



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 14 OF 2019

OSCAR WAFULA WALUBENGO.....PLAINTIFF

VERSUS

HASSAN MUCHAI KHAEMBA.....1ST DEFENDANT

JOHN WANYONYI WAMBULWA.....2ND DEFENDANT

IBRAHIM OGARO.....3RD DEFENDANT

JACKTON WANYONYI.....4TH DEFENDANT

RULING

1. The application dated **28/10/2019** and filed in court on **29/10/2019** has been brought by the defendants who seek the following orders:-
 - (a) That this court be pleased to certify the application as urgent and be heard on priority basis.
 - (b) That pending the hearing and determination of this application this court be pleased to set aside orders made on **24/10/2019** of closing both the plaintiff and the defendants' cases.
 - (c) That this court be pleased to set aside orders made on **24/10/2019** of closing both the plaintiff and the defendants cases and subsequently reopen the plaintiff case only to the extent of cross examination and for the defendants to tender their defence.
 - (d) That costs of the application be provided for.
2. The application is brought under provisions of **Section 1A, 1B, 3, 3A of the Civil Procedure Act, Order 45 rule 2, Order 12 rules 4, 7, Order 51 rule 1 of the Civil Procedure Rules 2010.**
3. The grounds on which the said application is made are that the court proceeded with the plaintiff's case on **24/10/2019** and the plaintiff's and the defendants' cases were closed and the suit is now pending judgement; that the defendants' counsel was indisposed at the time the suit came up for hearing and was not able to contact the defendants to inform them of the impending hearing or communicate his illness to court; that although the hearing date was fixed in court and defendants' counsel was aware of the suit his illness was clearly beyond his control and the defendants ought not to suffer on that account; that from the record the defendants and their counsel have in the past religiously attended and filed the required documents save for the absence on **24/10/2019**; that the defendants depended on the counsel representing them to update them on the hearing date and the counsel, though he had prepared himself to proceed could not have engaged them on pre-trial briefing prior to the hearing of the case and that it will be in the best interests of justice that the court allows the application so that the defendants are not condemned unheard; that the case before hand involves land; that the application has been lodged without undue delay; that there will be great prejudice on the part of the defendants if the evidence for the defence is not taken before judgment; that no prejudice will be occasioned on the plaintiff.
4. The application is supported by two affidavits one sworn by the 2nd applicant and the other one sworn by the applicants' counsel both dated **28/10/2019**. Those affidavits largely reiterate the same matters set out in the grounds above.
5. In reply to the application dated **28/10/2019** the plaintiff's counsel filed a replying affidavit dated **14/11/2019**. He avers that the notice of motion is undated and the supporting affidavit lacks annexures to support the claims made; that the application is meant to delay the hearing and the disposal of the matter for as long as possible; that the date was taken by consent on **31/7/2019** in the presence of Mr. Maragia the defendants' counsel and the 1st defendant; that even the 1st defendant who was acting in person never attended court on **24/10/2019**; that the

1st defendant has never filed any statement of defence and does not merit the exercise of this court's discretion in his favour; that no reasons have been given as to why the 1st defendant never attended the court on the date of the hearing; that it is not sufficient for the 2nd, 3rd and 4th defendants to merely state that they were awaiting communication from their counsel while they were in court when the hearing date was taken.

6. The plaintiff filed submissions on **15/11/2019**. The defendants filed theirs on **18/11/2019**.

7. I have considered the application, the response and the submissions. It is clear that the only issue that arises in this application is whether the court should set aside orders made on **24/10/2019** closing the parties respective cases and order cross examination of the plaintiff and the tendering of the defendants' evidence in the matter.

8. I have considered the application which though purported to be brought under among other provisions **Order 45 rule 2** of the Civil Procedure Rules does not amount an application for review. **Order 45 rule 2** of the Civil Procedure Rules states as follows:

“(1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

9. However the defendants have also cited **Order 12 rule 4** and **7** of the Civil Procedure Act as the basis for their application. **Order 12 rule 4** states that if only some of the plaintiffs attend the court may proceed with the suit or make such other order as may be just. **Order 12 rule 7** provides that where judgment has been entered or the suit has been dismissed the court may on an application to set aside or vary the judgment or order upon such terms as it may deem just.

10. It is clear that the provisions of the Civil Procedure Rules cited by the applicants do not avail them. However **Order 51 rule 10 (2)** of the Civil Procedure Rules provides that no application shall be defeated by mere technicalities or want of form that does not affect the substance of the application. Further **Order 10 rule 1** states that though it is necessary that the statutory provisions under which an application is brought required to be stated no application shall be refused merely for failure to comply with that rule. Besides I have noted the applicants have relied on **Section 1A, 1B, 3** and **3A** of the Civil Procedure Act. The collective effect of those provisions is to invoke the inherent power of the court and to call on it to do justice in the circumstances and to further the overriding objective of the Act and the Rules in order to facilitate the just expeditious proportionate and affordable resolution of civil disputes governed by the Act.

11. The grievance of the applicants is that their counsel was unwell and was unable to communicate with them or with court regarding the hearing scheduled for **24/10/2019**. All the defendants have now banded together, with the 1st defendant instructing Mr. Maragia previously counsel for only the 2nd, 3rd and 4th defendants, on **2/9/2019**. Mr. Teti was of the opinion that the 1st defendant only belatedly instructed counsel after the hearing date has passed and I think this is a genuine grievance because Olonyi & Co. Advocates filed a notice of appointment of advocates on his behalf on **4/11/2019** whereas the instant application was filed on **29/10/2019**. Mr. Teti's further grievance is that the 1st defendant having not filed a defence in the matter when he was acting in person does not merit the favourable exercise of discretion of this court despite representation and inclusion in the instant application.

12. The particular grievance against the 1st defendant aside, have the applicants demonstrated sufficient cause for the exercise of the court's discretion in their favour and would the plaintiff suffer prejudice if the orders sought were allowed?

13. I have considered the claim that Mr. Maragia was indisposed; I am inclined to believe Mr. Maragia, an officer of the court, when he swears an affidavit indicating that the nature of his illness prevented him from contacting the defendants or traveling to Kitale to conduct the hearing on the defendants' behalf; there are many types of illness and although it would be helpful to the court for a deponent to state the exact nature of his illness, this court is in all circumstances concerned more with whether justice for the parties can be achieved regardless of the veracity or otherwise of the claims to indisposition by their counsel. For that reason this court is inclined to consider the other factors that the application revolves around as hereinbelow.

14. The 2nd, 3rd and 4th defendants filed their respectively defences albeit at different times. The 1st defendant did not file a defence in the matter. If this court grants the prayers sought the finalization of this matter is bound to suffer a drawback in so far as the plaintiff will have to be summoned again for cross-examination and the defendants will have to call their evidence; that calls for a delay of at least two months. Save for his lack of a filed defence I do not therefore consider the 1st defendant to be in an extremely different position from that of the 2nd, 3rd and 4th defendants; if he filed his defence within a prescribed period during the estimated two month period of delay he may catch up with and prosecute his defence at the same time as the rest of the defendants. For that reason I am inclined to deal with the defendants as a team in the same boat for the purpose of the instant application.

15. In this application judgment has not been written; the application by the defendant intercepted the process of preparation of the judgment. The plaintiff alone testified in the matter and produced documents. Now that the defendants are all represented by the same counsel it should be expected that the cross-examination of the plaintiff, if ordered would take but a short time and the defendants would give evidence and the matter would again be reserved for judgment. I have considered that indeed the plaintiff's claim is mainly against the 1st defendant and that the 2nd, 3rd and 4th defendants are just said to be his supporters. It would be therefore just that the defence of the 1st

defendant be allowed for the sake of expedition of this matter.

16. For the above reasons I find the application dated **28/10/2019** should be allowed in the interests of justice.

17. However the plaintiff should not be inconvenienced without cost and as was said before costs are a panacea for delay occasioned by an adversary in litigation. I therefore find that the defendants should bear the costs of the application as a condition for the grant of the orders sought.

18. I therefore grant the application dated **28/10/2019** in terms of prayers No. **(b)** and **(c)** thereof on condition that the applicants pay to the plaintiff the costs of this application which I assess in the sum of Kenya Shillings Five Thousand Only (**Kshs. 5,000/=**) within **14 days** of this order and that the 1st defendant do also file his defence within **14 days** of this order in default of which actions, either singularly or cumulatively, the orders will automatically lapse and the orders will be deemed vacated, and this suit will proceed to judgment on the basis of the evidence given by the plaintiff only.

It is so ordered.

Dated, signed and delivered at Kitale on this 11th day of December, 2019.

MWANGI NJOROGE

JUDGE

11/12/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Teti for plaintiff

Mr. Bisonga for Olonyi for applicants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

11/12/2019.