



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L NO. 998 OF 2012**

*(Formerly HCC 195 of 2012)*

**DAVID RANDICH.....PLAINTIFF**

**VS**

**JOEL TIROP BUSIENI.....DEFENDANT**

***(Application by defendant to have the plaintiff recalled and to be allowed to re-open his case; matter having proceeded ex-parte; date taken by consent when defendant was in court; no good reason given but court on own discretion allows application subject to payment of costs within a stipulated period or else the application will stand dismissed)***

**RULING**

The application before me is that dated 12 November 2013 filed by the defendant. It is an application brought pursuant to the provisions of Order 45 Rule 1 (a) (b) and Sections 3 and 3A of the Civil Procedure Act. The defendant wants this court to review its orders of 7 October 2013, in which I closed the hearing of this case, and to have the plaintiff's case re-opened. The application also asks that the plaintiff be recalled for cross-examination and to grant the defendant an opportunity to be heard.

The application is reliant on several grounds and is supported by the affidavit of the defendant. The application is opposed.

On 3 June 2013, a date for the hearing of this matter was given and the matter fixed for hearing on 7 October 2013. The date was taken by consent of both counsel for the plaintiff, Mr. Komen, and counsel for the defendant, Mr. Mbeja. On that day, the record reflects that the defendant was also present in court. On 7 October 2013, only the plaintiff and his counsel were present. Having been satisfied that the date was taken by consent, I allowed the plaintiff to proceed with the suit. The plaintiff testified and closed his case and in the absence of the defendant, I ordered the close of the defence case. I then fixed the matter for submissions on 13 November 2013. Previously, the defendant was being represented by the law firm of M/s Cheluget & Company Advocates. On 30 October 2013, a Notice of Change of Advocates was filed so that M/s Rotuk & Company Advocates, came on record in place of M/s Cheluget & Company Advocates.

Inter alia, the grounds upon which the application is founded, are that the defendant was not informed of the hearing date by counsel who held brief for Mr. Cheluget, then on record for the defendant. It is stated that Mr. Cheluget has since been appointed the Speaker of Nandi County. It is further stated that the defendant has a good case and deserves to be heard. Mr. Melly for the applicant entirely relied on the grounds and the supporting affidavit to urge the application. Mr. Choge for the plaintiff, on the other hand opposed the application.

I have considered the application and the rival submissions. Although Order 45 is cited, I do not see how this application can be considered to be an application for review. What the defendant wants is to be allowed a chance to ventilate his case, which I think, falls within the purview of Order 12 of the Civil Procedure Rules, which deals with consequences of non-attendance at a hearing. I will therefore treat this application as such.

The main reason given for the application is that the defendant was not made aware of the hearing date by his counsel. He has deponed in his supporting affidavit that he thought that the matter was scheduled for hearing on 7 December 2013, and not 7 October 2013.

I do not buy the reasons given by the defendant. He was in court when the date of 7 October 2013 was given. It is also not clear to me, why he filed this application on 12 November 2013 if as far as he was concerned, the matter was due on 7 December 2013. One would have expected this application to come after 7th December and not before, if that was the case. I have also looked at the calendar and 7 December 2013 falls on a Saturday. If he thought that this was the date given, simple due diligence would have shown that that is a date falling on a weekend, when courts do not ordinarily sit, and this ought to have provoked him to inquiry. I am not convinced about the reasons given by the defendant, and I am unable to allow this application on the grounds and reasons given by the defendant. Indeed, I do not think that this application is merited at all, and strictly, ought to be dismissed.

I however note that this matter involves land. In my discretion, and so that the defendant does not feel that he was shut out, I will allow this application, but subject to the defendant paying to the plaintiff through his counsel, costs which in my discretion I assess at Kshs. 20,000/= , before the lapse of 7 days from the date of this order. If the costs are not paid as scheduled, this application will stand dismissed.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF FEBRUARY 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Delivered in the presence of:***

***Mr. P.K. Komen present for the Plaintiff/respondent***

***Mr. E.K. Melly present for the defendant/applicant***