



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 891 OF 2015**

**JOHN KORABA IROHA.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**REUBEN WAMBURU KAROBA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRAR KIAMBI..2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 27<sup>th</sup> July 2018 brought under order 45 rule 1 and 2; order 51 rule 1 of the Civil Procedure Rules, Section 3A, the inherent jurisdiction of the court and all other enabling provisions of the law.

2. It seeks orders:-

**(1) Spent**

**(2) That this honourable court be and is hereby pleased to review its order issued on 20<sup>th</sup> June, 2018 dismissing the claims in ELC suit No. 891 of 2015 as consolidated with ELC suit No. 1034 of 2014 by reinstating the said suits and the proceedings touching on the counterclaim be set aside.**

**(3) That this honourable court be and is hereby to stay any further proceedings in the counterclaim in ELC suit No.891 of 2015**

**(4) That costs of this application be provided for.**

3. The grounds are on the face of the application and are:-

**(a) That there is an error apparent on the face of the record.**

**(b) That this honourable court on 20<sup>th</sup> June, 2018 dismissed the claims in ELC suit No.891 of 2015 as consolidated with ELC Suit No. 1034 of 2014.**

**(c) That the net effect of the orders of dismissal of the suits is that the court would have condemned the applicant unheard.**

**(d) That the plaintiff/applicant herein is elderly and truly ailing.**

**(e) That there are sufficient reasons to review the order issued on 20<sup>th</sup> June, 2018 as the prevailing state of affairs is oppressive to the plaintiff/applicant who is an old man aged 90 years.**

**(f) That the plaintiff is claiming ownership of the LR NO. Githunguri/Githiga/T408.**

**(g) That there has not been an unreasonable delay in bringing the present application.**

**(h) That it is only fair, just and in the interest of justice that the orders sought be granted.**

4. The application is supported by the affidavit of Eddah Njoki Magu, Advocate for the plaintiff sworn on the 27<sup>th</sup> July 2018. There is also another affidavit by John Karoba Iroha the plaintiff/applicant sworn on the 27<sup>th</sup> July 2018.

5. It appears the 1<sup>st</sup> defendant/respondent did not file any response but filed written submissions dated 15<sup>th</sup> March 2018.

6. I have considered the notice of motion dated 27<sup>th</sup> July 2018, the affidavits in support and the annexures. The written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

7. It is the plaintiff's/applicant's submissions that he is ailing and has been seeking continuous medical attention. The reason for not attending court was because he was unwell. He urges this court to exercise discretion in his favour by granting the orders sought. By dismissing his suit, the court condemned him unheard. He has put forward the cases of **JMK vs MWM & MFS CA Civil Appeal NO. 150 of 2018; Onyango vs Attorney General [1988 – 1989] EA 456.**

8. The 1<sup>st</sup> defendant/respondent on his part submitted that he was not informed of the plaintiffs indisposition. The medical report the plaintiff seeks to rely on in this application was not placed before court at the time the plaintiff's suit was dismissed. The court could not have been aware that the plaintiff was ill. He has put forward the cases of **Abdullahi Mohamud vs Mohammed Kahiye [2015] eKLR; George Maina Michael vs Vitalis Kabita [2018] eKLR.** He prays that the application be dismissed.

9. I have considered the reasons advanced by the plaintiff/applicant for failure to attend court on 20<sup>th</sup> June 2018. He has annexed a medical report to show that he has been ailing. The same has not been rebutted by the 1<sup>st</sup> defendant/respondent. I also note that this application has been brought without undue delay.

10. Article 50 (1) of the Constitution of Kenya provides:

***“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”***

It is in the interest of justice that the plaintiff is given an opportunity to prosecute his claim. I also note that the dispute herein involves family members. The 1<sup>st</sup> defendant/respondent has not demonstrated what prejudice he may suffer if the suits are reinstated.

11. All in all I find that the plaintiff/applicant has satisfied the requirements for grant of the orders sought under order 45 rule 1, 2 of the Civil Procedure Rules. I find merit in this applicant and grant the orders sought namely:-

***(a) That the orders issued on 20<sup>th</sup> June 2018 dismissing the plaintiff's claim in ELC No. 891 of 2015 as consolidated with ELC 1034 of 2014 are hereby reinstated and the proceedings touching on the counterclaim are hereby set aside.***

***(b) That the proceedings in the counterclaim in ELC 891 OF 2015 are hereby stayed.***

***(c) That costs of this application be in the cause.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 25<sup>TH</sup> day of APRIL 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Defendants

.....Court Assistant