



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.247 OF 2013

(FORMERLY CMC CASE NO. 484 OF 2011)

NALINCHANDRA DEVCHAND DHODHIA.....1ST PLAINTIFF

TUSHAR JEVERCHAND DODHIA.....2ND PLAINTIFF

VERSUS

EVANS ONYANGO.....DEFENDANT

RULING

1. Evans Onyango, the Defendant, seeks vide the notice of motion dated 10th December 2018 for the ex parte hearing of 6th December 2018 and the consequent order closing the defence case be set aside, the defence case reopened to enable him and his witnesses to testify on a date to be fixed and costs. The application is based on the nine (9) grounds on its face and supported by the affidavit sworn by Dave Lun'aho Siganga Advocate on the 10th December 2018.
2. The application is opposed by Nalinchandra Devchand Dhodhia and Turshar Javerchand Dhodhia, the Plaintiffs, through the replying affidavit of Robert Maua, Advocate, sworn on the 28th January 2019.
3. The application came up for hearing on the 5th February 2019 when Mr. Amule and Maua, the learned Counsel for the Defendant and Plaintiffs respectively, made their oral submissions for and against the motion. The Learned Counsel for the Defendant relied on the decision in **Esther Wamaitha Njihia & 2 Others vs Safaricom Limited [2014] eKLR** where the Havelock J allowed the Defendant's application for stay of delivery of Judgment that had been set down without hearing the Defendant.
4. The issue for determination is whether the defendant has established reasonable basis for setting aside the ex parte hearing of 6th December 2018; closing the Defendant's case and for reopening the Defendant's case for hearing.
5. The Court has carefully considered the nine (9) grounds on the motion, the affidavit evidence by Counsel for both sides, the oral rival submissions, the record and come to the following conclusions;
 - a) That these proceedings were commenced through the plaint dated the 13th December 2011, and amended on the 11th August 2012, as Kisumu Chief Magistrates Civil Suit No. 484 of 2011. That interlocutory judgment was applied for and entered on the 2nd March 2012 and formal proof took place on the 11th May 2012. The judgment was delivered on the 25th May 2012 that the Defendant be evicted from Kisumu/Dago/288. That the defendant filed the notice of motion dated the 24th July 2012 to set aside the order of the 25th May 2012, among others. The application was allowed through a consent dated 7th August 2012 and entered as a court order on the 8th August 2012. The record further shows that an application dated 28th March 2013 was filed seeking to transfer the suit to this court. That the application was allowed through a consent letter dated the 8th April 2013 and entered as a court order on the 3rd May 2013.
 - b) That the Defendant filed their statement of defence to the Amended Plaint dated the 23rd August 2012, and the Plaintiffs reply to the defence dated the 25th September 2012 was filed. That as correctly submitted by Counsel for the Plaintiffs, pleadings closed after the expiry of 14 days after the service of the reply to the defence in accordance with **Order 2 Rule 13 of the Civil Procedure Rules**.
 - c) That the record shows that the 1st Plaintiff testified as PW1 on the 26th May 2015 and was cross-examined by Counsel for the Defendant. The Defendant was not in court on that date or any of the other dates the matter came up for hearing. The suit was then fixed for further hearing on the 6th December 2018 during the service week. The Deputy Registrar's notice dated the 6th November 2018 was served and received by both Counsel on that same date as evidenced by their chambers' received stamp on the copy of the

notice that is in the file. The Counsel for the Plaintiff further served a hearing notice dated the 13th November 2018 upon the Defendant's Counsel who received it on the same date as per the affidavit of service sworn by Robert Maua on the 30th November 2018.

d) That on the hearing date of 6th December 2018, the Defendant and his counsel were absent and the record shows that Odeny J, who was one of the service week Judges, placed the file aside up to 10.30 a.m. when the Land Registrar testified as PW2. That Counsel for the Plaintiff then closed the Plaintiffs' case and moved the court to close the Defendant's case. The court granted the learned counsel's request and gave directions on filing of submissions among others. The Plaintiffs' Counsel filed their written submissions dated the 18th December 2018.

e) That the main ground for the Defendant's application is that he has a good defence and it would be unconstitutional to proceed to write and deliver the judgment without according him an opportunity to be heard to enable the court make a determination on merit. The Plaintiffs' response is that the Defendant has over time caused unnecessary delay and that the application is a waste of judicial time. That the Defendant had not filed any statements or list of documents to signal that he intended to tender oral evidence. That even if the Defendant's Counsel was present during the hearing, he would not have tendered any evidence as there was no witness available.

f) That the court has given due considerations to the parties positions as set out in the motion, affidavits and submission and further considered the provisions of **Order 7 Rules 5 of Civil Procedure Rules** and it is clear a Defendant is obligated to ensure the list of witnesses to be called at the trial; written statements signed by the witnesses; and copies of documents to be relied on at the trial are filed with the defence. That the proviso to the rule allows written statements to be furnished at least fifteen days prior to the trial conference with the leave of the Court. That there was no pending application by the Defendant to be allowed to file and serve list of witnesses, written statements and copies of documents by the time the hearing of the 6th December 2018 took place. That as the Plaintiffs have closed their case and the Defendant has not applied for the Plaintiffs' case to be reopened, the court finds it is too late in the day for the Defendant to file and serve the list of witnesses, statements and documents required under the said rule at this stage.

g) That while the Defendant's Counsel's absence from the court on the 6th December 2018 may be excusable, there is no explanation tendered why the Defendant was not in court on that day. That the Defendant's Counsel has not tendered any evidence to confirm that he had communicated to his client about the hearing date of 6th December 2018, and or that he was required to attend. The claim by the Defendant that the proceedings of 6th December 2018 amounted to condemning him unheard, and violated his constitutional rights to be heard, cannot be based on any solid ground. That once party is given sufficient notice like in this case of the hearing date and they opt not to attend court, the court proceedings that take place cannot be said to be a violation of the right of the party who chose not to attend and participate. That the Defendant and his counsel are taken to be aware of the overriding objective and the duty of the Court set out in **Sections 1A and 1B of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That the overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act and Rules. That all parties and their advocates are under duty to assist the court further the overriding objective so as to ensure that the court attains just determination of the matters before it in an efficient, timely and cost effective manner. That the failure by the Defendant and his Counsel to attend the court on the 6th December 2018 while properly notified and then seeking to set aside the order closing the Defendant's case while there is no list of witnesses, witness statements and list of documents filed since the filing of the statement of Defence dated the 23rd August 2012 on the 5th September 2012, goes contrary to the provisions of the two Sections cited above and **Article 159 (2) b of the Constitution 2010**.

6. That for reasons set out above, the court finds no merit in the Defendant's notice of motion dated the 10th December 2018 and filed on the 14th December 2018. The said application is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 12TH DAY OF JUNE 2019

In the presence of:

Plaintiffs Absent

Defendant Absent

Counsel Mr. Maua and Mr. Amule for the

Plaintiffs and Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE