REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 266 OF 2017

(Formerly Machakos ELC No. 169 of 2012)

SAYATON ENE MUTUTUA SIRINGET.....PLAINTIFF

VERSUS

PHILIP AMUSI.....1ST DEFENDANT

CHRISTOPHER KYENDI NDAMBUKI.....2ND DEFENDANT

RULING

What is before Court for determination is the Defendants' Notice of Motion dated the 23rd February, 2018 and filed on 3rd April, 2018, brought pursuant to Order 12 rule 2 of the Civil Procedure Rules and all the other enabling provisions of the law. The Applicants seek the following orders:

1. Spent.

2. That pending the hearing and determination of this motion, the Plaintiff be and is hereby restrained from alienating, transferring, disposing, charging, mortgaging, interfering with LR. NO. KAJIADO/ KAPUTIEI CENTRAL/ 448 or interfering with the Defendants' quiet enjoyment of the suit property or until other orders from court.

3. That the Defendant be and is hereby allowed to present their evidence before this Honourable Court on the date fixed by the Court.

4. That there be such other or further orders as the Court deems fair and expedient to grant.

5. That the costs of this motion be to the Applicant.

The Application is based on the following grounds which in summary is that the Defendants are bona fide residents of LR KAJIADO/ KAPUTIEI CENTRAL/ 448 hereinafter referred to as the 'suit land'. That the Respondents agents, servants and contractors have been intimidating, harassing and threatening the Defendants. The Applicants have been in court since 2012 and have complied with the court orders, directions as well as rulings and have adhered to all the requirements to make the case ready for hearing. That on the material day, the Defendant travelled to Ongata Rongai on Sunday to meet their advocate who was not around but came back on Monday afternoon; by which time the Court had already heard the case. It was not the mistake of the Defendants' but that of their Advocate. The Defendants are ready to abide by any conditions the court will impose and that this case is of special circumstance since the Applicants have been residing on the suit land for over 12 years and it is the only home they know. Further, that to give the Defendants an opportunity to be heard shall be in line with the overriding objective of this court to facilitate the just, expeditious and proportionate resolution of the disputes between litigants. It is hence important to allow the Applicants to present their endeavors to obviate multiplicity of applications and possible appeal. That justice demands that all parties are heard prior to determination of this suit.

The Application is supported by the affidavit of CHRISTOPHER KYENDI NDAMBUKI the 2nd Defendant herein who reiterated their claim and deposed that he is one of the purchasers of the suit land where he has resided for over 12 years. He contended that it is imperative that the matter be heard *inter partes* to obviate multiplicity of applications and possible appeals.

The Application is opposed by SAYATON ENE MUTUTUA SIRINGENT the Plaintiff herein, who filed a replying affidavit where she deposed that the Applicants' instant Notice of Motion is an abuse of the Court process as the applicants are attempting to sanitize contempt of court on their part. Further that the application is brought under wrong provisions of the law, a deliberate wastage of the judicial time, there is no evidence the advocate messed up the Applicants' case and the application has been brought three (3) months which is clear, it is an afterthought. She contends that the application is a disguised application seeking injunction orders whereas the matter is pending for

judgment. She avers that prayer No. 2 seeks an injunction over a land parcel which is not subject to the suit and as such no orders are available to the applicants'. She insists no plausible, reasonable or convincing reasons have been availed before Court to warrant the reopening of the case. Further, that the 2nd Applicant simply states that he travelled to Ongata Rongai on Sunday 21st January, 2018 and did not meet his advocate, but does not explain why they failed to attend court on 22nd January, 2018 together with his co - defendant. She claims there is no application nor supporting affidavit by the 1st Defendant nor his authority to the 2nd Applicant to swear the supporting affidavit on his behalf. Further, that the Applicants have not said anywhere that they were unaware of the hearing date and as such their refusal to attend court was contemptuous. She reiterates that whereas the Applicant seems to blame the advocate for failing to attend court, the advocate has not seen it fit to give any explanation to the Court nor any evidence of their predicament. Further, that in any event the court has held on numerous occasions that sometimes the mistakes of counsel shall inevitably be meted on his client who shall in turn have recourse against his advocate and that this instant case is one case that merits such treatment. She states that the Defendants did not prosecute their counterclaim and the same should be dismissed with costs. She further reiterates that it is trite principle that litigation must come to an end and expeditiously so, with the Plaintiff not being subjected to reopen the case herein with attendant costs without any plausible reasons. She further insists that the Defendants were afforded a chance to defend the case and tender their evidence but they abused the opportunity and cannot now be heard to say that they are unfairly prejudiced. She prayed for the instant application to be dismissed with costs.

Both the Plaintiff and the Defendants filed their written submissions, which I have highlighted below.

The Defendants'/Applicants stated that their application is not an abuse of the process and submitted that the Application is brought pursuant to Order 12 rule 2 of the Civil Procedure Rules which provides for the procedure when only the Plaintiff attends Court during the hearing. The Applicants relied on the case of **Kenya Broadcasting Corporation Vs National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA) (2015) eKLR** that illustrates on the issue of the right to be heard. They submitted that they have not used judicial process to irritate the Plaintiff and relied on the case of **Graham Rioba Sagwe & 2 Others Vs Fina Bank Limited & 5** Others to support this argument. They submitted that the case needs to be reopened and the Applicants' allowed to be heard as they have raised triable issues in their defence. They further relied on the case of **Patel Vs EA Cargo Handling Services Ltd (1974) EA** to support this argument. They further submitted that the Defendants are not privy to obstruction of justice as they tried to make their advocate attend court in vain. Further, that Judgment has not been entered and it would be inorder for the court to take evidence and make a conclusive determination of the case. They challenged the Respondent's argument that the case should not be re-opened because the 2nd Applicant did not have authority to swear the affidavit on behalf of the 1st Applicant does not hold water. They argued that mistake to Counsel should not be meted on the Client and relied on the cases of **Edney Adaka Ismail Vs Equity Bank Ltd (2014) eKLR and Lucy Bosire Vs Kehancha Div. Land Dispute Tribunal & 2 Others** to support their argument. On the injunctive relief sought against the Respondent, they relied on the principles established in the case of **Giella Vs Cassman Brown and Company Ltd (1973) EA 358** to support their arguments.

In opposition to the instant application, the Respondent submitted that by the Applicants' seeking injunctive reliefs at this juncture, amounts to a mere afterthought to forestall the looming judgment. She relied on the case of **Membley Park Residents Association Vs The Presbyterian Foundation (2017) eKLR** to support her submission. Further, she relied on section 26(1) of the Land Registration Act and submitted that the Applicants have not proved that they are the registered owners of the suit property and have not challenged the Certificate of Title produced before Court. On the issue of reopening the case, she urged the court not to exercise its discretion and direct the case to be reopened. She insisted Applicants had absconded Court hence not entitled for the case to be reopened as they have not stated any valid reasons why they were absent in Court. Further, the Applicants' advocate had not provided reasons why he did not appear in court and that the Applicants can only blame their advocate and seek necessary recourse from him. She relied on the case of **Tana and Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 others (2015) eKLR** to support her submissions. She further submitted that the Applicants are intimidating the Court and urged the Court not to tolerate such contemptuous conduct. She relied on the case of **Patrick Gathenya V Esther Njoki Rurigi & another (2008) eKLR** to support her arguments. She reiterated that the Applicants had slept on their rights and took three (3) months to seek for reopening of the case. She further relied on the case of **Samuel Kiti Lewa Vs Housing Finance Co. of Kenya Ltd & Another (2015) eKLR** to support these arguments.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 23rd February, 2018 which was filed on 3rd April, 2018 together with the supporting and replying affidavits including the parties' submissions, the following are the issues for determination at this juncture:

- Whether the Plaintiff's case should be reopened.

- Whether the interim injunction sought by the Defendants ought to be granted pending the outcome the main suit.

I note hearing of the Plaintiff's case proceeded ex parte on the 22nd January, 2018 and she closed her case; The Court directed the Plaintiff to file her submissions. I note that the Defendants herein had filed a Counterclaim, which was never heard. The Defendants have filed the instant application seeking for the case to be reopened to enable them be heard as their advocate failed to attend court on the 22nd January, 2018. Their application is brought pursuant to Order 12 rule 2 of the Civil Procedure Rules that provides that: **' If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied— (a) that notice of hearing was duly served, it may proceed *ex parte*; (b) that notice of hearing was not duly served, it shall direct a second notice to be served; or (c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.'**

I note on the 20th September, 2017, both Counsels for the Plaintiff and the Defendants were present in Court when the case was fixed for hearing on 22nd January, 2018. I note on 22nd January, 2018, the Counsel for the Defendants failed to attend Court and the matter proceeded for hearing with only the Plaintiff's case. Further, on 5th March, 2018 the matter was mentioned for submissions and it is only the Plaintiff's Counsel who was present but he did not indicate whether he had served the Defendants' Counsel or not. I note in the instant application the Counsel for the Defendants has not sworn an affidavit to explain why he failed to attend to court on 22nd January, 2018. The Plaintiff has vehemently opposed the reopening of this case and argued that the Defendants have a remedy against their advocate for failure to attend

Court.

In the case of **Edney Adaka Ismail v Equity Bank Limited [2014] eKLR** Justice Mabeya held observed that**:' Further, there is no allegation presented that the Defendant stands to suffer any prejudice that cannot be compensated by way of costs if the application is allowed. All that has been alleged is that the Plaintiff had defaulted on its obligation to repay the loan facility and should therefore not be entitled to the orders he seeks. In my view, the Court has to take cognizance of the effect of allowing the Plaintiff's application. If the Plaintiff's dismissed application is reinstated for hearing and thereafter the same is found to be unmerited, there would be no prejudice caused on the part of the Defendant. This must however be weighed against the consequences of shutting out the Plaintiff from the hearing of his application and hence losing his vehicles held as collateral for the loan facility by the Bank. The Court must take into account the principle of proportionality and see where the scales of justice lie. The law is now clear that the business of the Court, so far as possible, is to do justice between the parties and not to render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See Suleiman -vs- Ambose resort Limited [2004] 2 KLR 589. From the record, notwithstanding the bitter dispute between the parties, the Plaintiff has continued to service the loan notwithstanding the orders that are force.'**

In the instant case, I note there is a Counterclaim raising weighty as well as triable issues relating to the suit land that ought be heard and determined. I concur with the Respondent's argument that litigation must end, but find that it is pertinent if all parties are heard before litigation is brought to an end. In the instant application, I note that the Advocate for the Defendants failed to file any affidavit to provide reasons as to why they failed to attend court when the suit was set down for hearing but this should not be meted against the Defendants.

In the case of **Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others [2016] eKLR**, the Court of Appeal observed thus: '**Therefore the focus in the 2010 Constitution is on justice, and in order to give effect to the objective and purpose of the Constitution, this Court must, in interpreting its jurisdiction, go beyond the letter in the Constitution and legislative provisions and apply the spirit of the Constitution. While the decision in the Rai case laid stress on the letter of the law as it was then, and the need for finality in litigation, the position has now changed as this Court is obligated not just to follow the letter but also the spirit of the Constitution which stresses on justice being done. Thus where appropriate as in this case, the principle of fairness and justice must take priority over the principle of finality.**'

After considering the submissions of the Applicants as well as the Respondents, and in being bound by the aforementioned decision, I note that insofar as the Counsel for the Applicants' failed to attend Court, I observe that the Applicants herein have a right as enshrined within the Constitution to be given a fair hearing. I further take cognizance of the fact that no prejudice will be suffered by the Plaintiff which cannot be compensated by way of costs, if the case was reopened and the Defendants allowed to present their evidence before this Honourable Court to enable the Court make a proper determination of the suit. In line with the overriding objective of this court, the role of this court is to provide substantive justice and not to lock out a party just because the Counsel failed to represent them properly, I will proceed to exercise my discretion and direct that this case be reopened for further hearing. I note that the Plaintiff also has a Defence to the Counter claim and it will only be proper if all the materials are presented in Court in respect of the dispute herein.

As to whether injunctive orders should be granted pending the outcome of the suit, I note the suit herein was instituted way back in 2012 and it is only after the ex parte hearing that the Defendants sought the said orders. The Plaintiff /Respondent has opposed the application stating that it is over a land parcel which is not subject to the suit and as such no orders are available to the applicants'. I concur with the Respondent's arguments and will decline to grant the injunctive orders sought at this juncture and direct that the obtaining status quo be maintained pending the outcome of the suit.

It is against the foregoing that I will allow prayer 3 of the instant Notice of Motion and direct that the Suit herein be and is hereby reopened to enable the Defendants to present their case.

I direct that the Plaintiff and her witness will be compensated by way of costs to be assessed in Court.

Dated signed and delivered in open court at Ngong this 23rd day of July, 2018

CHRISTINE OCHIENG

JUDGE