REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 97 OF 2008

MARCELLUS LAZIMA CHEGGE.....PLAINTIFF

VERSUS

MARY MUTORO SIRENGO.....1ST DEFENDANT/RESPONDENT

JOEL JOB SIRENGO.....2ND DEFENDANT/RESPONDENT

PAUL ANDREW OKWARO.....INTERESTED PARTY/APPLICANT

THE LAND REGISTRAR

TRANS-NZOIA/TURKANA WEST POKOT.....PROPOSED RESPONDENT

R U L I N G

1. By an application dated 24/7/2017 the 2nd defendant sought the following orders:-

(1) That this application be certified urgent and service thereof be dispensed with in the first instance.

(2) That the Ruling entered on 27th June, 2017 before the Honourable Judge Mwangi Njoroge be reviewed, set aside/be varied.

(3) That there be a stay of execution of the orders issued by the learned judge in the aforestated Ruling.

(4) That the 2nd defendant be allowed to but in and file his written witness statement and list of documents

(5) That there be a stay of proceedings pending the hearing and determination of this application.

(6) That the costs of this application be in the cause.

2. The grounds upon which the application is brought are that : if the 1st and 2nd defendants are not allowed to adduce their best evidence pursuant to the law of evidence, which evidence includes witness statement from the 2nd defendant, they may lose their property; that the Ruling sought to be reviewed, set aside or varied is against the spirit of ***Article 50 of the Constitution*** and that it is in the interests of justice

that the 2nd defendant be given an opportunity to be heard pursuant to the rules of natural justice.

3. The application is supported by the affidavit of Kennedy Otieno Arum counsel for the applicants. In that affidavit it is averred that; the 2nd defendant is willing and has been diligent to defend this suit, and has a right to be heard on the merit and if the Ruling of the court is not reviewed the 1st and 2nd defendant's case would be prejudiced.

4. A second supporting affidavit sworn by Joel Job Sirengo is also attached to the application. In that affidavit the failure to put in a witness statement is attributed to a mistake on the part of counsel for the 1st and 2nd defendants. The deponent avers that he would only be relying on the documents produced by the 1st defendant. He also attaches a copy of the witness statement he intends to rely on in this suit.

5. In reply to the application the plaintiff filed a replying affidavit dated 29/8/2017. He urged that: no certified copy of the ruling was sought to be reviewed was annexed to the application; that the grounds set out in the application do not support the reliefs sought; that the applicant had before the hearing confirmed that he and his co-defendant had filed their list of documents and witness statement of the witnesses they desired to call; consequently the court gave a trial conference order to the effect that the suit was ready for hearing and that order bound all the parties in the suit; that on 27/6/2017 the applicant, while sitting through the proceedings in this suit, heard all the evidence adduced by the plaintiff and the 1st defendant; that this court was right in declining to grant the applicant his prayer that he be allowed to draw and file his written statement as doing so would have gravely prejudiced the plaintiff's case, that granting the current application is tantamount to re-opening the defendant's case, which will prejudice the plaintiff's case if new evidence is introduced in the matter where the plaintiff has already given his evidence yet he will not have an opportunity to challenge the new evidence and that allowing the application would be a waste of judicial time in view of the contents in the copy of 2nd defendant's statement exhibited in his affidavit supporting the application since the allegations made in that statement are similar to those made by the 1st plaintiff in her witness statement dated 11/5/2016.

6. Further the plaintiff has averred that the applicant has filed a Notice of Appeal against the Ruling delivered by this court hence this application is an abuse of the court process.

The broad issues that arises in the instant application are whether:

1. The Ruling of the court against the spirit of Article 50 of the Constitution of Kenya?

2. Would failure to grant the instant application prejudice the 1st and the 2nd defendant's defence to the suit?

(1) <u>Is the Ruling of the court against the spirit of Article 50 of the Constitution of Kenya?</u>

7. It is true that ***Article 50 of the Constitution of Kenya*** safeguards the right to a fair and public hearing of any dispute that can be resolved by application of the law. It is the position that the denial of the adjournment that was sought by the 2nd defendant on 27/6/2017 and the subsequent denial of leave to file the statement of the 2nd defendant will shut out the 2nd defendant from being heard by the court. However, does that fact *per se* translate into a violation of **Article 50** of the constitution?

8. In my view however, to arrive at the proper conclusion, the proper test to apply in this particular case is to inquire into the whether the 2nd defendant had been accorded a chance of being heard, and, if he never took that chance, whether there was any good reason provided as to why he omitted to take it.

9. A provision granting the right to be heard, even if contained in the Constitution of Kenya is no licence for negligence or misconduct on the part of any party to a suit.

10. In my view where a chance to be heard has been availed to the party, and out of his own unexplained

default he is finally locked out of the hearing, he cannot simply invoke Article 50 of the Constitution so as to reopen the proceedings.

11. A look at the relevant part of the history of this matter is important for the determination of the instant application. The suit herein was filed in the year 2004. On 20/4/2016, the plaintiff's advocate fixed the suit for hearing on 5/9/2016. When the matter came up on the latter date counsel for both parties appeared before the court. Counsel for the plaintiff informed court that parties had complied with ***Order 11 of the Civil Procedure Rules***. Counsel for the defendant never disputed this.

12. Consequently, the court ordered that the matter was ready for hearing and that the parties should take a date at the registry once the new diary was available. On 11/1/2016, the counsel for 1st and 2nd defendants fixed an application dated 9/11/2016 for hearing on 6/2/2016. On the latter date, the application had not been served and this court ordered that a hearing date for the application be taken in the registry. This activity showed that the defendants were still aware of the pendency of the suit. Any application to allow a further statement would have been filed then.

13. On 16/3/2017 the plaintiff's counsel fixed the main suit for hearing on 27/6/2017. On 27/6/2017 both the counsel for the parties stated categorically that they were ready to proceed with the hearing. The plaintiff closed his case and the defendants' counsel called one witness.

14. When **DW1** had testified the defendants' counsel applied for an adjournment to file a statement which, he stated, was inadvertently not filed by his legal firm. The application naturally was opposed by the plaintiff on the basis that parties had completed the process of preparing the suit for hearing in the year 2016 and a certificate had been issued that the suit was ripe for hearing.

15. At this point I must state that when parties confirm before a court of law that a suit is ready for hearing, it should not be mere idle talk. Parties should always be aware that confirmation of a matter as ready for hearing has the consequence of binding them to any order as to hearing on the basis of the documents and statements on the record at the time the order was made. Any other interpretation of the decision to confirm a matter for hearing would be a mockery of the justice process.

16. Confirmation of a suit as ready for hearing by any party may preclude with finality the possibility of allowing any admission of further evidence or material that was available to the party at the time of such confirmation if permitting that evidence or material would amount to an ambush of their adversary.

17. It may be true, as urged by counsel for the 1st and 2nd defendant at the time of the application for an adjournment and leave to file a statement of the 2nd defendant, that this court has the power to order re-trial. However, that option can only be exercised in a limited number of cases and in special circumstances attendant to each. Cases cannot remain in court forever. They are supposed to be determined within a reasonable time. This suit was filed in 2008. It has not been determined yet.

18. In ***Argan Wekesa Okumu -vs- Dima College Ltd & 2 Others 2015 eKLR, Mabeya J*** refers to the case of ***Venture Capital & Credit Ltd -vs- Consolidated Bank of Kenya Ltd 2006 eKLR*** where ***Ochieng J*** quoted from the case of ***Allen -vs- Sir Alfred Mc Alpine [1968 1 ALL ER 543*** as follows:-

> **"Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution:**
>
> **"The delay of justice is a denial of justice ……To no one will we deny or delay right or justice. Over the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain".**

19. A court should be fair to both parties in a case. Where the plaintiff has delayed in complying with **Order 11** and the defendant has brought an application or dismissal for prosecution the court is likely, depending on the circumstances to grant the defendant the orders if no reasonable explanation for the plaintiff's delay is given to the satisfaction of the court.

20. In one such case ***Moses Mwangi Kimani -vs- Shamimi Kanjirapparambil Thomas & 2 Others 2014 eKLR*** the Court (Gikonyo J) stated as follows:-

> **"The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgment-seat. It is, therefore, a matter of discretion by the court.**

21. In the ***Moses Mwangi Kimani*** the court allowed the application by the defendant for dismissal of the suit for want of prosecution.

22. The converse is the situation in this case. The plaintiff has prosecuted his case and the defendant appears to be dilly dallying, not sure whether to help end the proceedings.

23. If Courts take great exception to dilatory conduct on the part of a plaintiff, what of similar conduct on the part of the defendant as in the instant case? Should defendants who are in breach equally face sanctions for those breaches?

24. In this suit, the Ruling impugned by the defendants was delivered on 27/6/2017. The counsel for the defendants closed his clients' case on the same day. The court ordered the parties to file final submissions in the matter. The defendants counsel only filed the instant application on 25/7/2017 almost one month later. This was two days before the date on which a judgement date was to be issued.

25. The plaintiff had filed his final submissions on the matter when the matter came up for mention on 27/7/2017. The defendants' application thwarted, and appears to have been meant to thwart, the issuance of a judgement date in this suit and thus delay it further.

26. I find that in a case this old, the defendants should have been more diligent than demonstrated. When the parties were granted an adjournment on 5/9/2016, and a certificate that the suit was ripe for hearing, the defendant should have acted soon thereafter upon realizing that the statement of the 2nd defendant was not on the record, to regularize the situation. Instead the defendants went about pursuing matters relating to costs in this suit. It may be within their right but they forgot that the main suit was still pending. Consequently, the application made on the hearing date was too late.

27. The consequences of the lack of care with which the 2nd defendant has conducted his case should not be visited upon the plaintiff. **Order 11 Rule 8** binds the parties unless the court orders otherwise. And this court was not inclined to order otherwise on 27/6/2017 when it delivered the Ruling that is sought to be reviewed.

28. Rules are made for the purpose of providing a smooth mechanism for the disposal of suits before court. Whereas the compliance with rules is not an end in itself, any default on the party of a litigant that may occasion his adversary great prejudice needs to be dealt with judiciously by the court to ensure that an innocent party does not fall prey to mischief on the part of a crafty adversary.

29. In this case the 2nd defendant wishes to file a statement long after the plaintiff has closed his case. The plaintiff now cries foul and this court is able to decipher the ensuing delay as the reason for his great discomfiture at such a suggestion. It is situations like this one that the Civil Procedure Rules sought to avert by providing for certification that a matter is ripe for hearing. Having participated at the proceedings

at which the suit was certified as ready for hearing, the defendants cannot now be heard to say that the denial of an adjournment and the barring of the filing of a statement made by the 2nd defendant on 27/6/2017 could violate their rights under **Article 50** of the Constitution. They had their golden chance to put the records in order to their best interests but they squandered it. The Ruling of the court was therefore not against the spirit of Article 40 of the Constitution.

Would failure to grant the instant application prejudice the 1st and the 2nd defendant's defence to the suit?

30. The plaintiff is of the opinion that the denial of the orders sought herein would not prejudice the two defendants as in his view, the content of the statement made by the 1st defendant is largely replicated by the 2nd defendant in the draft exhibited in the application. The Court has perused the statements and found this may very well be the case. However the evidence of a witness is not complete till after cross examination, if any is sought by the adversary.

31. However it has been said that the omission to file the statement was a mistake on the part of the 2nd defendant's counsel. Where such blunders are committed by an advocate there may be some room to allow for their correction. In the case of ***Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [Eklr]*** where the applicant was said to have committed a "litany of blunders" the court stated as follows:-

> **"True Mr. M'Inoti has pointed out that so far the applicant has committed a "litany of blunders". For that reason he submitted I ought not exercise my discretion in favour of the applicant. He further urged that enough is enough and the applicant must bear the burden of his advocates' many blunders. Here I must bear in mind the fact that the applicant is not the architect of the "litany of blunders'. Do I punish him by dismissing the application?.....".**

32. The court in that case further observed as follows:

> **"If I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice in our courts. Whilst I do not condone errors on the part of counsel, I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearings of appeals take. He has no other forum to go to if he is shut out here".**

33. The decision above may have been made by the Court Of Appeal when the Supreme Court had not been created. However in the current case that situation does not apply. Nevertheless this court finds that it is better for the plaintiff to suffer a little inconvenience which can be compensated for by way of costs rather than let the 2nd defendant walk away from court with the feeling that he has been denied a hearing on the basis of a mistake on the part of his counsel. He may have other recourse for the redress of that mistake.

34. However the court looks farther than this. The granting of the application at hand will mean the rescheduling of the intended judgement in the case, and the setting down of the suit for the hearing of the 2nd defendant's evidence, and the application of more judicial time for the purpose of hearing of the 2nd defendant's evidence. It will mean that the time that could have been spent better hearing parties who were ready for their cases will be now spent on a party who has been negligent in the conduct of his case. This is improper and the 2nd defendant can not walk away without any sanctions.

35. Consequently I allow the application dated 24/7/2017 but with sanctions, to the extent that the ruling of 27th June 2017 is hereby reviewed, and that the 2nd defendant is allowed to file his statement late, and that this suit shall proceed to further hearing with that statement on the record and that the 2nd defendant shall however be liable to pay the plaintiff the sum of Ksh 30,000/= as costs for the inconvenience before the hearing of his evidence. Dated, signed and delivered at Kitale on this **23rd** day of **November, 2017.**

MWANGI NJOROGE

JUDGE

23/11/2017

Coram

Before - Mwangi Njoroge - Judge

Court Assistant - Isabellah

N/A for the parties

COURT

Ruling read in the absence of both parties.

MWANGI NJOROGE

JUDGE

23/11/2017