REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 103 OF 2008

MANSUKHALAL JESANG MARU.....PLAINTIFF

VERSUS

FRANK WAFULA.....DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated **28/3/2019** by the defendant/applicant seeking the following orders:-

(i) That service of this application be dispensed with in the first instance.

(ii) That the orders made by this honourable court on 21/3/2019, requiring the defendant/applicant to pay the plaintiff/respondent the sum of Kshs.20,000/= (twenty thousands) only, before the next hearing the next hearing date be reviewed and/or vacated, pending the hearing and determination of this application.

(iii) That pending and thereafter pending (sic) the hearing and determination of this suit, this honourable court be pleased to order that costs of the entire suit be in the course.

(iv) That the cost of this application be provided for.

2. The grounds upon which the application is made are contained at the foot of the application. Briefly those grounds are that the defendant herein has been on three (3) consecutive occasions be condemned to pay the plaintiff costs for adjournment of the suit; that the defendant has on proceeding two (2) occasions complied by paying the requested amount i.e. Kshs.25,000/= paid on 11/2/2019 and Kshs.20,000/= paid on 21/3/2019, which payment was not acknowledged by issuance of an official receipt; that the defendant having realized that the 1st advocate representing him was not keen enough to attend court, decided to substitute him and engaged the services of a second counsel who equally did not personally appear on the date set down for hearing though he requested his learned colleague to stand in for him; that reasons sought for adjourning the case were genuine in that the hired advocate was to be accorded time by this honourable court to peruse the file and acquaint himself with the background of the case before proceeding with the matter at hand; that it is not denied that the matter at hand is fairly old and should be dispensed with, but it is trite law that justice should not only be done but should be seen to be done; that the defendant is being punished unfairly for the mistakes that are not of his making and should not be made to suffer occasioned by his advocates; that for justice to be served upon the defendant the court ought to be cautious and exercise its discretion in a fair manner before imposing such excessive costs upon the defendant before the next hearing date, which in the alternative could have been put in the cause; that the defendant has discovered that costs if any, can be in the cause and that the defendant stands to suffer irreparable damage should the orders sought herein not be granted.

3. The application is supported by an affidavit sworn on 28/3/2019 by the defendant/applicant herein.

4. The application is opposed. The plaintiff filed his grounds of opposition dated **9/4/2019**. The plaintiff contends that the application is misconceived and bad in law; that there is no error or mistake apparent on the face of the record, concerning the court's order of 21/3/2019; that upon granting the adjournment sought by the application on the 21/3/2019 and which adjournment application had been opposed, the court had a discretion to impose such terms and conditions as would meet the ends of justice; that the applicant could have appealed against the said order of 21/3/2019, otherwise "review" would not be available; that the court cannot be directed on what orders to make as concerns future adjournments and that the application will only serve to further delay the finalization of this suit that got filed in 2008.

5. The defendant filed a further affidavit sworn on **15/4/2019** on same date. He deponed that in the unlikely event that the respondents obtain judgment in their favour they would still file the bill of costs for taxation and it's unlikely that they would exclude the amount already paid to them on various dates as ordered by the court. The defendant further proceeds on a narrative regarding his mishaps with his advocates in this matter which I do not think are relevant to the application at hand. Paragraph 10 of his further affidavit avers that he is unable to pay

the costs as ordered because his wife is sick and requires special treatment.

6. The defendant filed submissions on **15/4/2019**. I have looked through the record and found no submissions filed on behalf of the plaintiff in respect of the instant application.

7. I have considered the application the responses and the submissions filed.

8. The suit at hand was filed in the year **2008** now it is **10 years old**. This court has been engaged in an exercise to relieve litigants of the burden of litigation older than 5 years in the spirit of implementing the policy of sustaining the Judiciary Transformation.

9. In the times that this suit has been adjourned at the instance of the defendant this court has indulged him simply to allow him to wake up to the requirements of an attitude of expeditious disposal of litigation as required in the recent days. He appears not to have learnt his lesson fast enough and from 8/10/2018 to date - a period of about 6 months - he has made at least 6 direct or indirect applications for adjournment leading to the orders that has been made by this court.

10. It is noteworthy that **Order 17 rule 1(1)** of the **Civil Procedure Rules** requires that once a suit has been set down for hearing it shall not be adjourned unless the party applying for adjournment satisfies the court that it is just to grant the adjournment.

11. Order 17 Rule 2 provides that when a court grants an adjournment it shall give a date for further hearing or directions. **Order 17 Rule 2** does not fetter the court in terms of the directions it may give after allowing the adjournment and these directions in my view may include orders as to costs.

12. In my opinion a litigant who appear reluctant to proceed with the suit has only the recourse of abiding by the orders of the court which indulged him by granting him an adjournment.

13. One option available to a court that is not convinced of the bonafides of an application for an adjournment is to grant that adjournment and order punitive costs against the party so applying. This is in order to salve the wounds of delay inflicted unnecessarily on an innocent party.

14. The second option is to compel the applying party to proceed notwithstanding his expressed unpreparedness which may be more deleterious than having to pay costs. This option is deleterious because the litigant may have had a good reason for the adjournment which he poorly communicated to court and in an unconvincing manner.

15. In the event of poor communication, the latter option insures his right to be ultimately heard. If he were compelled to proceed while unprepared there may occur a substantial miscarriage of justice that may have long lasting effects.

16. So where a litigant is condemned to punitive costs to compel him of his own volition to cease unnecessarily delaying the hearing by numerous and vexatious applications for an adjournment, usually strenuously opposed by the adversary, condemnation to costs is the lesser evil.

17. In view of what I have said and in the context of this case I do not find any merit in the application dated **28/3/2019** and the same is hereby dismissed with costs.

Dated, signed and **delivered** at **Kitale** on this **30th** day of **April, 2019.**

MWANGI NJOROGE

JUDGE

30/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiff/respondent

Mr. Wafula in person present

COURT

Ruling delivered in open court.

MWANGI NJOROGE

JUDGE

30/4/2019