



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 103 OF 2008

MANSUKHLAL JESANG MARU.....PLAINTIFF

VERSUS

FRANK WAFULA.....DEFENDANT

R U L I N G

1. The applicant dated **29/10/2018** is by the defendant. It seeks that this court's orders issued on **23/10/2018** and the "*ex parte*" proceedings together with all consequential orders be set aside and the plaintiff's case be re-opened and heard on merits.

2. The application is opposed by the plaintiff through grounds of opposition dated 30/10/2018 and filed on the same date. The application is premised on the grounds that the date of 23/10/2018 was taken without consulting the Advocate for the defendant, who had other "pre-fixed" matters in Eldoret on the same date; that counsel for the defendant was not ready to proceed on that date due to those "pre-fixed" matters; that he therefore instructed a lawyer to hold his brief to adjourn the hearing and to take a convenient date but nevertheless the court proceeded with the hearing of the matter *ex parte* in the absence of the defence lawyer and ordered the plaintiff's case closed. The further ground is that the failure to attend court was not intentional. These grounds are outlined in the supporting affidavit sworn by one Alfred K. Chepkwony on 29/10/2018. Under oath, the deponent who is Counsel for the defendant states that the pre-fixed cases were Eldoret ELRC Nos. 184/17, 133/17 and 251/17. A copy of the counsel's diary for 23/10/2018 is exhibited as "*AKC 1(a), (b), (c) and (d)*".

3. Another supporting affidavit which is not mentioned in the body or foot of the application, sworn by the defendant on 29/10/2018, is attached to the application. It reiterates the grounds at the foot of the application.

4. I have considered the application and the response. Mr. Kiarie's submission, that is, that the perception that the hearing of the plaintiff's case proceeded *ex parte* is incorrect, is in my view the right position. Mr. Bororio appeared on behalf of Mr. Chepkwony and sought an adjournment on the date of hearing, only for the court to rule that the hearing would proceed. The defendant himself was in court and when Mr. Bororio who had held brief for his Advocate failed to turn up at 11.25 am the scheduled time of hearing, the court asked the defendant if he wished to cross-examine the plaintiff and his witness whereupon he declined to do so. That cannot be deemed by any stretch of imagination to be an *ex parte* proceeding.

5. A setting aside order would only have been merited had it been proved that the hearing proceeded *ex parte* and with no fault on the part of the defendant and his counsel. I would not want to deem any counsel who has been sent to hold brief in a matter as only having authority limited to securing an adjournment, for that indeed presupposes that the application for adjournment will be doubtlessly successful. The court does not take exception to this kind of presumption especially when it relates to matters that rank among the oldest in this station whose backlog this court desires to clear with expedition.

6. I find that an order setting aside the proceedings of 23/10/2018 is therefore not merited. I therefore decline to issue a setting aside order. In lieu thereof I hereby issue an order that the defendant will be at liberty to apply orally for a recall of the plaintiff and his witness to cross examine them after which he will promptly give evidence and call his witnesses in this suit if he so chooses.

It is so ordered.

Dated, signed and delivered at Kitale on this 31st day of October, 2018.

MWANGI NJOROGE

JUDGE

31/10/2018 - at 9.40 am

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nyamu and Mr. Kiarie for plaintiff

N/A for defendant

Defendant present

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

31/10/2018