



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC SUIT NO. 46 OF 2017**

**WILFRED MUNAI KILUNGU.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ALFRED WANZA MUSAU.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**MUTAVI MUNAI.....DEFENDANT/APPLICANT**

**R U L I N G**

1. What is before this Court for ruling is the Defendants/Applicant's Notice of Motion Application expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, Orders 18 and 51 Rule 1 of the Civil Procedure Rules, 2010 Part 1 Rule 3 of the High Court (Practice and Procedure) Rules and all other enabling provisions of the law for orders that:-

**1) Spent.**

**2) This Honourable Court be pleased to stay the proceedings herein pending the hearing and determination of this Application interpartes.**

**3) This Honourable Court be pleased to re-open the Defence case and consequently allow the Defendant to testify.**

**4) Spent.**

**5) Costs of this Application be provided for.**

2. The application is dated 28<sup>th</sup> December, 2018 and was filed in court on even date. It is predicated on the grounds on its face and is supported by the supporting and supplementary affidavits of Mutavi Munai, the Defendant/Applicant herein sworn on 28<sup>th</sup> December, 2018 and 15<sup>th</sup> February, 2019. Amongst the grounds raised by the Defendant/Applicant are that the defence case was closed in the absence of the Defendant/Applicant but in the presence of his Counsel, that the Defendant's absence was due to sickness, that he has been battling illness for some time and that he is a 85 year old man. The Defendant/Applicant in his supporting affidavit deposited in paragraphs 3, 4 and 5 of his supporting affidavit that he was absent from court on the date defence hearing was to proceed because of sickness. He annexed medical records as MM1. That he is an old man who was unable to communicate with his Advocate on record because he had lost contact with him.

3. In the supplementary affidavit, the Defendant/Applicant has deposed that the 1<sup>st</sup> Plaintiff/Respondent's replying affidavit sworn on 14<sup>th</sup> January, 2019 is based on falsehoods and fertile imaginations. The Defendant/Applicant went on to depose that whereas on 31<sup>st</sup> October, 2018 his Advocate informed the court that his application for re-opening his defence case was to be filed in the same day, he realized and established that he had mistakenly not supplied the Advocate with all the medical records. He went on to depose in paragraph 6 that he has never harassed nor threatened to evict the Plaintiffs/Respondents and their children from their respective homes. In paragraph 7, the Defendant/Applicant has deposed that the Plaintiffs/Respondents and their children are settled in their respective parcels of land and not in the land that is the subject matter of this suit (emphasis are mine).

4. The Plaintiffs/Respondents have opposed the application through the replying affidavit of Wilfred Munai Kilungu, the 1<sup>st</sup> Plaintiff/Respondent herein. The 1<sup>st</sup> Plaintiff/Applicant has deposed in paragraphs 3, 4, 5, 6, 7, 9 and 10 of the replying affidavit that he has been advised by his Advocate on record which he accepts as true and correct that the application has no merit as there are no proceedings to be stayed since the matter is pending for judgment, that the matter was last in court on 31<sup>st</sup> October, 2018 when the same was fixed for judgment on 12<sup>th</sup> February, 2019 and that on that day, the Advocate for the Defendant/Applicant sought for an adjournment on the ground that he wanted to file this application which application was declined and the matter was fixed for judgment, that on 31<sup>st</sup> October, 2018, the Advocate for the Defendant/Applicant informed the court that this application was to be filed on the same day and heard immediately but he took unreasonable delay to file on the 28<sup>th</sup> December, 2018 and the delay has not been explained, that since the start of the matter, the

Defendant/Applicant has been delaying this suit for one reason or another with the intention of delaying justice, that the Defendant/Applicant has continued to harass them and their children while alleging that he has a title deed and that he will make sure that the matter will never be finalized, that when the matter came up for defence hearing on 05<sup>th</sup> July, 2018, the Advocate for the Defendant/Applicant applied for adjournment on the ground that the Defendant/Applicant was sick and was in hospital and the application was declined and parties were ordered to file their submissions after the Defendant's/Applicant's Advocate relied on the defence but he never filed submissions and that he has not seen evidence to prove that the Defendant/Applicant was in hospital on 05<sup>th</sup> July, 2018, and it, therefore, follows that the Defendant/Applicant has not been telling the truth.

5. Both parties filed their submissions on the 19<sup>th</sup> February, 2019 and 26<sup>th</sup> February, 2019 pursuant to the Court's direction that the application be disposed off in that manner.

6. The Advocate for the Defendant/Applicant has submitted that it is not disputed that the case was closed on 05<sup>th</sup> July, 2018 owing to the Defendant/Applicant failure to show up in court to testify. He went on to submit that the Defendant/Applicant has demonstrated through medical documents that when the matter came up for defence hearing on 05<sup>th</sup> July, 2018, he was indeed sick. He added that the Defendant/Applicant has also demonstrated that he is of age and that his Advocates lost contact with him. The Advocate termed the allegations by the Plaintiffs/Respondents that he is employing delaying tactics in this matter and that he has been harassing and threatening them with eviction as unfounded. Citing Section 107(1) and (2) of the Evidence Act, the Counsel submitted that the Plaintiffs/Respondents have not adduced any evidence to prove their grave allegations.

7. The Advocate cited Article 50(1) of the Constitution that provides the right to fair hearing as follows:-

50(1)

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

8. The Counsel relies on the case of **Peter Kitoyi vs. Chema Holdings Ltd [2016] eKLR** where **Obaga J** opined thus,

*“This is a clear case in which discretion should be exercised in favour of the Applicant. I therefore allow the Application with the result that the Court's Order of 20/1/2016 closing the Defence Case is hereby set aside. The Defence case is hereby re-opened and the Defendant is allowed to testify in its defence.”*

The Counsel further cited the case of **Daniel Kimeli Kiprono & Another vs Hoses K. Kemboi & 2 Others [2018] eKLR** where **Ombwanyo J** held thus;

*“I have considered the Application and do find that this is a matter that the court should exercise its discretion judiciously. I do not intend to delay the Defendant access to the seat of justice.....*

*The upshot of the above is that the Defence is hereby re-opened to allow the Defendant to testify and produce evidence and call witnesses.”*

The Advocate concluded by submitting that the Defendant/Applicant has brought forth sufficient reason to warrant the court to exercise its discretion in his favour.

9. On the other hand, the Advocate for the Plaintiffs/Respondents reviewed the affidavit evidence and submitted that there was no sufficient reason to warrant this court to exercise its discretion in favour of the Defendant/Applicant. Regarding the first authority relied upon by the Defendant/Applicant, the Advocate submitted that the same does not exist. However, this is not borne out by copy of the authority that the Defendant's/Applicant's Counsel availed in court. As for the second authority, the Advocate submitted that it is distinguishable from this case since in the former case, it was the court that had changed its mode of operation such that by the time the defence Counsel arrived in court late, he found the case already having been dismissed.

10. I have read the application together with the supporting and supplementary affidavits as well as the replying affidavit. I have also read the submissions filed by the Advocates on record for the parties herein. Annexure MM1 to the Supplementary affidavit shows that the Defendant/Applicant was treated on 11<sup>th</sup> April, 2016 while annexure MM2 shows that the Defendant/Applicant had sought treatment on 05<sup>th</sup> July, 2018 when the matter came up for defence hearing. In my view this shows that the Defendant/Applicant has a history of ill health. It is also apparent from the copy of the Defendant's/Applicant's identity card annexed as MM3 that he is an old man and may have indeed lost contact with his advocate on record due to a combination of old age and sickness. Given those circumstances, it would be unfair to deny the Defendant/Applicant a chance to be heard and to have his dispute resolved by the application of the law. As was put by the Defendant's/Applicant's advocate, illness is a natural catastrophe that can occur to anyone. The Plaintiffs/Respondents will not be prejudiced in any way should the Defendant's/Applicant's case be re-opened. They can be compensated by way of costs. The allegations by the Plaintiffs/Respondents that the Defendant/Applicant has been harassing and threatening to evict them from the suit property are unfounded. The Defendant/Applicant has provided sufficient reasons to warrant this court to exercise its discretion in his favour. I am persuaded by the two authorities that were cited to me by the Defendant's/Applicant's Counsel. The upshot of the foregoing is that the application has merit and I proceed to allow it in terms of prayers 2 and 3. The Defendant/Applicant will bear the costs of the application.

**Signed, dated and delivered at Makueni this 27<sup>th</sup> day of May, 2019.**

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. Kisongo for the Defendant/Applicant

Mr. Mutinda of the Plaintiffs/Respondents

Ms. Nzioka – Court assistant

**MBOGO C.G, JUDGE**

**27/05/2019.**