

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 48 OF 2012

ELIZABETH SAVALA.....PLAINTIFF

VERSUS

HEZEKIAH KIRAH LIYOSI

JAMES KHASHAMBA.....DEFENDANT

RULING

The application is dated 10th April 2019 and is brought under sections 1A, 1B and 63 e of the Civil Procedure Act (Cap 21) and Order 12 Rule 7 of the Civil Procedure Rules, 2010 seeking the following orders;

1. This application is certified as urgent, service of the same be dispensed with in the first instance and the same be heard ex-parte.
2. Pending the hearing and determination of this application, there be a stay of proceedings herein.
3. The proceedings taken on 24/9/2018 and the judgment delivered on 20/11/2018 together with all consequential and or resultant orders be set aside on such terms and or conditions as the court shall deem fit and the suit be heard de novo for a decision to be made on merits upon hearing all the parties.
4. The costs of this application are provided for.

It is based on the following grounds, that, the defendant/applicant acknowledges service of the hearing notice for the suit to be heard on 24/9/2018 but states that owing to the fact that the date for hearing was taken ex parte by the plaintiff's counsel the date taken by the plaintiff's counsel was not convenient to counsel for the defendant who was engaged in Kericho Environment and Land Court Case No. 119 of 2007, Kiplangat Bartegan vs. Eunice Nyasuguta Makori. The hearing date was taken without an invitation to counsel for the defendant for taking a hearing date suitable to both parties and the court. At the time of service of the hearing notice for 24/9/2018, counsel for the defendant clearly indicated on the served copy of the hearing notice that Mr. Onsongo who has the conduct of this matter shall be engaged in Kericho ELC 119 of 2007 and hence was not available to attend before this court for hearing on the said date. That as an officer of the court, counsel for the plaintiff should have informed the court of the remark on the served hearing notice and brought to the attention of court the non-availability of Mr. Onsongo on the said date. This suit was instituted by way of an originating summons and that there were no directions taken or given on the way of disposal of the same, whether by way of oral evidence or otherwise. On the basis of the foregoing, there is an error apparent on the face of the record as no directions were taken in line with Order 37 Rule 16 and 18 of the Civil Procedure Rules, 2010. On 24/9/2018, the court made an order that submissions be filed and the defendant be served but plaintiff did not serve the defendant with either the submission or a notice of mention of the matter. The defendant/applicant has a good and plausible defence against the plaintiffs' claim as set out in the replying affidavit. It in the wider interest of justice that the defendant/applicant is accorded an opportunity to be heard in his defence and in line with overriding objectives of the court together with Article 159 of the Constitution of Kenya. It fair and just that the defendant/applicant is accorded a chance of being heard in line with the rules of natural justice. The plaintiffs/respondents will not suffer and prejudice should the orders sought for herein be granted as prayed.

The second application is dated 25th April 2019 and is brought under Article 50 (1) and 159 (2) (d) of the Constitution of Kenya, Sections 1A & B, 3A and 63 € of the Civil procedure Act and Order 37 rule 7 of the Civil Procedure rules 2010 seeking the following orders;

1. This honorable court do authorizes its Deputy Registrar to sign all the necessary documents on behalf of the 2nd defendant/respondent James Khashamba Aludira to effect transfer of L.P. Nyang'ori/Banja/1039 into the names of Elizabeth Savala as per the decree of this court dated 20th November, 2018.
2. Costs arising from or incidental to the instant application be borne by the defendants/respondents herein.

It is brought on the grounds that, the plaintiff and the defendants herein had dispute over L.P. NYANG'ORI/BANJA/1039 which was heard and determined by this honourable court and decree issued. The 2nd defendant has declined to sign the necessary documents to effect transfer being the application for land control board consent and transfer forms. The orders are in the best interest of justice and to bring the matter to an end. That it is necessary to comply with the decree issued in this matter.

This court has considered the applications and the submissions therein. I have perused the court file and find that indeed Counsel for the plaintiff herein failed to inform the court that the hearing notice for 24/9/2018 was received under protest and that it was clearly indicated that Mr. Onsongo was not going to be available as he was held up in Kericho Environment and Land Court in Case No. 119 of 2007, Kiplangat Bartegan Vs. Eunice Nyasuguta Makori. It is in the interest of justice, both under the constitution and the rules of natural justice that the defendant be accorded a chance of being heard so that the court can make a decision based on the merits of the case. I therefore

grant the application is dated 10th April 2019 as prayed and the costs to be in the cause. The application dated 25th April 2019 is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH JUNE 2019.

N.A. MATHEKA

JUDGE