



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 417 OF 2017

(Formerly Kisii ELCC NO. 949 OF 2016)

PETER MAROA NYAMOHANGA.....PLAINTIFF

Versus

SAMWEL NICHOLAS KEBOYEDEFENDANT

RULING

1. This ruling is in respect of an application by way of a notice of motion dated 26th September, 2018 expressed under certificate of urgency pursuant to Orders 51 of the Civil Procedure Rules, 2010 (hereinafter referred to as the motion). The applicant(defendant) who is represented by the firm of Kerario Marwa and Company Advocates is seeking the following orders:-

- a) **Spent**
- b) **Spent**
- c) **THAT** this honourable court be pleased to set aside it's Judgment dated 30th July, 2018.
- d) **THAT** the costs of this application be in the cause.

2. The motion is anchored on the applicant's supporting affidavit sworn on even date and copies of documents marked M.PN 1 (judgment delivered on 30th July, 2018) and M.P.N 2 (P. 53 form under **Section 52 of the National Police Service Act ,2011**) accompanying the affidavit. The notice is also anchored on the grounds which include;-

- i. **THAT** the applicant and the plaintiff (respondent) has entered into a consent to settle the matter which consent was entered into on the 27th May 2017 before the office of the assistant chief Nyametaburo sub-location and later on before the advocates for the parties.
- ii. **THAT** the respondent did not sent the consent and mischievously waited to proceed with the matter without the knowledge of the applicant.
- iii. **THAT** the applicant was never served either in person or through his advocate then or any notice requiring him or his representative to attend court.

3. The applicant averred inter alia, that he entered into a consent with the respondent to settle the matter before the assistant chief, Nyametaburo sub-location on 27th May, 2017. That the consent was meant to be signed before the parties respective counsel. That the respondent did not sent the consent to his counsel to sign, but approached the court for redress to seek judgment under undue advantage. That the applicant was never duly served to attend court for the hearing of the suit hence the orders sought in the motion be granted in the interest of justice.

4. The respondent acting in person opposed the motion by his replying affidavit sworn on 9th October,2018. He averred, inter alia, that the motion in totally bad in law, frivolous, a sham and an abuse of the court process. That the applicant has come to court with unclean hands as the consent is fictitious, fraudulent and not honoured by the applicant hence it occasioned the impugned judgment.

5. The plaintiff/respondent further averred that the defendant/applicant is out to frustrate him from enjoying the fruits of his judgment. He urged this court to strike out the motion with costs and issue execution against the applicant in the interest of justice.

6. On 5th February, 2019, this court directed that the motion be argued by oral submissions limited to five (5) minutes for each party; see **Order 51 Rule 16 of the Civil Procedure rules, 2010**. The parties complied accordingly.

7. The applicant's counsel submitted that the defendant/applicant has the right to be heard under the **Constitution of Kenya, 2010** and urged the court to grant the orders sought in the motion. The respondent submitted that the applicant, who was represented by counsel was duly served for hearing of the suit which proceeded in his absence, judgment delivered and there was no appeal there from.

8. I have examined the entire motion, the replying affidavit and oral submissions by each party herein. Has the applicant satisfied the threshold for the grant of the orders sought in the motion? The answer follows hereunder.

9. **Black's Law Dictionary 10th Edition** defines the term "**Stay** also termed **stay of Execution**" as:-

"An order to suspend all or part of a judicial proceedings or a Judgment resulting from that proceedings or suspension of Judgment."

10. The orders sought in the motion are within the discretion of this court. In the case of **Patel –v- EA Cargo Handling Services Ltd (1974) EA 75**, it was held that there are no limits or restrictions on the judge's discretion thereof except that if he does vary the judgment he does so on such terms as may be just. It was further held that the court must be satisfied that the applicant has :-

- a) A good defence or a defence on the merits
- b) Shown the cause of delay in entering appearance.

11. It is trite law that the exercise of the discretion must be judicious so as not to cause injustice in the case; see **Mbogo and another –v- Shah (1968) EA 93**.

12. Moreover, in the exercise of its discretion the main concern of the court is to do justice to the parties. Under **section 3A of the Civil Procedure Act (Cap 21)**, the courts' discretion is exercised ever more for the purpose of upholding the law and this would require preserving the claims of the parties so that they may be heard and determined according to the law and on merits.

13. In his statement of defence dated 30th November 2012, the defendant/applicant stated in part that he will show and prove that :-

- a) **The plaintiff owns half of the suit parcel No. Bukira/Buhiringera/7 and the other half is owned by his brother one John Mokami Nyamohanga.**
- b) **He is a purchaser for consideration of all that land measuring 4.5 acres out of the suit land.**
- c) **The plaintiff has been attempting to resell the portions sold to him to other 3rd parties thereby necessitating the placement of a caution to protect his (purchaser) interest.**

14. Quite plainly, the applicant's statement of defence raises triable issues. Thus he has a defence which calls for hearing of the suit on merits.

15. By an affidavit of service sworn on 17th May, 2018, the applicant's counsel was duly served for hearing. As already observed, there is a defence on

merits in the matter. Furthermore, the motion has been brought within less than two (2) months after delivery of the impugned judgment hence it does not suffer from inordinate delay. Also there is no dispute that the parties had attempted to settle the dispute by consent prior to hearing of the suit and subsequent judgment.

16. It is noted that this suit is quite old and **Article 159 (2) (b) of the Constitution of Kenya, 2010** provides that justice shall not be delayed. Nonetheless, **Article 50(1) as read with Article 234 (c)** of the same Constitution stipulate that right to fair trial shall not be curtailed.

17. All in all, the motion is merited in the circumstances. However, hereafter the suit has to be heard and determined on priority basis in the interest of justice.

18. In the result, the applicant's motion dated 26th September, 2018 is allowed in the following terms:-

- a) **This court's judgment delivered on 30th July 2018 and the plaintiff's bill of costs of 27th September 2018 be and are hereby set aside.**
- b) **Costs of the motion shall be in the cause.**

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this **6th** Day of **MARCH 2019**.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Mwita Kerario, learned counsel for the applicant/defendant

The respondent/plaintiff, present in person.

Tom Maurice – Court Assistant