1/2021 for directions.

Delivered in open Court at Chuka this **14th day of December, 2020** in the presence of:

CA: Ndegwa

Sichanya h/b Guantai for the Applicant

Joseph Kibaara – Plaintiff/Respondent

P. M. NJOROGE,

JUDGE.