



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 103 OF 2008**

**MANSUKHALAL JESANG MARU.....PLAINTIFF**

**VERSUS**

**FRANK WAFULA.....DEFENDANT**

**RULING**

1. The application dated **18/9/2019** and filed in court on the same date has been brought by the defendant. It seeks the following orders:
  - (i) **That service hereof be dispensed with and the application be certified as urgent and be heard *ex-parte* in the first instance.**
  - (ii) **That there be stay of proceedings of the entire suit or execution of any prior of consequential orders pending the hearing of the defendant intended appeal whereby a notice of appeal has been duly filed and served upon the concerned parties.**
  - (iii) **That costs of the application be awarded to the applicant.**
2. The applicant has brought the application pursuant to **Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3A, 3B and 63 Civil Procedure Act**.
3. The grounds upon which the application is premised are that the applicant's intended appeal has high chances of success hence ought to be taken into account; that the respondent may proceed to close this suit unless stay orders are granted and the intended appeal shall be rendered nugatory and the applicant will suffer substantial loss; that the applicant shall as a result suffer irreparable loss and damages which may not be fully compensated in monetary terms; that the respondent shall not in any way suffer prejudice and that the application has been made without undue delay.
4. The application is supported an affidavit of the defendant dated **27/8/2019** and a further one on **7/10/2019**.
5. The plaintiff filed grounds of opposition on **30/9/2019** opposing the application. His grounds are that there has been inordinate delay in the filing of the application; that since the intended appeal is against an order for payment of adjournment costs, then proceeding with the hearing would not occasion any prejudice to the applicant; that there is no demonstration that any success in the intended appeal would render the appeal nugatory; that the plaintiff is on record saying he is not insisting on payment of the adjournment costs, before the further hearing of the suit; that the suit has been pending for many years and it is in the interest of justice to have it finalised; that the court record shows a spirited effort by the applicant to scuttle any further prosecution of this suit and that the application is not merited and should be dismissed with costs.
6. The defendant filed his submissions on **15/10/2019**. The plaintiff filed his on **24/10/2019**. I have considered the application, the response and the submissions.
7. The background to the application is that when serious efforts to have this matter heard and determined commenced on **3/2/2016** after a long hiatus of **7 years** since the last court appearance on **27/9/2009**, the plaintiff explained the delay and the suit was spared dismissal and the plaintiff was ordered to fix a hearing within 30 days from that date failure to which the suit would stand automatically dismissed. Pursuant to that plaintiff's Counsel Mr. Nyamu attended the registry on **26/2/2016** and fixed the hearing for **9/6/2016**. On that date the court adjourned the hearing to **27/10/2016**. On the same date the defendant filed a motion dated **2/6/2016** and set it down for hearing on **30/6/2016**. Come **30/6/2016** the plaintiff had not been served with that motion and it was adjourned to **11/7/2016**. On **11/7/2016** the application was adjourned to **25/7/2016** at the plaintiff's instance. On **25/7/2016** the motion was adjourned **30/8/2016**. On the latter date it was argued and ruling was set for **28/9/2016** granting the application for leave to amend the defence to include a counterclaim. On **15/9/2017** the Deputy Registrar fixed the matter for mention on **4/10/2017** for directions at the instance of the plaintiff. On **4/10/2017** the matter was fixed for mention on **7/11/2017** when it was issued with a hearing date of **4/4/2018**. There is no record on what transpired on **4/4/2017** but on **10/4/2018** the plaintiff fixed a hearing date of **20/4/2018**. On **20/4/2018** the matter did not proceed. It was next fixed for mention by the plaintiff on **19/6/2018** when he took **4/7/2018** as the mention. On **4/4/2018** the hearing date **8/10/2018** was taken by consent. On **8/10/2018** the defendant

sought an adjournment on the basis that Mr. Chepkwony his advocate was indisposed. The matter was adjourned to **23/10/2018** on which date the plaintiff was ready but the defendant applied for an adjournment which application the court overruled and hearing proceeded. PW1 and PW2 testified on that date. The plaintiff's case was closed. At the end of those proceedings the defendant who was in court applied for 2 weeks to set aside the proceedings. The court gave the defendant 7 days to prepare for his defence and barred the filing of further documents in the matter and set **30/10/2018** as the new hearing date. On **29/10/2018** the defendant filed an application seeking that the proceedings of **23/10/2018** be set aside. Ruling was delivered on **31/10/2018**. On **31/10/2018** the ruling was read and the defendant allowed to apply orally for a recall of the plaintiff and his witness for cross-examination. The matter later came up for hearing **14/11/2018** when Mr. Chepkwony orally applied to have the proceedings typed and the plaintiff's witnesses recalled which request the court granted and fixed the hearing for **28/11/2018**. On **28/11/2018** the defendant appeared in court alone and asked for an adjournment on the basis that his advocate was bereaved and the matter was adjourned to **11/2/2019**. On **11/2/2019** the defendant was represented by a Mr. Changorok who expressed to be holding brief for a Mr. Bundi for the defendant who asked for an adjournment on the basis that the latter had just freshly appointed. The court granted the request and gave **21/3/2019** as the hearing date when the plaintiff's witnesses would be cross-examined. On **21/3/2019** Mr. Karani for the defendant cross-examined the PW1 and decline to cross-examine PW2 on the basis that he needed time to examine some documents. The court allowed the adjournment of cross-examination of PW2 and ordered that the defendant do pay the plaintiff **Kshs.20,000/=** as costs. Hearing was adjourned to **28/3/2019** at **2.00 p.m.** on which date defendant appeared for himself and informed court that he had an application for review of certain orders. The court ordered the application to be heard on **9/4/2019** and delivered a ruling on **30/4/2019** which has given rise to the instant application.

**8.** I do not for one moment doubt that the desire of the defendant to appeal against the ruling dated **30/4/2019** is genuine. However it must be pointed that that intended appeal only relates to the payment of costs. Mr. Kiarie for the plaintiff is on record as having stated on **18/9/2019** that he is not intent on seeking that the costs be paid before the hearing of the defence case that was scheduled for that date. However Mr. Wafula, the defendant insisted that he intend to prosecute the appeal. The court allowed the defendant an adjournment on that date and condemned to **Kshs.10,000/=** payable before the next hearing date as well as court adjournment fees.

**9.** I think I have said enough about this application. When the plaintiff who is entitled to costs undertook to allow the defence hearing scheduled for **18/9/2019** to proceed before he could be paid costs that was a clear signal that the costs that had been awarded so far were no longer a hindrance to the prosecution of the defence case. The application at hand is seeking a stay of the entire suit pending the hearing of the intended appeal. The defendant's ground is that he shall suffer irreparable loss and damage which may not be fully compensated in monetary terms if the prayers sought in the application are not granted and that the plaintiff would not suffer any prejudice. He also maintains that the appeal would be rendered nugatory.

**10.** With respect I do not find any merit in all the three grounds above. First, a stay of proceedings would halt the progress of the entire suit whereas the only borne of contention is whether the defendant should pay costs before hearing of the defence case; this is notwithstanding the fact that the plaintiff has given clear signs that payment of those costs as a pre-condition for the hearing of the defence case had been waived. Second, it is not correct for the defendant to state that the plaintiff would not suffer any prejudice if the proceedings were stayed; the greater number of adjournments in this case have been occasioned by the defendant and for reasons which the court accepted only for the purpose of allowing the defendant to be adequately prepared for the hearing of his case.

**11.** Having examined the record in this matter afresh and outlined the highlight of the defendant's conduct earlier in this ruling, this court is of the opinion that the defendant is only intent on wilfully obstructing the progress of this case for reasons best known to himself. This would not be said to be not prejudicial to the plaintiff who, having closed his case a year ago is being made to wait for the defence case to proceed at the defendant's pleasure.

**12.** This court disagrees with the defendant's attempt to have every party and the court operate at his whim and caprice in the matter at the expense of the finalization of a claim filed in 2008. It finds the application dated **18/9/2019** to be without merit and an abuse of the process. The same is hereby dismissed with costs to the plaintiff.

**Dated, signed and delivered at Kitale on this 7<sup>th</sup> day of November, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**7/11/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for plaintiff/respondent

Mr. Wafula for himself

**COURT**

Ruling read in open court at 1.30 p.m.

**MWANGI NJORGE**

**JUDGE**

**7/11/2019**