



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.795 OF 2015

(Formerly Civil case No. 48 of 2011)

SERANIA AKELO LALA.....PLAINTIFF

VERSUS

OKINYO GOMBA.....1ST DEFENDANT

SILIBIA OGADA IMBIRA.....2ND DEFENDANT

SAMWEL AKECH.....3RD DEFENDANT

RULING

1. Okinyo Gamba, the 1st Defendant, through M/S Kowinoh & Company Advocates filed the notice of motion dated 15th September 2016 seeking to have the order and proceedings of 7th September 2016 set aside. The application is based on two grounds on the notice of motion and supported by the affidavit sworn by Kowinoh Omondi, Advocate on the 15th September 2016.
2. The application is opposed by the Plaintiff through the replying affidavit sworn by Geoffrey O. Yogo, advocate on the 21st September 2016.
3. The application came up for hearing on the 18th October 2016 when Mr. Baganda for Lore for the 1st Defendant and Mr. Yogo for the Plaintiff made their oral rival submissions.
4. The court has considered the grounds on the notice of motion, the affidavit evidence by both sides and after perusing the court record come to the following findings;
 - a) That when this matter was called out on the morning of 7th September 2016, Mr. Yogo for the Plaintiff and Mr. Onyango for Kowinoh for the Defendant addressed the court and agreed to have the hearing of the Plaintiff's case commence at 10.45 a.m.
 - b) That the matter was called for hearing at 11.30 a.m. and Mr. Yogo for the Plaintiff was allowed to present the Plaintiff's evidence in the absence of Mr. Kowinoh advocate for the 1st Defendant who had not come nor sent a representative contrary to the earlier undertaking to be ready by 10:45 a.m.
 - c) That the counsel on record for the 1st Defendant is M/S Kowinoh & Co. Advocates vide their notice of appointment dated 10th December 2013 and filed in court on 23rd January 2014. That it

was therefore the responsibility of that firm to ensure a counsel was in court for the hearing at the time agreed. That it is therefore perturbing that when Mr. Yogo Advocate called Mr. Kowinoh advocate at 11.00 a.m, he reported that he was in his chambers and that his client had not contacted him.

d) That though the 1st Defendant may not have a reasonable explanation as to why their counsel were not in court at the time the hearing commenced and evidence of Plaintiff was taken, the court is of the view that the proceedings of 7th September 2016 should be set aside to allow the Defendants an opportunity to participate in the proceedings. This will ensure all parties participate in the hearing from the start instead of writing a judgment at this stage and having the Defendants move the court to have it set aside later on.

e) That the 1st Defendant counsel should however pay the court adjournment fee and the thrown away costs of the Plaintiff and his counsel before the next hearing date.

5. That the notice of motion dated 15th September 2016 is therefore allowed in the following terms;

a) That the exparte proceedings and order of 7th September 2016 are hereby set aside and the hearing to commence denovo.

b) That the 1st Defendant counsel do pay the Plaintiff and his counsel's thrown away costs assessed at Kshs.10,000/= (Ten thousand) within 30 (thirty) days.

c) That the 1st Defendant counsel do pay court adjournment fee before the next hearing date.

d) That a hearing date be fixed after the reading of this ruling.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 1ST DAY OF FEBRUARY 2017

In presence of;

Plaintiff Absent

Defendants Absent

Counsel M/S Kagoya for Yogo for Plaintiff/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

1/2/2017

1/2/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

M/S Kagoya for Yogo for Plaintiff/Respondent

Court: Ruling delivered in open court in present of M/s Kagoya for Yogo for the Plaintiff/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

1/2/2017