



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 525 OF 2017

(Formerly Nairobi ELC case No. 277 of 2015)

ROBIN NYANGAU MOSONGO.....1ST PLAINTIFF

TABITHA MBUTE LAVI.....2ND PLAINTIFF

VERSUS

NGOITON LEIYAN.....1ST DEFENDANT

KAJIADO COUNTY GOVERNMENT

(SUCCESSOR TO COUNTY COUNCIL OF KAJIADO).....2ND DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Motion application dated the 16th March, 2018 and filed on 20th March, 2018 brought pursuant to order 10 rule 11 and order 51 of the Civil Procedure Rules; Section 1A, 1B and 3A of the Civil Procedure Act. The 1st Defendant seeks the following orders:

1. Spent.
2. That this Honourable Court be and is hereby pleased to grant a stay of proceedings herein pending the hearing and determination of the instant application.
3. That this Honourable Court be and is hereby pleased to set aside its proceedings and orders issued on the 19th February, 2018 and the 1st Defendant/ Applicant herein be allowed to be heard and cross examine the Plaintiff witnesses who testified and tender his evidence.
4. That this Honourable Court be pleased to make any other such orders as it may deem fit and just in the circumstances.
5. That the costs of this application be in the cause.

The application is premised on various grounds and supported by the affidavit of NZIOKI BELINDA NDOTI whom is an advocate practicing in the firm of messrs Ongegu & Associates Advocates who has the conduct of this matter on behalf of the Defendant. She avers that on 11th October, 2017, the Plaintiff's advocate served the firm of messrs Ongegu & Associates Advocates with a hearing notice of the main suit and indicated the same was to be at the High Court at Kajiado in Ngong on 19th February, 2018. She confirms that on the said 19th February, 2018 she went to Ngong Law Courts where it was purported that the Environment & Land Court was sitting as per the hearing notice served and on reaching Court, she enquired from the Registry at the said Ngong Law Courts whether the Environment & Land Court was sitting and she was informed that it was not. She tried contacting the Plaintiff's advocate through her mobile phone to confirm whether the Court was sitting in Ngong or in Kajiado but she did not pick her call. She claims she called the Plaintiff's Advocate office to confirm where the Court was sitting and she spoke with the Secretary who advised her to call the Advocate herself. She contends that she sent a text message to the Plaintiff's Advocate who informed her that the matter had proceeded and concluded in her absence. Further, that on 20th February, 2018 the Plaintiff's Advocate served them with a mention notice for filing submissions. She reiterates that she was misled that the Environment & Land Court was sitting at Ngong as she was served with a hearing notice to that effect and her non attendance was not deliberate but due to circumstances beyond her control. Further, that it is in the interests of justice that the 1st Defendant is allowed to participate in the proceedings, cross examine the Plaintiff's witnesses and tender his own evidence. She claims that no prejudice will be occasioned to the Plaintiff, and the 1st Defendant is prepared to abide by any terms and/or conditions that the Court may set.

The application is opposed by the Plaintiffs' whose advocate BADIA A. FIONA filed a replying affidavit in which she challenges the provisions under which the application has been filed since no judgement has been entered. She explains that on 19th February, 2018 the matter proceeded to hearing and the Court directed that the parties file their written submissions. She contends that the instant application has been filed and served more than one month after the proceedings when the Court expected the parties to file their respective submissions. She states that she took the hearing date ex parte and served the 1st and 2nd Defendants' with the Hearing Notices on 11th October, 2017 and 15th November, 2017 respectively. She insists that the causelist for the 19th February, 2018 was quite instructive that the matter would be heard at Ngong which was in line with the Hearing Notice dated the 10th October, 2018. She reiterates that the matter proceeded for hearing ex parte in accordance with the law and that the 1st Defendant's advocate at paragraph 4, 5, and 9 of her supporting affidavit is sworn with the sole intention of maligning her image including her reputation and in extension her law firm which the public hold in high esteem. She denies getting any missed call from the 1st Defendant's advocate on 19th March, 2018. Further, that the SMS communication alluded to in paragraph 7 of the applicant's supporting affidavit, which she acknowledges, was initiated on 19th February, at 2. 15 pm which shows the 1st Defendant's advocates' lack of interest in the instant suit. She insists the 1st Defendant including his advocate have been disinterested in the instant suit and she proceeded to highlight various instances since the suit was filed to demonstrate this. She reiterates that the Plaintiffs' will be prejudiced if the 1st Defendant's application dated the 16th March, 2018 is allowed as he has interfered with the suit land and the Plaintiffs' will continue incurring costs to attend court. Further, that the instant application is an abuse of the Court process filed for the mere sake of filing as well as protracting the litigation of the suit and must of necessity fail in law. Further, that she has demonstrated that the events of the 19th February, 2018 as far as the 1st Defendant's failure to attend the court session was not an isolated event but a habit which actually became a pattern. She avers that the instant application as a whole is filed with the sole purpose of filling in gaps in the 1st Defendant's case which action is deeply mischievous and an abuse of the court process.

Both the Plaintiffs and the 1st Defendant argued the instant application on the 13th June, 2018 which arguments I have considered.

Analysis and Determination

Upon perusal of Notice of Motion application dated the 16th March, 2018 and filed on 20th March, 2018 including the supporting and replying affidavits, and upon hearing the arguments from the Counsels for the Plaintiffs as well as the 1st Defendant, the following are the issues for determination:

- Whether the proceedings as well as the orders granted on 19th February, 2018 should be set aside.
- Whether the 1st Defendant should be allowed to cross examine the Plaintiffs' witnesses who testified as well as tender his evidence.

It is the 1st Defendant's counsel's contention that they were misled and failed to attend court for hearing on the 19th February, 2018. He seeks the proceedings as well as orders made on 19th February, 2018 be set aside and he be allowed to cross examine the Plaintiff's witnesses as well as tender his evidence. The Application has been vehemently opposed by the Plaintiffs' Counsel who aver that the 1st Defendant has not been serious for the past three years when then matter has been pending in court. She disputes the 1st Defendant's counsel's failure to attend court and contends that the instant application is an orchestrated delaying tactic which amounts to an abuse of the court process. She challenges the legal provisions under which the application is based. Upon analysis of the facts as presented, I note that the 19th February, 2018 was the first time the matter was proceeding for hearing before me. I have perused the hearing notice and noted it was properly served upon the Defendants. I take judicial notice of the fact that at the Ngong Law Courts, whenever the Environment & Land Court is sitting therein, there is no fixed courtroom, so it is possible from the averments of the 1st Defendant's counsel that they were misled by the Registry that the Court was not sitting.

In the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR**, the Court of Appeal observed as follows: ***'The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:***

"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

Insofar as the 1st Defendant's Counsel failed to attend Court on 19th February, 2018, in being bound by the aforementioned judicial authority, I find that his Defense raises triable issues and it would be important if he was given a chance to cross examine the Plaintiffs' witnesses as well as present his case. Even if the instant application has been brought under one wrong legal provisions, these are issues that can be cured by an amendment and it is also a Constitutional principle that Courts should dwell on substantive justice and not technicality. Further, that no party should be condemned unheard and that the overriding objective of the Court is to ensure justice is dispensed expeditiously and no party suffers prejudice. Since judgment has not been entered in this matter, I do not foresee any prejudice the Plaintiffs' will suffer if the orders sought in the instant application were granted. It is my observation that the Plaintiffs' can always be compensated by way of costs and that the 1st Defendant cannot be penalized for his Counsel's mistake to attend court.

It is against the foregoing that I will exercise my discretion and proceed to allow the application dated the 16th March, 2018 in the following terms:

- The Order of the Court dated the 19th February, 2018 be and is hereby set aside.

- The Plaintiffs' case be and is hereby reopened for the 1st Defendant to cross examine the witnesses.
- The 1st Defendant to cater for the Plaintiff's counsel and witnesses costs totaling Kshs. 10, 000 within the next 14 days from the date hereof.
- The matter to be fixed for hearing within the next 60 days from the date hereof.
- If the 1st Defendant fails to comply with the above terms, the Plaintiffs' will be free to take a judgment date.

I so order.

Dated signed and delivered in open court at Kajjado this 25th day of September 2018.

CHRISTINE OCHIENG

JUDGE