



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NUMBER 429 OF 2012

NANCY WAIRIMU KARENJU.....PLAINTIFF

=VERSUS=

LUCIA KAMAU.....DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 27th June 2019 which seeks to set aside this court's orders of 18th March 2019 which dismissed the Defendant/Applicant's Notice of Motion dated 3rd July 2018. The suit herein was heard Ex-Parte and a Judgement delivered on 28th September 2017. The Applicant then filed Notice of Motion dated 3rd July 2018 which was slated for hearing on 18th March 2019. When the application of 3rd July 2018 came up for hearing, the Applicant's Advocate was not present. The Advocate for the Plaintiff/ Respondent applied for its dismissal. The court went ahead to dismiss the Applicant's application.
2. The Applicant's Advocate contends that on 18th March 2019, his clerk informed him that Judges at Milimani had gone for a retreat at Nyahururu and that therefore matters which had been listed for hearing would not proceed. The Advocate therefore did not attend court. The Advocate later learnt that it is only the High Court Judges who had gone for the retreat and the Environment and Land Court Judges were actually sitting and hearing matters.
3. The applicant's Advocate therefore argues that his non-appearance in court on 18th March 2019 was not deliberate. The Advocate explained that he took time to file the application for setting aside the orders of 18th March 2019 as he was sick and out of the office for some time. The averments by the Advocate have been confirmed by an affidavit sworn by his court clerk Edward Kihara.
4. The Applicant's application has been opposed by the Respondent based on grounds of opposition dated 15th June 2020. The Respondent contends that he Applicant has not given sufficient grounds to enable this court to exercise its discretion in her favour. The Respondent further contends that the Applicant is out to delay the jurisdiction of this matter.
5. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the oral submissions by the Advocates for the parties herein. The only issue for determination is whether the Applicant has shown sufficient reasons to warrant the court to exercise its discretion in her favour.
6. The grounds for the exercise of a court's discretion to set aside Ex-Parte orders or Judgement are that the court has to consider the reasons for non-attendance and if these reasons are excusable. The court has also to consider the delay in bringing the application and the general conduct of the Applicant in the proceedings and the prejudice if any which the Respondent will suffer.
7. In the instant case, there is no contention that High Court Judges had gone to Nyahururu for a retreat during the week when the applicant's application was dismissed. The Applicant's Advocate had been informed by his clerk that he had been informed that Judges at Milimani were away for a retreat. The Advocate saw no need of attending court if Judges were away. The Advocate asked his clerk to take other dates.
8. It is apparent that the information which the Advocate's clerk got was misleading as High Court Judges go for separate retreats and the courts of equal status of the High Court that is the Environment and Land Court and the Employment and Labour Relations Court too have their separate retreats which are held annually. It is only the Annual Judges colloquium which brings together all Judges of the Supreme Court, Court of Appeal, High Court, Environment & Land Court and Employment and Labour Relations Court.
9. It is therefore clear that the non-attendance of the Applicant's Advocate in court on 18th March 2019 was not deliberate. The failure to bring this application promptly has been explained. The Applicant's Advocate was away from the office on account of illness. This has not been contested. The Advocate's clerk has sworn an affidavit confirming the averments of the Advocate.

10. The Applicant had filed this suit in person but she later engaged an Advocate who was served with hearing notices but did not bother to inform the Applicant leading to the Ex-Parte Judgement which she seeks to set aside. From the affidavits annexed to the application which was dismissed, the Applicant has been in the disputed property for over three decades. It is important that she be heard on her application which the court will decide on whether the Ex-Parte judgement should be set aside. There will be no prejudice suffered by the Respondent if the Applicant is allowed to urge her application for setting aside the Ex-parte judgement.

11. I therefore allow the Applicant's application dated 27th June 2019 with the result that the orders of this court given on 18th March 2019 are hereby set aside. The Application dated 3rd July 2018 is hereby reinstated for hearing on merits. Costs shall be in the cause.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF MAY 2021.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

Mr Kerongo for Plaintiff/Respondent

Mr Kamata for Defendant/Applicant

Court Assistant: Okumu

E. O.OBAGA

JUDGE