



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 65 OF 2011

JAMES PETER KINYUNGU MBANDI.....PLAINTIFF

VERSUS

NGUMBAO GODA & 72 OTHERS.....DEFENDANTS

RULING

1. Before me is an application dated 7th February 2017. The Plaintiff/Applicant is praying for orders, inter alia:-

(a) THAT the entire proceedings and orders made on 5th October 2016 be set aside.

(b) THAT the Suit herein be reinstated for full hearing and determination.

2. The Application is supported by the annexed affidavit of Silvester Maundu Mbandi sworn on the same 7th day of February 2017. The application is premised on a number of grounds, among them:-

(i) That the Plaintiff's Suit herein was dismissed by this Court without giving the Plaintiff an opportunity to participate in the proceedings herein.

(ii) That the dismissal of the Suit will occasion substantial and irreparable loss to the Plaintiff who has not been given a reasonable opportunity to be heard before being condemned.

(iii) That the failure by the Plaintiff and/or his witness herein to attend Court on 5th October 2016 was not intentional as the Plaintiff's main witness herein was set to attend a board meeting at Baobab Beach Hotel where he currently works as a General Manager, and the Defendants Advocates were duly informed that the Plaintiff's Advocates would apply for an adjournment.

(iv) That it is in the interest of justice that the dismissal orders in October 2016 be set aside and there be a stay of any further proceedings herein and the matter be considered in its full merits.

3. By a Replying Affidavit sworn by the Defendants Advocates Ms Faida K. Jadi on 2nd March 2016, the Defendants are opposed to the application and the grant of the orders sought. It is the Defendants' case that the Application is a non-starter brought in bad faith and aimed at wasting the Court's time.

4. The Defendants aver that the Plaintiff has never been serious in prosecuting the case and is always asking for adjournments. It is their case that indeed, on 4th October 2016, the Plaintiff's Advocate did

call her office and indicated that he would apply for an adjournment when the matter came up for hearing the following day on 5th October 2016. Counsel avers that she refused to consent to the adjournment request and informed the Plaintiff's Counsel that she would be opposing the application for adjournment. Accordingly on 5th October 2016, Counsel instructed Ms Ruto Advocate and informed her to proceed with the case and oppose the application for adjournment in the event that a request therefor is made and to proceed to a request for a hearing date for the Counterclaim.

5. It is further Counsel's case that the Defendants were present in Court when the matter came up for hearing of the Plaintiff's case and it is therefore not true as contended by the Plaintiffs that the Defendants had consented to the adjournment.

6. I have considered the application and the Affidavit in Reply. I have also considered the written submissions and the authorities filed herein by the Learned Advocates appearing for the parties. This is a very old case. The original plaint was filed herein on 8th June 2011 and it is therefore a matter which ought to have been dispensed with a long time back.

7. The power to set aside ex-parte orders is a discretionary one. As was held in **Patel –vs- EA Cargo Handling Services Ltd(1974) EA 75:-**

“There are no limits or restrictions on a Judge's discretion except that if he does vary the Judgment he does so on terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself or fetter the wide discretion given to it by the rules...”

8. In **Maina –vs- Muriuki(1984) KLR 407**, it was held that the discretion to set aside orders granted ex-parte is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The Court further held that where the common thread was that there were triable issues in a defence, it was in the interest of justice that a defendant be given an opportunity to defend the suit.

9. I have carefully considered the application and the record herein. In my considered view, both the Plaintiff and the counterclaim raise weighty issues that would ordinarily require a determination by the Court on merit. The Plaintiff's case is that they were not able to proceed with the hearing on 5th October 2016 as their witness was attending a Board Meeting at his work place. Why the Plaintiff considered attendance of a Company Meeting more crucial than attending a Court of law to proceed with a case of this magnitude was never properly explained to this Court.

10. I however take note that on 4th October 2016, Counsel for the Plaintiff called Ms Faida K. Jadi Advocate and communicated the fact that they would be applying for an adjournment on the hearing day. While Ms Jadi avers that she did not agree to the request for adjournment, the record herein appears to suggest a different scenario. The coram as recorded by the Honourable Angote J. then seized of the matter reads as follows:-

“Ms Ruto for Ms Jadi for Defendant (present)

Mr. Shujaa for Nyabicha for Plaintiff (present)

x x x

Mr. Shujaa: *I apply for adjournment. The Plaintiff's witness is attending a Conference in Diani. We ask for (an) adjournment.*

Ms Ruto: *Ms Jadi does not oppose the application for adjournment.*

x x x

11. It would accordingly appear to me as stated by the Applicant that having spoken a day before the hearing, the Advocates reached some understanding. This can be the only reason that the said Ms Ruto indicated that Counsel for the Defendant was not objecting to the request for an adjournment. As it were, no Affidavit was placed before me sworn by the said Ms Ruto to clarify the instructions she received from the Counsel for the Defendant/Respondent.

12. That being the case and given that the Defendant's counterclaim was not determined by the Orders of 5th October 2016, I think it is fair and proper that both parties be afforded an opportunity to canvass their respective cases on merit.

13. The suit in its entirety involves parties who both claim that a right to own property and to peaceful, exclusive and quiet enjoyment thereof has been infringed. It would therefore be proper for this court to afford each party an opportunity to present their case so that the Court makes a determination of all issues in controversy once and for all.

14. The upshot is that the application dated 7th February 2017 is allowed on condition that the Plaintiff shall proceed to fix the same for hearing and to prosecute his case within 90 days of the date hereof.

15. The cost of the application shall be in the cause.

Dated, signed and delivered at Malindi this 19th day of September, 2017.

J.O. OLOLA

JUDGE