



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 58 OF 2009**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**GEORGE FRED ONYANGO.....1<sup>ST</sup> DEFENDANT**

**VALERIA AKUKU ONYINO.....2<sup>ND</sup> DEFENDANT**

**SAMMY MUSILA.....3<sup>RD</sup> DEFENDANT**

**GEORGE KIMANI NJUKI.....4<sup>TH</sup> DEFENDANT**

**SAMMY MWAITA.....5<sup>TH</sup> DEFENDANT**

**RULING**

On 6<sup>th</sup> February, 2017 due to the age of this suit, the court listed the same for hearing on 23<sup>rd</sup> March, 2017 during the service week that was organised by the court for the purposes of clearing old cases. When the matter was mentioned for fixing the said hearing date, the plaintiff and the 4<sup>th</sup> defendant's advocates were present and the plaintiff's advocate was directed to serve the advocates for the 3<sup>rd</sup> and 5<sup>th</sup> defendant's with a hearing notice. The 3<sup>rd</sup> defendant's advocates were served with a hearing notice on 14<sup>th</sup> February, 2017 while the 5<sup>th</sup> defendant's advocates were served on 8<sup>th</sup> February, 2017.

When the matter came up for hearing before Kemei J. on 23<sup>rd</sup> March, 2017, Ms. Maina advocate appeared for the plaintiff while Mr. Nyanga held brief for Ms. Nzei for the 3<sup>rd</sup> defendant. There was no appearance for the 4<sup>th</sup> and 5<sup>th</sup> defendants. When the matter was called out, Mr. Nyanga informed the court that Ms. Nzei was not ready to proceed as she was engaged in another matter in the High Court at Machakos. From the record, the court placed the matter aside to 11.00am to allow Ms. Nzei's clerk from whom Mr. Nyanga seems to have been taking instructions to contact her on when she would have been ready to proceed with the matter. When the court resumed at 11.11 a.m, Mr. Ligunya held Ms. Nzei's brief for the 3<sup>rd</sup> defendant while Ms. Maina appeared for the plaintiff. There was still no appearance for the 4<sup>th</sup> and 5<sup>th</sup> defendants. At this sitting, Mr. Ligunya informed the court that Ms. Nzei was on Mombasa Road on her way to Nairobi to attend the hearing of the matter and requested that the matter be adjourned to 12.30pm. The court allowed Mr. Ligunya's request and adjourned the matter to 12.30pm to give Ms. Nzei time to arrive from Machakos. When the court resumed again at 12.30pm, Ms. Nzei had not arrived and the advocate who was holding her brief was nowhere. The 4<sup>th</sup> and 5<sup>th</sup> defendants advocates were also still absent. The court proceeded with the hearing of the plaintiff's case. The plaintiff called two witnesses and closed its case. The matter was thereafter adjourned to 17<sup>th</sup> May, 2017 for the hearing of the defence case.

What I now have before me are two applications by the 3<sup>rd</sup> and 4<sup>th</sup> defendants. The first application was brought by the 4<sup>th</sup> defendant by way of Notice of Motion dated 19<sup>th</sup> April 2017. In the application, the 4<sup>th</sup> defendant sought an order setting aside the ex-parte hearing that took place on 23<sup>rd</sup> March 2017, re-opening of the plaintiff's case and the recalling of the plaintiff's witnesses for cross-examination. The application was supported by the affidavit sworn on 20<sup>th</sup> April 2017 by the 4<sup>th</sup> defendant's advocate, John Patrick Machira. In his affidavit, Mr. Machira averred that he confirmed from the online cause list that the suit was not listed for hearing on 23<sup>rd</sup> March, 2017 and that this is why neither he nor his client attended court on 23<sup>rd</sup> March, 2017. He annexed to his affidavit a copy of the online cause list for 23<sup>rd</sup> March 2017 to show that this suit was not listed for hearing on that day. He contended that his failure to attend court on 23<sup>rd</sup> March, 2017 was unintentional mistake on his part. He sought for leniency and mercy from the court stating that he was willing to abide by any orders the court may make in the matter.

The second application was brought by 3<sup>rd</sup> defendant by way of Notice of Motion dated 12<sup>th</sup> May 2017. In the application, the 3<sup>rd</sup> defendant sought the setting aside of the ex-parte hearing that took place on 23<sup>rd</sup> March, 2017. The 3<sup>rd</sup> defendant also sought leave to amend his statement of defence. The application was supported by the 3<sup>rd</sup> defendant's affidavit sworn on 12<sup>th</sup> May, 2017. The grounds upon which the application was premised were that the 3<sup>rd</sup> defendant's advocate was not invited for the fixing of the hearing date of 23<sup>rd</sup> March, 2017 when the matter was heard. The 3<sup>rd</sup> defendant averred that his advocate was served with a hearing which she received under protest because on the same date, she was going to be engaged in part-heard matters before the High Court at Machakos which had been scheduled earlier. The 3<sup>rd</sup> defendant annexed to his affidavit, an extract of the his advocate's diary for 23<sup>rd</sup> March, 2017 in support of the application. The 3<sup>rd</sup> defendant stated that an application for adjournment that was made on behalf of his advocate was disallowed by the court on 23<sup>rd</sup> March 2017 and that his advocate managed to get to Nairobi from Machakos after 2.00pm long after the court had dealt with the suit. The 3<sup>rd</sup> defendant stated that his defence raises triable issues and that he stands to be greatly prejudiced by the ex-parte proceedings of 23<sup>rd</sup> March 2017 if the same are not set aside. On his application for leave to amend the defence, the 3<sup>rd</sup> defendant averred that he wished to amend the defence to introduce a counter-claim against the plaintiff so as to bring all the issues in controversy before the court for trial and determination.

The two applications were opposed by the plaintiff through separate replying affidavits sworn by its advocate Ms. Grace Maina on 3<sup>rd</sup> May, 2017 and 31<sup>st</sup> May, 2017 respectively. The plaintiff stated that contrary to the 4<sup>th</sup> defendant's assertion that the suit was not listed for hearing on 23<sup>rd</sup> March, 2017, the suit was listed in the Environment and Land Court cause list for that day. The plaintiff contended that the 4<sup>th</sup> defendant's advocate had not given any reason why he did not check on the position of the matter at the court registry.

With regard to the 3<sup>rd</sup> defendant's application, the plaintiff averred that the 3<sup>rd</sup> and 5<sup>th</sup> defendants were served with hearing notices for 23<sup>rd</sup> March, 2017 on which day the hearing of this suit commenced at midday in a bid to indulge the 3<sup>rd</sup> defendant's advocate. The plaintiff contended that the defendants would not suffer any prejudice if their applications are disallowed as they still have an opportunity to prosecute their cases during the defence hearing. The plaintiff averred that re-opening of the suit would be prejudicial and would only serve to delay the expeditious disposal of the suit in addition to being a waste of the court's precious time. In respect to the prayer for amendment of the statement of defence sought by the 3<sup>rd</sup> defendant, the plaintiff averred that the matters sought to be included in the amended defence were within the knowledge of the 3<sup>rd</sup> defendant at the time of filing his defence on 17<sup>th</sup> March 2009. According to the plaintiff, allowing such an amendment would amount to aiding a negligent pleader who was yet to comply with Order 11 of the Civil Procedure Rules, a further demonstration of negligent conduct of litigation on the part of the 3<sup>rd</sup> defendant and his advocate. Lastly, the plaintiff averred that the amendment sought would greatly prejudice the plaintiff who had closed its case.

The 3<sup>rd</sup> defendant's application was also opposed by the 4<sup>th</sup> defendant who filed grounds of opposition dated 23<sup>rd</sup> May 2017. The 4<sup>th</sup> defendant averred that the application was fatally defective, incompetent and a nullity in law in so far as it sought to raise a counterclaim against a co-defendant. The 4<sup>th</sup> defendant further averred that no reasons had been advanced to justify the amendment that was being sought late in the day.

The two applications were argued on 13<sup>th</sup> February, 2018. Ms. Nzei for the 3<sup>rd</sup> defendant reiterated the contents of the 3<sup>rd</sup> defendant's affidavit in support of his application and submitted that the 3<sup>rd</sup> defendant had advanced a good case for the exercise of the court's discretion in his favour. Counsel argued that she was not present when the suit was fixed for hearing and that there was no evidence that she had been served to attend court for that purpose. She argued that the authorities cited by the plaintiff were not binding on the court which was free to depart from the same in exercise of its discretion. With respect to the prayer for amendment, Ms. Nzei submitted that under Order 8 Rule 3(1) of the Civil Procedure Rules, the court can allow amendment at any stage of the proceedings.

On his part, Mr. Machira for the 4<sup>th</sup> defendant conceded that he made a mistake in not attending court and in advising his client also not to attend court. He submitted that the mistake emanated from his reliance on the online cause list for the day which did not show that the matter was listed for hearing. He urged the court to allow the 4<sup>th</sup> defendant's application and to grant the defence an opportunity to cross examine the plaintiff's witnesses. He relied on the case of Shah v Mbogo[1967]E.A.116 and submitted that the plaintiff would not suffer prejudice which cannot be remedied by costs which they were ready to pay. Counsel submitted that Order 12 Rule 2 of the Civil Procedure Rules was not cast in stone and does not stop the court from doing justice.

In response, Ms. Maina for the plaintiff submitted that Order 12 Rule 2(a) of the Civil Procedure Rules allows a court to proceed with a hearing ex-parte where only the plaintiff appears on the date of the hearing. Counsel submitted that the hearing date was taken in court and the defendants were duly served with hearing notices. She submitted that no good grounds had been advanced to warrant the re-opening of the case. The plaintiff argued that no prejudice would be suffered by the defendants if their applications were disallowed as they would have an opportunity to present their cases. With respect to the prayer for amendment of the defence sought by the 3<sup>rd</sup> defendant, Counsel submitted that the facts sought to be introduced were not new and were always within the knowledge of the 3<sup>rd</sup> defendant. She submitted that allowing the amendment brought after undue delay would amount to aiding a negligent pleader and would also prejudice the plaintiff's case which was already closed. The plaintiff's advocate cited a number of authorities in support of her submissions which included the cases of National Bank of Kenya(K)Ltd v Syntax Printers Ltd & 2 others(2010)eKLR and James Ochieng' Oduol T/A Ochieng Oduol & Company Advocates v Richard Kuloba(2008)eKLR.

#### Determination:

The 3<sup>rd</sup> and 4<sup>th</sup> defendants' applications have two limbs. The first limb is seeking the setting aside of the ex parte hearing that took place on 23<sup>rd</sup> March, 2017. This prayer is common in the two applications. The second limb is seeking the amendment of the defence. This prayer has been sought only by the 3<sup>rd</sup> defendant. I will consider first whether the court should set aside the ex-parte proceedings of 23<sup>rd</sup> March 2017. I will thereafter consider the prayer for amendment of defence.

The ex-parte proceedings sought to be set aside took place on the 23<sup>rd</sup> March, 2017. As I have mentioned earlier, the plaintiff called two witnesses and closed its case. The matter was thereafter adjourned for the hearing of the defence case. Under Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules, the court has power to set aside ex parte proceedings. The court also has power under section 146(4) of the Evidence Act, Chapter 80 Laws of Kenya and Order 18 Rule 10 of the Civil Procedure Rules to recall a witness for further examination in chief or cross-examination. Order 18 Rule 10 of the Civil Procedure Rules provides follows:

***“The court may at any stage of the suit recall any witness who has been examined, and may subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit”.***

Similarly, section 146(4) of the Evidence Act provides that:

***“The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination and if it does so, the parties have the right of further cross-examination and re-examination respectively.”***

The powers of the court under the foregoing provisions of the Civil Procedure Rules and the Evidence Act are discretionary. It is settled that the court’s discretionary powers must always be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the Court of Appeal in the case of Patriotic Guards Ltd v James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, (2018)eKLR as follows:-

***“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”***

In the case of Philip Chemwolo & another v Augustine Kubede [1982]KAR1033 at 1040 Apaloo JA. stated as follows:-

***“Blunder will always be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”***

From the facts of this case, I am of the view that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were to blame for their failure to attend court on 23<sup>rd</sup> March, 2017 for the hearing of this suit. The 4<sup>th</sup> defendant’s advocate was present in court when the matter was listed for hearing. Instead of attending court, the 4<sup>th</sup> defendant’s advocate chose to check on the position of the case from the comfort of his office through an online cause list which turned out not to have carried the correct information on the case. The 4<sup>th</sup> defendant’s advocate conceded that the failure on his part and on the part of his client to attend court was as a result of a mistake on his part. As concerns the 3<sup>rd</sup> defendant, his advocate did not deny that she was served with a hearing notice more than a month before the hearing date. The 3<sup>rd</sup> defendant’s advocate neither communicated with the court nor the plaintiff’s advocate about the suitability of the hearing date. Again although she instructed a number of advocates to hold her brief, none had instructions to proceed with the hearing of the matter. The court is also of the view that the 3<sup>rd</sup> defendant’s advocate did not tell the court the whole truth why she was unable to attend court. When an adjournment was sought on her behalf on 23<sup>rd</sup> March, 2017, the court was told that the 3<sup>rd</sup> defendant’s advocate was attending to HCCC No. 284 of 2007 at the High Court in Machakos. This case does not appear in the extract of the 3<sup>rd</sup> defendant’s advocate’s diary that was annexed to the 3<sup>rd</sup> defendant’s affidavit as annexure “Smb”. Again, it appears that even if the 3<sup>rd</sup> defendant’s advocate had attended court, she would not have been ready to proceed with the hearing of the case in view of the amendments to the defence that have now been sought by the 3<sup>rd</sup> defendant. Furthermore, there is no explanation as to why the 3<sup>rd</sup> defendant did not attend court for the hearing even if the advocate was engaged.

In view of what I have stated above, I am not satisfied that the 3<sup>rd</sup> and 4<sup>th</sup> defendants have offered reasonable explanation as to why they did not attend court on 23<sup>rd</sup> March, 2017. I am therefore not inclined to set aside the ex parte proceedings of 23<sup>rd</sup> March, 2017. However, in the interest of justice, I would re-open the proceedings and re-call the plaintiffs witnesses who had testified on 23<sup>rd</sup> March, 2017 so that they may be cross-examined by the defendants’ advocates.

On the 3<sup>rd</sup> defendant’s application to amend the defence, Order 8 Rule 3(1) of the Civil Procedure Rules gives the court a discretionary power to grant leave to amend pleadings at any stage of the proceedings. The main issue for consideration in applications for amendment as stated in Central Kenya Limited v Trust Bank Limited (2000)2 EA 365 is whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the adverse party beyond compensation in costs. **The amendments sought to be introduced by the 3<sup>rd</sup> defendant seeks to introduce a counterclaim. The case is part heard and the plaintiff has closed its case. As I have mentioned above, I am not going to set aside the proceedings of 23<sup>rd</sup> March, 2017 so that the hearing of the suit starts afresh. In the circumstances, I am in agreement with the plaintiff that the plaintiff would be prejudiced if the application for amendment is allowed. I have noted that no reason has been given by the 3<sup>rd</sup> defendant why the application should not have been brought earlier. I am not inclined therefore to allow the 3<sup>rd</sup> defendant’s application for leave to amend the plaint.**

Conclusion:

In conclusion, I hereby make the following orders in the two applications before me:

1. The 4<sup>th</sup> defendant's application dated 19<sup>th</sup> April, 2017 is allowed in terms of prayer 3 thereof with costs to the plaintiff.
2. The 3<sup>rd</sup> defendant's application dated 12<sup>th</sup> May, 2017 is allowed to the extent that the plaintiff's case is re-opened and the plaintiff's witnesses, who testified on 23<sup>rd</sup> March, 2017 are recalled for cross-examination by the 3<sup>rd</sup> defendant's advocate.
3. The 3<sup>rd</sup> defendant's prayer for leave to amend the defence is refused.
4. The 3<sup>rd</sup> defendant shall pay to the plaintiff the costs of his application.

**Delivered and Dated at Nairobi this 1<sup>st</sup> day of November, 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Ms. Maina for the Plaintiff

No appearance for the 3<sup>rd</sup> Defendant

Mr. Mutinda h/b for Machira for the 4<sup>th</sup> Defendant

No appearance for the 5<sup>th</sup> Defendant

Catherine - Court Assistant