



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.NO.201 OF 2017

CATHERINE NJERI ANGOTE

(Suing as the administrator of the Estate of

SAMUEL ANGOTE ABABU(DECEASED).....PLAINTIFF/RESPONDENT

-VERSUS-

LUCY WANGARI NGUGI.....1ST DEFENDANT/APPLICANT

JERRY WESTAGATE LIMITED.....2ND DEFENDANT/APPLICANT

RULING

The matter for determination herein is the *Notice of Motion* dated **7th July 2017**, brought by the Defendants/Applicants under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules 2010. The Applicants have sought for these orders:-

- 1) That this Honourable Court do review and/or set aside the orders of 20th and 21st June 2017 regarding the hearing of this case.***
- 2) That the ex-parte proceedings conducted herein on 21st June 2017 be and are hereby set aside and this suit be set down for hearing de novo and/or the Plaintiff be ordered to tender her evidence afresh.***
- 3) That this Honourable Court do issue any such further and appropriate orders in the circumstances of this matter as it deems fit.***
- 4) That the costs of this application be provided for.***

The application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit of Philip Nyachoti Advocate**. Basically, the grounds are:- that the matter proceeded for hearing ex-parte on **21st July 2017**, in the absence of the Advocate for the Defendants. That the said advocate, **Philip Nyachoti** who was in conduct of the matter fell ill and vide a letter dated **19th June 2017**, informed the Plaintiff's advocate of his illness. Further that the matter was scheduled for hearing for two consecutive days being **20th June 2017 and 21st June 2017**. However, on **20th June 2017**, **Mr. Kinuthia Advocate** held brief for **Mr. Nyachoti Advocate** and sought for adjournment. Further that the Court

allowed the adjournment on **20th June 2017** but directed **Mr. Kinuthia** who was not well versed with the case to prepare and attend court on **21st June 2017**, for hearing. That **Mr. Kinuthia** was not in a position to attend court for hearing on **21st June 2017**, as he had a prior matter for hearing at **High Court at Lodwar** being **Lodwar HC Criminal Case No.4 of 2017**. For that reason, there was no representation for the Defendants when the matter came up for hearing on **21st June 2017** and though the 1st Defendant applied for adjournment, her plea was rejected by the Court and matter proceeded for hearing without representation of the Defendants. That it is imperative that all the parties are heard fairly and be allowed to ventilate their positions exhaustively and thus this application. Further that no prejudice will be occasioned to the Plaintiff if the application for setting aside of the *ex parte* proceedings is allowed as Plaintiff may be compensated with costs. Therefore that it is fair and in the interest of justice and equity that the orders sought herein be granted.

The application is opposed by the Plaintiff who swore an affidavit on **26th July 2017** and confirmed that the matter indeed proceeded for hearing on **21st June 2017**, in the presence of the Defendants but absence of their advocates or representation from **Nyachoti & Co. Advocates**. Further that the Court had adjourned the matter on **20th June 2017**, but directed that the same proceed on **21st June 2017**. Therefore, the instant application is intended to delay the matter which has been pending since the year **2009**. Further that the matter has been adjourned severally at the instance of the Defendants. The Plaintiff urged the Court to disallow the application.

The parties canvassed the instant application by way of written submissions which this Court has carefully considered.

Though the Defendants/Applicants relied on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules in their submissions on the issue of review, the Court finds that the application herein is anchored under Sections 1A, 1B and 3A of the Civil Procedure Act.

Sections 1A and 1B of the Civil Procedure Act deal with the issue of overriding object of the Act which is to facilitate the **just, expeditious proportionate** and **affordable resolution** of disputes. Further, the Court has a duty to further the said overriding objective of this Act. The Court is called to further the said overriding objective by ensuring that disputes are determined in a just manner to all the parties, efficient and expeditious disposal of the matter and timely disposal of the proceedings. How does the Court ensure that the above objectives are achieved? The Court is supposed to manage its proceedings and ensure that parties are not given leeways to cause unnecessary delay in timely disposals of proceedings before it. Further that the proceedings of matter in court should be controlled and regulated by the Court but not the parties.

Further the application is anchored under Section 3A which gives the Court the inherent power to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of Court.

The Court has considered the court records herein and it is indeed correct that the Plaintiff herein filed this suit on **13th October 2009** and simultaneous to the Plaint, she filed a **Notice of Motion** application seeking injunctive orders against the Defendants. It is instructive to note that the Court ordered that status quo be maintained. The Court has noted that the matter has come for hearing of the main suit but has been adjourned at the instance of the Defendants on several occasions. On **13th March 2017**, the Plaintiff filed a **Notice of Motion** seeking to have the Defendants cited for contempt for defying existing status quo order.

On **29th March 2017**, when the matter came for hearing of the said contempt proceedings, the Plaintiff was represented by **Mr. Olewe** and the Defendants by **Mr. Kinuthia** for **Mr. Nyachoti**. **Mr. Olewe** consented to do away with the contempt application so that parties can concentrate on the main suit. **Mr. Kinuthia** was in agreement that the matter could be expedited. For that reason, the Court directed that the matter be set down for hearing by taking two consecutive days which was done on the same date in the presence of **Mr. Olewe** for the Plaintiff and **Mr. Kinuthia** for both Defendants.

However, the first date of the hearing being **20th June 2017**, **Mr. Kinuthia** who had all along appeared for the Defendants sought for adjournment on behalf of **Mr. Nyachoti** who was allegedly unwell. **Mr. Olewe** objected to the adjournment on the ground that the Plaintiff had done away with the contempt proceedings so as to expedite the matter. He also alleged that the Defendants were in continuous violation of the status quo order as they continued to put structures on the suit property.

The hearing date having been taken in the presence of **Mr. Kinuthia** for the Defendants and who had appeared previously for the same Defendants, the Court allowed adjournment on **20th June 2017**, but directed that the matter proceeds for hearing on **21st June 2017**, without fail as **Mr. Kinuthia** was previously in conduct of the matter. However, on **21st June 2017**, **Mr. Kinuthia** failed to turn up in Court without any explanation. There was no representation from the **Law Firm of Nyachoti & Co. Advocates** but the Defendants were present. Though the 1st Defendant sought for adjournment, the Court noted that the date had been taken in the presence of **Mr. Kinuthia** who had stayed away from court with no representation or explanation. The Court observed that court orders are not given in vain and directed the matter to proceed for hearing.

Consequently, the Plaintiff **Catherine Njeri Angote**, gave her evidence in chief. However, at the close of the Plaintiff's case, the 1st Defendant sought for adjournment to enable her prepare for cross-examination of the Plaintiff. The Court allowed adjournment and directed the Defendants to prepare for cross-examination on **20th July 2017**.

However, the Defendants filed the instant application instead. What is clear is that on **21st June 2017**, the matter did not proceed for hearing *ex parte* because the Defendants were indeed present in court. It is only the Defendants advocates who were absent in court.

Order 12 of the Civil Procedure Rules regulates the conduct of hearing of suit in court. Order 12 Rule 7 provides as follows:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.

On **21st June 2017**, the Court directed the matter to proceed in the presence of the Defendants though their advocate was not present. The Court was prompted to do so by taking into account that the matter had severally been adjourned at the instance of the Defendants. The Court had directed **Mr. Kinuthia** to prepare for hearing of the suit on **20th June 2017**. However, on **21st June 2017** the said **Mr. Kinuthia** failed to appear in court and/or even send a representative. On **20th June 2017**, **Mr. Kinuthia** never informed this Court that he would be in **Lodwar** for another matter.

It is not in doubt that granting of adjournments involves exercise of judicial discretion which must be exercised judicially. This Court exercised its discretion on **20th June 2017**, and allowed the adjournment as sought by the Defendants. However, given the history of the delay in this matter, the Court directed that the suit do proceed for hearing a **21st June 2017** without fail. However **Mr. Kinuthia** chose not to appear in Court or sent representation. The Court observed that courts order are not issued in vain and proceeded with the hearing. Given that the Court is behoved by the provisions of Sections 1A & 1B of the Civil Procedure Act, it had a duty to further the overriding objective of the Act which include **just** and **expeditious** determination of disputes before it. ‘Justice delayed is justice denied’. The Plaintiff has come to Court to seek for justice and had waited **since 2009** to have the matter commence for hearing.

The matter proceeded in the presence of the Defendants and so it cannot be said that the Plaintiff's evidence was taken *ex parte*. The parties had even complied with Order 11 of the Civil Procedure Rules and all the documents to be relied on were in possession of both the Plaintiff and Defendants Advocates. The Court is behoved by Section 3A of the Civil Procedure Act to make such orders that are necessary for the end of justice and to prevent abuse of court process.

Further, Order 12 Rule 7 grants the Court discretion to make such orders as it may deem fit in the circumstances of the case.

Given that the Defendants are in possession of the Plaintiff's witness statement and bundle of documents and given that no proper explanation has been given as to why **Mr. Kinuthia** failed to be in Court on **21st June 2017**, or why he did not send anyone to explain his absence, the Court finds that there is no good reason given as to why the proceedings of **21st June 2017** should be set aside.

However, for the interest of justice and being guided by Section 3A and Order 12 Rule 7 of the Civil Procedure Act and Rules, the Court finds that the proper order that commends herein is to recall of Plaintiff for cross-examination by the advocate for the Defendants.

Therefore having carefully considered the instant **Notice of Motion** dated **7th July 2017**, the Court finds it not merited and it is disallowed entirely with no orders as to costs.

The Defendants advocate is at liberty to cross-examine the

Plaintiff herein on the evidence available in the Court file. The matter to be set down for cross-examination of the Plaintiff on a mutually agreed date.

It is so ordered.

Dated, Signed and Delivered at Thika his **6th** day of **October 2017**.

L. GACHERU

JUDGE

6/10/2017

In the presence of

M/S Otieno holding brief for Mr. Olewe for Plaintiff/Respondent

M/S Momanyi holding brief for Mr. Nyachoti for 1st and 2nd Defendant/

Applicant

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

6/10/2017