



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1031 OF 2000

GITHINJI HINGA.....APPLICANT

VERSUS

C.K GITAU T/A VENUS GENERAL MERCHANTS.....1ST DEFENDANT

OFFICIAL RECEIVER, CREDIT FINANCE LIMITED.....2ND DEFENDANT

JOHNSON KAGAI MUNYIRI.....3RD DEFENDANT

RULING

The application before court is dated 11th September, 2019 by the plaintiff/Applicant seeking the following orders;

- 1. That the applicant be given leave to act in person in this matter.**
- 2. That this Honourable Court be pleased to set aside the dismissal order of 28th April, 2017 and the suit be heard on merit.**
- 3. That the costs of this application be in the cause.**

The application is supported by an affidavit of Githinji Hinga sworn on 11th September, 2019. From the record, the plaintiff was represented by the firm of Kaai, Mugambi & Co. Advocates, the 1st and 2nd defendants appeared in person while the firm of Kingara & Co. Advocates are on record for the 3rd defendant herein. The 3rd defendant/Respondent through his advocate, Stanley Kingara, filed a replying affidavit dated 3rd August, 2020 indicating that the 3rd defendant had died and therefore could not respond to the application before court. There is no response from the 1st and 2nd defendants and from the court record, there is no evidence of service.

The application came up for hearing on 19th January, 2021 where the plaintiff/applicant sought to rely on his affidavit. The 3rd defendant/respondent was represented by Mr. Wangila who was holding brief for Mr. Kingara. There was no representation from the firm of Kaai, Mugambi & Co. Advocates. The 1st & 2nd defendants/respondent was also not represented in court.

The present suit was instituted on 4th July, 2000 on behalf of the plaintiff by the firm of Kaai, Mugambi & Co. Advocates against the defendants for seeking the following orders;

- i) Transfer of the piece of land known as GITHI/KIREREMA/692 in the name of the plaintiff.**
- ii) Costs of this suit**
- iii) Any other or further relief this Court may deem fit to grant.**

That the firm of Kingara & Co. Advocates entered appearance and filed defence on behalf of the 3rd defendant on 17th August, 2000 while the 1st defendant entered appearance on 10th August, 2000.

It is the plaintiff's/applicant's case that the proceedings in the suit were going on well until 2015 when the advocates on record became disinterested in the suit. The plaintiff/applicant avers that he made several follow ups with his advocate however he would be informed either that there were no dates at the court registry or that the court file was missing. It is the plaintiff/applicant's case that in 2016, he sought help at the Judiciary Service Desk after which he was advised to approach Kituo Cha Sheria for assistance where he was assigned a probono advocate.

It is the plaintiffs/applicants submission that the Notice to Show Cause was not served upon him or upon his advocate on record at the time. It is his submission that the process server indicated that the building hosting his advocate, Kaai, Mugambi & Co. Advocates, did not exist and therefore service was not effected.

Mr. Wangila on behalf of the 3rd defendant stated that he would rely on the replying affidavit of Stanley Kingara. He maintains that the suit against the 3rd defendant/respondent has abated as he had died on 19th June, 2019 as indicated in the death certificate attached. In reply, the plaintiff indicated that the death of the 3rd defendant was not within his knowledge and prayed that the Court reinstate his suit.

In my view, the issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the suit. It is within the court's discretion to set aside any order issued by it ex parte so long as sufficient cause has been shown by the applicant. *Order 12 Rule 7 of the Civil Procedure Rules, 2010* provides that;

7. 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.

Similarly, section 3A of the Civil Procedure Act, Cap 21 states;

3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Order 51 Rule 15 also gives the Court power to set aside an order made *ex parte*, however, the discretion to set aside should be exercised judicially so as not to assist a litigant who deliberately seeks to obstruct or delay the course of justice but should be exercised in order to avoid injustice occasioned by inadvertence or excusable mistake or error. This was the holding in the case of **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** where the court held that:

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

The application by the plaintiff/applicant is not opposed, the applicant has shown that he was not indolent and that he did make steps to ensure that the suit is prosecuted. It is evident that the that the court moved *suo motu* in issuing the Notice to Show Cause. The Notice was never served on him or the advocate on record and therefore there was no consent for the dismissal of this suit.

Accordingly, i would allow the application dated 11th September, 2019 for the reason it is the plaintiff who will be greatly prejudiced if he is not given his day in court, the court has not been shown how the other parties will be prejudiced by the reinstatement of this suit.

For the foregoing reason, the application dated 11th September, 2010 is allowed and the dismissal order of 28th April, 2017 is set aside and order that the suit be reinstated for hearing and determination on merits. This court has also taken into account that the claim herein is a land dispute and therefore the Environment and Law Court has jurisdiction over the same in line with the provision of **Article 162(2) (b)** of the **Constitution of Kenya, 2010** and **Section 13** of the **Environment and Land Court Act, 2011**. Subsequently, the suit is transferred to the Environment and Land Court for hearing and determination.

Dated and Signed at Nairobi this 25th day of February 2021.

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S. CHITEMBWE

JUDGE