



**REPUBLIC OF KENYA**

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

**ELC NO.125 OF 2017**

**GEORGE KAMAU GITHAE.....PLAINTIFF**

**VERSUS**

**MOSES CHEBOI.....DEFENDANT**

**RULING**

1. This ruling is in respect of an application brought by way of notice of motion dated 22<sup>nd</sup> October 2018 by the defendant/applicant seeking for the following orders:

- a) Spent
- b) That the firm of Anassi Momanyi & Co. advocates be allowed to represent the defendant.
- c) Pending the hearing inter partes and the determination of the application, there be an order of stay of execution of the default judgement and all the consequential orders.
- d) The default judgement entered on 25/9/2018 be set aside and the defendant be accorded a hearing.
- e) Costs of the application be in the cause.

**DEFENDANT/APPLICANT'S SUBMISSIONS**

2. Counsel for the defendant/applicant submitted that the application seeks to have the default judgment dated 2/9/2018 set aside so that the matter is heard on merits and he is accorded a hearing. That the default judgment was entered as a consequence of the defendant and his advocate's failure to attend court as the applicant was unaware of the hearing as he was not notified of the same by his advocate.

3. Counsel further submitted that the advocate had filed an application to cease acting which application should have been heard and determined before the hearing of the matter. That the honourable court has unfettered discretion to allow the application on terms which will meet the ends of justice and that mistake of Counsel should not be visited upon a litigant.

4. It was Counsel's submission that it is a fundamental right of every party to be accorded a hearing and that such right can only be taken away if the party behaves in a manner that obstructs the course of justice.

5. That the defendant is desirous of being heard on merit and that the plaintiff can be compensated by way of costs. Counsel therefore urged the court to allow the application as prayed.

**RESPONDENT'S SUBMISSION**

6. Counsel for the plaintiff/respondent opposed the application and relied on the replying affidavit sworn by the plaintiff. It was Counsel's submission that the plaintiff/respondent has demonstrated that the defendant/Applicant has been employing delaying tactics to derail the conclusion of the case herein.

7. Counsel gave a chronology of the proceedings in the case that the defendant/Applicant initially appointed the firm of M/S Anassi Momanyi and Company Advocates who ceased to act for the defendant on 17<sup>th</sup> January, 2018 vide an application dated 6<sup>th</sup> November, 2017.

8. That the defendant/Applicant subsequently appointed the firm of Arap Mitei & Company Advocates whom upon the suit coming up for hearing on 9<sup>th</sup> April, 2018 sought for an adjournment on the ground that they had just been instructed by the defendant to represent him and

thus needed time to peruse the file and prepare for the case.

9. That the court allowed the application for adjournment on condition that the defendant/Applicant pays court adjournment fees together with Kshs.7,000/= as costs to the Plaintiff before the next hearing date which was 24<sup>th</sup> July, 2018 which was never complied with.

10. That on 23<sup>rd</sup> July, 2018 the firm of Arap Mitei & Company Advocates filed the application to cease acting for the defendant when they realized that they had not complied with the court order on the date of the hearing.

11. Counsel submitted that even though the firm of Advocates filed the application to cease acting for the defendant on 23<sup>rd</sup> July 2018 it was neither fixed for hearing nor served on the Counsel for the plaintiff. Further that when the matter came up for hearing on 24<sup>th</sup> July, 2018, it is on record that Mr.Mitei was present in Court and he placed the matter aside to 11 .30am and indicated to the court that he was ready to proceed. He never indicated to the court that he had filed an application to cease acting for the defendant.

12. That when the matter was called out at 11.30am, the firm of Arap Mitei & Company Advocates were absent in court and since they had not complied with the orders of the court issued on 9<sup>th</sup> April, 2018, the matter proceeded for hearing whereby the plaintiff/respondent testified and the plaintiff's case was deemed closed and submissions were filed and judgment date was set for 25<sup>th</sup> September, 2018.

13. It was Counsel's submission that the firm of Arap Mitei & Company Advocates waited until 17<sup>th</sup>September, 2018 when they filed an application seeking to arrest the judgment set for delivery on 25<sup>th</sup> September, 2018. The Court dismissed the said application citing reasons that the same lacked merit, was overtaken by events and most importantly that the same was an abuse of the court process and was thus meant to delay the cause of justice.

14. That the defendant then changed advocates again and re-appointed the firm of Anassi Momanyi & Company Advocates who filed the notice of intention to appeal against the ruling dismissing the application filed on 17<sup>th</sup> September, 2018 and to date, no appeal has been filed. Counsel also submitted that the Applicant is taking this court in circles and the instant application is another tactic to further delay the conclusion of this case whereas he is illegally occupying and utilizing the plaintiff's of land who is the registered owner of the suit land.

15. Counsel submitted that even though the Applicant has a right to be heard, in the current circumstance the said right ought not to be accorded to him since his behaviour amounts to obstruction of justice. That further the defence on record raises no triable issues and that the respondent will suffer prejudice if the application is allowed. Counsel relied on the case of **Scooby Enterprises Ltd vs Kisii County Assembly Service Board 2016 eKLR**. He therefore urged the court to dismiss the application with costs to the plaintiff.

#### **ANALYSIS AND DETERMINATION**

16. There are three prayers that the applicant is seeking for in this application, firstly for leave for Annassi Momanyi & Co. Advocates to be allowed to represent the defendant, stay of execution of the default judgment and all consequential orders and setting aside of judgment dated 25<sup>th</sup> September 2018. It is trite law that a party has a right to be heard but it is also trite law that a party should not be allowed to abuse the court process to delay justice as justice delayed is justice denied.

17. From the court proceedings and the chronology given by Counsel for the defendant it is evident that the defendant was given an opportunity to defend the claim against him but took the court process for granted. This matter was filed on 23<sup>rd</sup> March 2017 and that the defendant was served with summons to enter appearance of which he filed a defence.

18. The matter came up for hearing, Counsel for the defendant Annassi Momanyi & Co. Advocates filed an application to cease acting which was allowed. The defendant later appointed Arap Mitei & Co. Advocates to act on his behalf. As stated above Counsel was ready to proceed but did not appear at the time allocated for the hearing. Counsel only filed an application dated 17<sup>th</sup> September 2018 to arrest the delivery of judgment which was dismissed as it lacked merit. The defendant had also not complied with the order granted by the court to pay costs before the next hearing date.

19. Anassi Momanyi & Co Advocates who wants to represent the defendant had withdrawn from acting for the defendant for lack of instructions. This is a classic case of abuse of court process and obstruction of justice. The tired phrase that mistake of Counsel should not be visited on the client as he or she has a right to be heard cannot be applied in this case as the applicant was given an opportunity to be heard but squandered the chance.

20. I have noticed that there is a practice by Counsel who file applications to cease acting on the day of the hearing of the main suit to prompt an adjournment then later withdraw the same on grounds that they have received instructions to proceed with representation of the client. Courts are trying to clear backlogs in order for litigants to access expeditious justice but some stakeholders including some advocates are not helping in this quest.

21. The court is alert and would know when parties are playing monkey tricks to subvert justice. The defendant was not denied an opportunity to be heard as submitted by Counsel. In fact Counsel wants to cover his tracks for not diligently representing the client. I find that the applicant has not come to court with clean hands and therefore the court cannot exercise its discretion in his favour.

22. In the case of *National Cereals & Produce Board versus Errad Suppliers & General Contractors Limited, Nairobi civil Application No. Nai 48 of 2012 (UR) 33 of 2012* was cited for the proposition that no stay order is capable of being issued by a Court of law against a negative order (such as a dismissal or a striking out order).

23. The court dismissed an application for arresting the judgment and the same was delivered in favour of the plaintiff. The applicant has not

satisfied the requirements of stay of execution as per Order 42 Rule 6 of the Civil Rules. The applicant has not established that he will suffer substantial loss if the order is not granted. This is the most important ingredient in granting an order of stay of execution.

24. The court is further guided by the case of in the case of **Global Tours &Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** where Ringera J. stated that:

*“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”*

25. Having said that I find that the application lacks merit and is therefore dismissed with costs to the plaintiff.

**Dated and delivered at Eldoret on this 31<sup>st</sup> day of July, 2019.**

**M. A. ODENY**

**JUDGE**

**RULING READ IN OPEN COURT** in the presence of Mr.Mitei holding brief for Mr.Momanyi for Defendant/Applicant and Miss.Awinja holding brief for Mr.Okara C.K. for Plaintiff/Respondent.

Mr.mwelem – Court Assistant