



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC CASE NO. 61 OF 2016

**FRANCIS MURITHI RUTERE (Suing as the administrator of the estate of
M'RUTERE M'MUNYAGE alias RUTERE MUNYUNGI)....PLAINTIFF/RESPONDENT**

VERSUS

JULIUS MUTWIRI NJUKI.....1ST DEFENDANT/APPLICANT

PHINEAS MUTWIRI.....2ND DEFENDANT/APPLICANT

RULING

1. The Notice of Motion dated 17th July 2017 seeks the following orders:-

i) Spent.

ii) THAT the Honourable court be pleased to review its orders of 29.5.2017 by reinstating the counter-claim herein filed on 29.5.2017 and admitting the defendants list of documents and witness statements in the interest of justice.

iii) The costs be in the cause.

2. The application is based on the following grounds:-

(a) THAT it is in the spirit of fairness and in the interest of justice this application is preferred.

(b) THAT the applicant needs to be granted a fair day in Court.

(c) THAT the rules of Natural Justice dictate that the applicant be given an opportunity to ventilate his case properly and fairly.

(d) THAT the applicant's non-compliance with Court orders is not deliberate and neither is it meant to delay the finalization of this matter but occasioned by circumstances beyond his control.

3. There is an affidavit of Julius Mutwiri Njuki, the applicant herein, where he explains that he fell ill and that is why he was unable to get in touch with his advocate in order to comply with Court's orders.

4. The Applicant has annexed treatment notes to buttress his averment.

5. The Respondent has opposed the application though his Replying Affidavit filed on 2.8.17. He avers

that the orders given on 24.4.17 were consent orders and that the Applicant did not comply with the same.

6. The Respondent also contends that even after the Court declined to accept the defence and counter-claim of the Applicants on 29.5.17, the Applicants went ahead to file their list of documents and statement of witnesses.

7. It is also contended by the Respondent that the Applicant was not sick.

8. Directions were given on 18.9.17 for the application to be argued by way of written submissions.

DETERMINATION

9. I have considered all the arguments raised herein and the respective submission. The only issue that this Court is considering is whether sufficient cause has been advanced by the Applicants as to why they failed to comply with the Court's orders of 24.4.17.

10. The reason given by the Applicant for not filing the documents pursuant to the Court's orders of 24.4.17 was because he was apparently sick.

11. My ruling of 20.2.17 aptly captures the history of this case with regard to the expeditious disposal of the case is concerned. The Court had ruled that the Defendant has not been vigilant in prosecuting his case. Even way back in 2009, the issue of the Defendant being given time to file an amended defence was being deliberated upon.

12. It is also noted that there are two Defendants, Julius and Phineas. So if Julius fell sick, what then happened to Phineas?

13. Despite the foregoing, I do find that as rightly submitted by the Applicant, this Court still retains the unfettered discretion to make such orders as it thinks fit as appertains to the application for review.

14. One of the cardinal principles of the **rules of Natural Justice** is the right to be heard. This principle is anchored under Article 50 (1) of the constitution:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”.

15. I note that after all these years defence side has finally filed their further Amended Statement of defence, after a litigation journey of 8 or so years. Defence has also filed all their documents and statements of witnesses. All these documents have been filed contrary to the orders given by the court on 24.4.17 and 29.5.17.

16. It would be rather harsh to now lock out defences' evidence after all these years. What I can say is that at least the Court's orders of 24.4.17 and 29.5.17 did jolt them (defence) into taking deliberate steps to have the suit heard.

17. I also note that defence have now engaged a different counsel.

18. Finally, I have taken into account the fact that when the Court was allowing defence to avail their pleadings and paginated documents on 24.4.17, plaintiff's case had already been closed on 20.2.17. The orders of 24.4.17 were more or less given by consent of the advocates of the parties. It therefore follows that this is not a situation where plaintiff's side are being ambushed, and or would be prejudiced.

19. In the final analysis, I allow the application of 17.7.17 on the following terms.

i) The orders of 29.5.17 are hereby reviewed such that the counter-claim filed on 29.5.17 and

defendants list of documents and witness statements are hereby admitted as part of the court's records.

ii) Defendants / Applicants are condemned to pay costs arising from and /or incidental to this application.

iii) A hearing date to be fixed in Court.

iv) The defence is notified that the case will not be adjourned at the instance of the defence.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT MERU THIS 9TH DAY OF NOVEMBER, 2017 IN THE PRESENCE OF:-

CA Janet/Haway

Miss Njenga for Defendant/Applicant

Kiago H/B for Carlpeters Mbaabu for Plaintiff /Respondent

HON. L. N. MBUGUA

ELC JUDGE