



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.35 OF 2012

PAUL OGOGO.....PLAINTIFF

VERSUS

ISAAC ISIAH ONYANGO PANDEDEFENDANT

RULING

1. **Isaac Isiah Onyango Pande**, the defendant, seeks for ex parte proceeding of the Plaintiff's case to be set aside and that the costs of the application dated 10th May 2017 be met by **Paul Gogo**, the Plaintiff. The application is based on the four grounds on the notice of motion and is supported by the affidavit sworn by Achura Anthony, an advocate from the firm of M/S Amondi & Company Advocates on record for the Defendant.
2. The Application is opposed by the Plaintiff through the undated replying affidavit by the Plaintiff filed on the 11th October 2017.
3. The hearing of the application came up on the 19th October 2017 when Mr. Achura and Oduor, learned counsel for the Defendant and Plaintiff respectively, agreed to rely on the filed affidavits and the application was fixed for ruling today.
4. The following are issues for determination by the court;
 - a) Whether the Defendant has established reasonable grounds for the setting aside of the ex parte plaintiff's case proceedings.
 - b) Who pays the costs.
5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, the pleadings and processes filed, the record and come to the following findings:
 - a) That this proceedings was commenced by the Plaintiff vide the originating summons dated 22nd August 2012 and in filed on the 24th August 2012 through the firm of M/S L.G. Menezes Advocates.
 - b) That the Defendant appointed the firm of M/S Amos O. Oyuko & Company Advocates who filed their notice of appointment of advocates dated 10th September 2012. That it is through the firms of Amos O. Oyuko & Company Advocates that the Defendant's replying affidavit sworn on 17th September 2012, list of documents dated 10th March 2014 and list of issues dated 8th August 2014

were drawn and filed, among others.

c) That the record shows that M/S Amondi & Co. Advocates filed a notice of appointment of advocate to come on record for the Defendant dated 3rd February 2015. That the notice did not indicate on its face that it was to be served on any firm of advocate or the Plaintiff. That also filed with the said notice of appointment was undated further list of documents indicating it was to be served upon L.G. Menezes Advocates. That on the following day, that is 4th February 2015, M/S Amondi & Co. Advocates filed the notice of change of Advocate on behalf the Defendant indicating that they had come on record in place of “Oyuko & Advocates.” The notice indicated that it was to be served on (1) Oyuko and Company Advocates and (2) L.G. Menezes Advocates.

d) That the recorded proceedings shows that the evidence of the Plaintiff, Paul Debako Gogo was taken on the 27th October 2014 after the Defendant indicated his preparedness to proceed with the hearing in the absence of his counsel on record. That further hearing was adjourned to the 4th February 2015 when the record shows that Mr. Oyuko and Amondi Advocates were on record for the Defendant while Mr. Nyamweya Advocate was present for the Plaintiff. That upon Mr. Amondi Advocate seeking adjournment to consult his client as he had not known that the Defendant had another counsel on record, the hearing was adjourned to the 26th May 2015. That come that day, both parties and Mr. Nyamweya Advocate for the plaintiff were present but the Defendant’s counsel was absent. That the hearing continued with the evidence of one Joseph Okinda being taken as PW2. That the record indicates that Mr. Amondi Advocate for the Defendant cross-examined the witness which signifies that he walked in when the witness was testifying. That another witness named Tobias Ojwang testified as PW3 and was cross-examined by Mr. Amondi for the Defendant. That a further hearing was fixed for the 13th October 2015.

e) That on the 13th October the hearing was confirmed to start at 11.00 a.m.. That when the matter was called at 12.05 p.m. in the presence of M/S Kyamazima for Amondi for Defendant, the hearings was adjourned with directions that another hearing date be fixed at the registry. That then counsel for the Plaintiff wrote a letter dated 5th November 2015 to the Deputy Registrar, and copied to M/S Amos O. Oyuko & Company Advocates, seeking for the matter to be mentioned on the 17th November 2015 to fix a suitable hearing date. That there is no entry on record bearing the date of 17th November 2015. That the mention was not paid for until the 18th November 2015 under receipt No.753929. That the entry of the same date, the 18th November 2015, indicates that one Fred for L.G. Menezes for the Plaintiff fixed the matter for hearing for 12th May 2016. That on that date the hearing was adjourned to the 9th November 2016 as there was no evidence that the Defendant’s counsel had been served with a hearing notice. That come the 9th November 2016, the hearing was adjourned yet again to the 7th February 2017 upon the plaintiff’s counsel disclosing that service **of hearing notice had erroneously been** made on a counsel not on record for the defendant.

f) That on the 7th February 2017, the court allowed the Plaintiff counsel to call Kelvin Otieno Pedo who testified as PW3 after confirming that a hearing notice had been served on Mr. Oyuko, who was the counsel on record for the Defendant. That on record is an affidavit of service sworn by Julius Otieno Raminya on the 2nd February 2017 with a hearing notice dated 10th November 2016 showing that it was received by the firm of Amos O. Oyuko Advocates on the 11th November 2016.

g) That after the testimony of PW4, the Plaintiff counsel closed the case of the Plaintiff and moved for the Defendant’s case to be closed as both the Defendant and his counsel were absent. Thereafter the court issued directions on filing of written submissions. That the counsel for the Plaintiff filed their written submissions dated 21st April 2017. That during the mention of 15th May 2017, the counsel for the Defendant informed the court about their notice of motion dated 10th May 2017, which is the subject matter of this ruling, and applied for a hearing date for it. That the court

fixed it for hearing on 19th October 2017 when today's date for ruling was fixed.

h) That though M/S Amondi & Co Advocates filed the notice of change of advocate dated 4th February 2015 definitely after coming from court earlier in the day when he applied for adjournment to consult his client on learning that M/S Amos O. Oyuka & Co. Advocates were already on record for the Defendant, there is no evidence to confirm that the said notice was served on the Plaintiff's counsel on record. The Plaintiff's deposition at paragraph 4 of his replying affidavit has not been rebutted or controverted and though M/S Amondi Advocate continued to attend court or to be represented in court appearing for the Defendant after the 4th February 2015, their failure to serve the notice of change of Advocate that they filed on 4th February 2015 is the one to blame for the Plaintiff act of serving the hearing notice for 7th February 2017 on the previous counsel, M/S Amos O. Oyuko & Co. Advocates. That the Defendant's notice of motion at prayer 2 that seeks for "the exparte proceedings to be set aside and the Plaintiff's witnesses be recalled and the defendant applicant allowed to cross-examine them," must be restricted to the one witness named Kelvin Otieno Pedro, who testified as PW4 as he is the only Plaintiff's witness to be heard on that day. That the court find the application fair and reasonable, but as the confusion faced by the Plaintiff's counsel on which firm of advocates to serve the hearing notice was caused by the firm of M/S Amondi & Co. Advocate failure to serve the notice of change of advocate, it is only fair that the firm meet the thrown costs of this application assessed at Kshs.10,000/= (Ten thousand).

i) That though the Defendant's notice of motion dated 10th May 2017 does not seek to set aside the order of 7th February 2017 closing the Defendant's case, the court exercising its discretion and with a view of ensuring expeditious disposal of the dispute vacates the said order suo moto to facilitate the overriding objective as set out under **Section 1A and 1B of Civil Procedure Act Chapter 21 of laws of Kenya.**

6. That flowing from the foregoing the court finds merit in the Defendant's notice of motion dated 10th May 2017 and orders as follows;

a) That the exparte proceedings that took place on the 7th February 2017 when the evidence of PW4 was taken is hereby set aside limited to allowing the said witness to be recalled during the next hearing date for cross-examination by the Defendant or the Defendant's counsel. That thereafter the plaintiff counsel or the Plaintiff will be at liberty to re-examine the witness.

b) That the order closing the Defendant's case of the 7th February 2017 is hereby set aside to allow the Defendant tender his defence during the next hearing date.

c) That M/S Amondi & Co Advocate, on record for the Defendant, do pay the Plaintiff thrown away costs of the application assessed at Ksh.10,000/= (Ten thousand) in 30 (thirty) days.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2018

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Maganga for Plaintiff

Mr. Abade for Achira for Defendant/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018

. Maganga for Plaintiff and Mr. Abade for Achira for Defendant. 14/2/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

Mr. Maganga for the Plaintiff/Respondent

Mr. Abade for Achira for Defendant/applicant

Court: Ruling dated and delivered in open court in presence of Mr

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018