



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 420 OF 2017

JOHN NJOROGIPLAINTIFF/APPLICANT

VERSUS

STEPHEN MUNGAI GACHERU.....1ST DEFENDANT/RESPONDENT

MINIMI ENTERPRISES LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

This suit was filed on **14th March 2014**, wherein the Plaintiff sought for an Order of Specific Performance of the Contract dated **25th September 2007** between himself and the Defendant. He further sought for transfer of $\frac{1}{4}$ acre from the suit land **Thika Municipality Block 10/17** to himself. The Plaintiff had alleged in his Plaint that he had entered into a **Sale Agreement** dated **25th September 2007** to purchase $\frac{1}{4}$ acres of land to be excised from Land parcel **No.Thika Municipality Block 10/17** for **Kshs.1,500,000/=**. He further alleged that he paid part of the purchase price and the balance was only **Kshs.120,000/=**. He also averred that he took possession of the suit land and has built his house thereon where he lives today. However, the 1st Defendant went into hiding and has refused to transfer the suit land to the Plaintiff. The Defendants entered appearance through the **Law Firm of Amolo & Gacoka Advocates** and filed their Defence on **17th April 2014**. The Defendants admitted to having entered into a **Sale Agreement** with the Plaintiff. However, they averred that the

delay to transfer was occasioned by the **Law Firm of Njoroge Kugwa & Co. Advocates** which failed to forward the completion document and therefore the suit was premature. The Defendants sought for dismissal of the Plaintiff's suit with costs.

Thereafter, the matter came to court on several occasions for Pre-trial directions. Though the Plaintiff had complied with **Order 11**, the Defendants sought for time to comply but from the court record, there is no evidence of such compliance. Further from the Court record, the matter was given a hearing date on **14th February 2018** in the absence of the Defendants' Representative though invited for taking of such a date. The hearing was slotted for **15th May 2018**, when one **Mr. Muiruri** holding brief for **Mr. Chege** for the Defendant sought for adjournment as his client was not available. The Court noted that was not a good reason for seeking for adjournment and declined to allow the adjournment. When the matter was called again at 12.30pm, there was no representation for the Defendants and the matter proceeded ex parte wherein Plaintiff gave evidence for himself and produced various exhibits. The Court thereafter directed the Plaintiff to file written submissions and mention was slotted for **17th July 2018**.

However, before the next court appearance, the Defendants filed the **two Notices of Motion** applications dated **28th June 2018** wherein in the **first application**, the Defendant/Applicant has sought for two Orders:-

2) That this Honourable Court be pleased to vacate and/or set

aside the court proceedings and all other consequential

orders made on 15th May 2018 when the matter proceeded in

the absence of the Defendants or their Counsel

3) That the costs of and relating to this application be provided

for.

The 1st Defendant alleged that he was unwell and that is the reason why he did not attend court. That he has been locked out from a fair trial and he should not be condemned unheard. It was averred that failure to attend court was not deliberate as he was indisposed and the advocate who was sent to hold brief abandoned the court's proceedings. The application was also supported by the **Affidavit of Paul Chege Advocate**, who has the conduct of this matter and who averred that failure by the Defendants to attend court was not deliberate but excusable and that it is trite that a party should not be condemned unheard as provided by **Article 50** of the **Constitution 2010**.

On the **second application**, the Defendants have sought for the following Order:-

2) That this Honourable Court be pleased to grant its Leave to

the Defendants to amend its defence dated 16th April 2014, in

terms as proposed in the draft Amended Defence exhibited

herewith.

The Defendants did admit that the defence was filed on **17th April 2014**, but the intended amendment will aid in bringing clarity to the pleadings rectifying of previous oversights and omissions and inclusivity in determining the real questions in controversy. That it is in the interest of justice that the application be allowed as it is brought in good faith before Judgment. The application is supported by the **Affidavit of Stephen Mungai Gacheru**, 1st Defendant/Applicant who averred that it is **fair** and **just** that the Defendant be allowed to amend their defence in terms of the annexed draft defence marked **SMG-1**.

The applications were contested by the Plaintiff/Respondent herein by the **Replying Affidavit** of **Antony Karanja Kangiri Advocate** who averred that the Defendants' advocate was duly invited to fix the matter for hearing but he failed to do so. That when the matter was set for hearing, the Defendants and their advocate failed to attend court and the matter proceeded *ex parte*. The Defendants had no reasonable cause for failure to attend court. He further averred that the application for amendment has been overtaken by events as the matter has already proceeded for hearing. Further that the Defendant had ample time to amend the Defence since **2014** and the current application is an afterthought.

The applications were canvassed by way of written submissions which this Court has carefully read and considered. The Court has also considered the relevant provisions of law and it will render itself as follows:-

The first application is brought under **Sections 3 & 3A** of the **Civil Procedure Act** which donates inherent power to court to make such orders that are necessary for the end of justice to be met. The Defendants have

sought for Order of setting aside proceedings of **15th May 2018**. It is apparent that the Defendants were absent and so was their advocate on the material date. However, there was a **Mr. Muiruri** who held brief for **Mr. Chege** for the Defendants and sought for adjournment on the basis that the 1st Defendant was unavailable. **Mr. Muiruri** did not inform the Court that the 1st Defendant was unwell. However, the Court found the given reason not reasonable to warrant an adjournment.

It is trite that adjournments are granted at the discretion of the court. The Court found the reason given for seeking for adjournment not reasonable and the Court used its discretion to disallow the adjournment. It is evident that the Defendants herein had not even complied with **Order 11**. The matter was filed in the **year 2014** and by **2018**, the Defendants had not complied with **Order 11**. It seems the Defendants were not serious with expeditious disposal of the matter which expeditious disposal of suits is one of the overriding objectives of **Sections 1A** and **1B** of the **Civil Procedure Act**.

Though the Defendants have sought for setting aside of *ex parte* proceedings, the principles to be considered are similar to the ones for setting aside **ex parte Judgment**. The *ex parte* proceedings were heard on **15th May 2018**, and the Defendants filed this application on **28th June 2018**. There was some unexplained delay in bringing the instant application for setting aside. The Plaintiff filed the suit in the **year 2014**

and it took him **4 years** to be called to the witness stand. Setting aside the proceedings would indeed prejudice him as there has been inordinate delay in finalization of this matter. The failure to attend court has not been adequately explained by the Defendants. The court will therefore not set

aside the proceedings of **15th may 2018**.

However, for the interest of justice and as provided by **Section 3A** of the **Civil Procedure Act**, the Court finds that the necessary Order herein is to have the Plaintiff recalled for cross-examination by the Defendants' Advocates.

For the above reasons, the Court finds and holds that it is prudent to will allow the Defendants' **first Notice of Motion** dated **28th June 2018**, only in terms of **prayer No.3** and Defendants will pay a **throw away costs** of **Kshs.15,000/=** to the Plaintiff herein.

On the **2nd Application** for amendment brought under **Order 8 Rule 3 & 5** of the **Civil Procedure Act**, it is trite that Court has discretion to allow amendments to the proceedings any time before Judgment. See the case of **Central Kenya Ltd...Vs...Trust Bank & 4 Others C.A No.222 of 1998**, where the Court held that:-

“All amendment should be freely allowed at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”.

As the Court noted earlier, this suit was filed in **2014** and the Defendants filed the Defence on **17th April 2014**. The matter proceeded for hearing on **15th May 2018**, **four (4) years** after the filing of the suit. Though amendments should be freely allowed, the same should not be allowed if its effects would be prejudicial to the other party. There has been inordinate delay in bringing this application for amendments on the part of the Defendants. The delay has not been explained and the said amendment would prejudice the Plaintiff as it would cause further delay to the suit.

The Court finds that the issue of limitation can be brought out in the submissions as it is a point of law. Allowing the amendment at this stage would delay the matter further.

For the above reasons, the Court finds that the Defendants' **second Notice of Motion** application dated **28th June 2018**, **seeking to amend the defence is not merited**. The said **application is accordingly dismissed with costs to the Plaintiff/Respondent**. The only prayer that has succeeded is for **recalling of the Plaintiff to be cross-examined by the Defendants' advocate on his evidence already adduced**.

It is so ordered.

Dated, Signed and Delivered at Thika this 6th of May 2019.

L. GACHERU

JUDGE

6/5/2019

In the presence of

No appearance for the Plaintiff/Respondent

No appearance for the Defendants/Applicants

Lucy - Court Assistant

Court – Ruling read in open court in the absence of the parties and their advocates.

L. GACHERU

JUDGE

6/5/2019