



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 493 OF 2016

NGUGI KAGIA.....PLAINTIFF

VERSUS

BUCI ROTUBA LIMITED.....DEFENDANT

RULING

1. By Notice of Motion dated 30th July 2018, the defendant sought a galaxy of orders as follows:

i. Spent

ii. Spent

iii. That the honourable court do set aside (sic) its orders of 19th July 2018 that allowed the proceeding of this matter in the absence of the defendant and or his witnesses and substitute the same with orders reopening cross-examination of the plaintiff who testified on material date and eventual reopening of the entire proceedings.

iv. That the honourable court do reopen this suit and make orders allowing the defendant and his witnesses to participate in the proceedings, call witnesses, produce evidence and tender documents for purposes of fair trial and just determination of real issues of dispute herein.

v. That the honourable court do stay and set aside all its orders of 19th July 2018 and subsequently facilitate fresh hearing of the plaintiff, his witnesses and defendants (sic) and its witnesses for interest of justice.

vi. That the honourable court do allow the hearing of this matter be transferred to the Naivasha Chief Magistrate Court since the court at Naivasha has both pecuniary, administrative and geographical jurisdiction.

vii. Spent

viii. That costs of the application be in the cause.

2. The application is supported by an affidavit sworn by Michael Mugo Mwangi, a manager of the defendant company. He deposed that when the court reconvened on 19th July 2018, there was no advocate in court willing to hold brief for the defendant's advocates due to factors beyond the defendant's control. He thus urged the court to allow the application.

3. The plaintiff responded to the application by filing a Notice of Preliminary Objection on the grounds that the orders sought in the application are res judicata and that the defendant be denied audience for failure to comply with previous orders of 6th March 2018.

4. The application was heard by way of written submissions. Both parties filed submissions. The applicant argued that since the dispute before the court involves land, it is only fair that it be given a chance to be heard and that the court has a duty to do justice to all the parties. On his part, the plaintiff argued that the issue of transfer of the suit to Naivasha is res judicata in view of the orders made on 19th July 2018 and that the defendant is not deserving of the orders owing to failure to comply with past orders on costs.

5. I have considered the application, the preliminary objection and the submissions. Although the prayers appear to be many, ultimately the applicant just seeks two substantive prayers: setting aside and transfer of the suit. So as to put matters in perspective, it is crucial to review the record as regards the happenings of 19th July 2018 when the suit came up for hearing. On that day when the matter was initially called out while the court was going through the cause list, counsel for the plaintiff indicated readiness to proceed with hearing. He however protested that adjournment costs which the court ordered the defendant to pay the plaintiff on 6th March 2018 had not been paid. Ms Khalayi

who was holding brief for Mr G Kimani sought an adjournment on the ground that Mr Kimani was held in court in Naivasha. Additionally, she urged the court to transfer the case to the subordinate court at Naivasha. Finally, she stated that she had no instructions on the issue of costs. Upon considering the matter and taking into account that plaintiff's adjournment costs and court adjournment fees imposed on the defendant on 6th March 2018 had not been paid, the court dismissed the application for adjournment. When the matter was called out later that morning for the hearing to commence, there was no appearance for the defendant. The plaintiff's case was therefore heard and closed. At the instance of counsel for the plaintiff, the defence case was also closed.

6. I will deal first with the issues of res judicata. **Section 7 of the Civil Procedure Act** provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

7. Thus, for res judicata to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR.**

8. The plaintiff contends that the issue of transfer of the suit is res judicata. A perusal of the record herein shows that although counsel for the defendant raised the issue of transfer of the suit on 19th July 2018, the court ordered that the hearing proceeds. Hearing indeed proceeded. By implication therefore, the court declined the request for transfer of the suit. The court cannot therefore revisit the matter of transfer.

9. Even if I was to consider the issue of transfer at this point, I would take into account that this case is already partly heard before this court. A transfer would cause the hearing to start de novo, thus occasioning unnecessary delay, expense and injustice to parties. I would therefore not have allowed transfer at this stage.

10. The applicant has also sought setting aside of the orders of 19th July 2018. It is important to note that the said date was fixed by consent much earlier on 6th March 2018. When dealing with an application seeking to set aside an order made in such circumstances, the court is called upon to exercise discretion pursuant to the principles laid down in **Mbogoh & Another v. Shah [1968] EA 93** which were more recently reiterated as follows in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR:**

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173.

11. I therefore have unfettered discretion on whether or not to grant the orders of setting aside herein. I note that the application was filed on 31st July 2018, slightly over 10 days after the order sought to be set aside was made. There is therefore no inordinate delay. I also consider that in view of the nature of the dispute before the court, I should purely in the interest of justice, give the defendant another chance to be heard.

12. In the end, I make the following orders:

- a) The orders of 19th July 2018 closing the plaintiff's and defence cases are hereby set aside.
- b) PW1 shall be recalled purely for cross-examination and re-examination.
- c) Costs of the application shall be to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 22nd day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Cheruto holding brief for Mr Kimani for the defendant/applicant

Mr Karanja for the plaintiff/respondent

