



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**CASE NO. 87 OF 2017**

**PATRICK EUNYASAT.....APPLICANT**

**= VERSUS =**

**JOSEPH ITEBA ETYANG**

**VINCENT ASOKA**

**ANGELINE ATENGE ETEBA**

**(SUING ON BEHALF OF**

**OKUMU NYONGESA MAKARI)**

**LAWRENCE AMONI AMUYA.....RESPONDENTS**

**R U L I N G**

1. The Applicant – **PATRICK EUNYASAT** – has moved the Court vide the Notice of Motion dated 31<sup>st</sup> October 2018 filed under Article 159 of the Constitution of Kenya and Sections 3 and 3A of the Civil Procedure Act seeking the following orders: **“THAT the Honourable Court be pleased to allow the Applicant to arrest judgment by being allowed to give his evidence on Court.”**

2. The Applicant (Defendant to the main suit) in his Supporting Affidavit to the Application states that he did not attend Court on 19<sup>th</sup> March 2018 when the matter was slated for Defence Hearing on 19<sup>th</sup> March 2018 because he was indisposed and admitted in Hospital. After he was discharged on 23<sup>rd</sup> March 2018, he made effort to inquire as to what transpired in Court on the hearing date but was unsuccessful. He then sought representation and was informed by his newly appointed Advocate that the Court file was in chambers awaiting judgment. He then filed this application.

3. The Application is opposed vide the Replying Affidavit of –**LAWRENCE AMONI AMUYA**- filed on 9<sup>th</sup> November 2018 sworn on his behalf and on behalf of the rest of the Respondents. He asserts that the case was heard to conclusion on 21<sup>st</sup> March 2018, not 19<sup>th</sup> March 2018 as alleged by the Applicant. He also stated that there was no Application challenging the proceedings and orders issued by the Court on 21<sup>st</sup> March 2018. Further, there was inordinate delay in bringing the Application, over 5 months from the hearing date. He prays for the Application to be dismissed with costs.

4. Parties opted to canvass the Application by way of written submissions. The Defendant/Applicant’s submissions were filed on 5<sup>th</sup> December 2018. They were based on the Applicant’s reasons for non-attendance on 21<sup>st</sup> March 2018, the same being his health issues evidenced by his medical records. He could not get a representative to attend Court in his stead as his sons were unavailable. Counsel for the Applicant explained that the reason for delay was due to the fact that the Applicant was acting in person and faced challenges in locating the Court file as it could not be traced in the Court Registry. This was because it was in chambers awaiting judgment, hence inaccessible. He prayed for the Application to be granted in the interests of justice.

5. The Plaintiff/Respondents’ submissions were filed on 27<sup>th</sup> November 2018. Counsel for the Respondents reshaped their position as stipulated in their Replying Affidavit. He mentioned the erroneous hearing date as stated by the Applicant as well as the inordinate delay in filing the Application.

6. I have read the parties' pleadings, submissions by each side as well as the applicable law. The Applicant bases his Application on Sections 3 and 3A of the Civil Procedure Act which provide the basis for the discretionary powers of the Court. He also cited as well as Article 159 of the Constitution which provides for administration of justice without undue regard to procedural technicalities.

7. The Court record reflects the events leading up to this point. The Applicant has attended Court on only one occasion. That occasion was 15<sup>th</sup> November 2017 when the case was mentioned for directions. He sought for time to respond to the Plaintiffs' Originating summons. There was no appearance for the Applicant on the next Court date, 25<sup>th</sup> January 2018 when directions were taken. He also had not filed a response as at the said date which was given in his presence. The Court then proceeded to hear the matter on 21<sup>st</sup> March 2018 having satisfied itself that the Defendant was duly served as per the affidavit of service on record filed on the same date. It appears to me that the Defendant has not been keen on defending his case. This is clear from the casual manner in which he has handled his defence. He has been sleeping and he is waking rather late in the day. He only has himself to blame.

8. The case has proceeded to a very advanced stage pending delivery of the final judgment. No explanation has been offered for the laxity with which the Defendant has conducted himself. Moreover, there is no Defence on record. On what basis does the Defendant seek to cross examine the Plaintiffs and give evidence in rebuttal? Filing a Defence is not a mere procedural technicality but a matter of substantive law. The Applicant has annexed two authorities that have little bearing on his Application and do not aid his case. In the first case, **Anastacia M'Ekandi Vs Anthony Kaunga (2018) eKLR** the Application to re-open the case was disallowed. In the second case, **Boniface Kivindyo Mutisya Vs Alfred Kavila Kivindyo & 2 Others (2018) eKLR**, the Application to arrest the judgment was dismissed despite the fact that the Applicant's only sought to introduce written submissions.

9. Without further ado, the Application dated and 31<sup>st</sup> October 2018 is hereby dismissed with costs to the Respondents.

**Dated, signed and delivered at Busia this 26<sup>th</sup> day of February, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff/Respondent: Absent

Defendant/Applicant: Absent

Counsel of the Plaintiff/Respondents: Present

Counsel of the Defendant/Applicant: Absent

Court Assistant: Nelson Odame