



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 104 OF 2016

MILTON MWIMA WAFULA (Suing on behalf of

the Estate of Ezekiel Wafula).....PLAINTIFF/APPLICANT

= VERSUS =

SAMWEL KHADONDI.....DEFENDANT/RESPONDENT

R U L I N G

1. The Plaintiff/Applicant– **MILTON MWIMA WAFULA** – has moved the Court vide the Notice of Motion dated 24th October 2018 under Orders 40 and 51 of the Civil Procedure Rules 2010, sections 1A and 3A of the Civil Procedure Act and all other enabling provisions of the law praying the Court to review and vacate its orders of 24th October 2018 whereby the suit was dismissed for non-attendance on the part of the Plaintiff.

2. The Application is supported by the Affidavit of the Plaintiff’s counsel, **BEN MUNYASYA**, Advocate. He depones that having personal conduct of the suit on behalf of the Plaintiff, he was aware that the case was scheduled for hearing of the main suit on 24th October 2018. However, he was unable to attend Court as he was unwell. He implores the Court not to punish the innocent litigant for his advocate’s mistakes in as much as the decision to dismiss the suit was sound. Counsel for the Applicant further states that he is in the process of verifying the Title to the suit property availed by the Respondent and that an interested third Party wishes to be enjoined to the suit to aid the Applicant’s case. He contends that the suit concerning a boundary dispute raises substantive issues of law that should be determined on merit.

3. The Application is opposed vide the Replying Affidavit sworn by Counsel for the Defendant - **GABRIEL FWAYA**. He states that no explanation has been rendered concerning the absence of the Plaintiff on the aforementioned hearing date. He contends that the Plaintiff has never been keen on prosecuting his case and that the Application lacks merit, is intended to mislead the Court and is an abuse of Court process.

4. Parties canvassed the Application by way of written submissions. The Applicant’s submissions were filed on 17th December 2018. Counsel for the Plaintiff mainly reshaped the averments in his Affidavit. He also introduced extraneous issues such as the intended joinder of a relative of the Plaintiff’s to counter the Defence’s Title Deed. On the issue of non-attendance and the discretion of the Court to review the orders dismissing the suit he quotes Apaloo JA in an uncited decision presumably **Phillip Chemowolo & Another Vs Augustine Kubado (1982-88) KAR 103** whereby the Court held as follows:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

5. The Defendant’s submissions were filed on 27th November 2018. Counsel for the Defendant took issue with the Plaintiff’s counsel’s reason for his absence in Court on 24th October 2018. As per his sick-off form marked as annexure BM1 to his supporting affidavit, he was to be off for 21 days from 16th October 2018 to 6th November 2018. Regardless of his illness the Plaintiff’s advocate drew the present Application, swore the supporting affidavit in Busia and had it filed yet he was to appear in Court the same day. The Defendant’s Counsel concluded that the farfetched sequence of events presented by the Plaintiff’s Advocate were false and intended to mislead the Court. He prayed that the Application be dismissed with costs.

6. I have considered the Application, the response made, the parties’ respective submissions and the applicable law. The Court has to be guided by the Court record on the events leading up to this point. On numerous occasions, the Defendant has fixed the matter for pre-trial

conference. Twice over, on 8th March 2017 and 5th April 2017, the Plaintiff's counsel sought and was granted extensions to comply with Pre-trial directions. He stated that he needed to obtain a copy of a judgment pertaining to another suit pertaining to his client's case. The matter was scheduled for hearing on 13th February 2018. The Plaintiff was absent and Counsel for the Defendant took another date, 28th May 2018 and undertook to serve the Plaintiff. On the said date, a Mr. Makokha held brief for Mr. Munyasia, counsel for the Plaintiff. He sought an adjournment which was marked as the final adjournment to obtain the same document mentioned on 5th April 2017; reproduced verbatim as follows:

“Give us time to seek past judgment in past cases, the matter could be *res judicata*”

7. On 24th October 2018, a Mr. Jumba held brief for Mr. Munyasia for the Plaintiff. He informed the Court that Counsel for the Plaintiff was unwell and sought time to enjoin another party. The same was opposed by Counsel for the Defendant who pointed out that the adjournment of 28th May 2018 was marked as the last adjournment. In dismissing the suit, the Court noted that the Plaintiff has been giving numerous excuses preventing the case from proceeding.

8. It is evident from the record that the Plaintiff instituted the case while ill prepared. His documents were insufficient and he sought numerous extensions to seek them. Counsel's pronouncement on 28th May 2018 that the judgment sought may render the matter *res judicata* put the case in limbo. On 24th October 2018, the Plaintiff's Counsel threw a spanner in the works by bringing in the issue of joinder. With regard to his illness that caused him to fail to attend Court on the said date, I cannot comprehend how Counsel failed to attend Court in the morning due to illness then managed to draft and file an Application to reinstate the case on the same date at Busia on the strength of a sick-off form from a facility in Donholm Nairobi recommending 21 days off-duty. Counsel for the Plaintiff did not commit a “blunder” but by his conduct handled his client's case casually culminating in a waste of the Court's time.

9. In this matter it is the actions of the Plaintiff and/or his counsel that will inform the decision of the Court. There is a maxim of law that goes as follows: **FACTA SUNT POTENTIORA VERBIS**, meaning: Deeds are more powerful than words. The conduct of both the Plaintiff and his counsel in the suit negates the averments made in the application. Both had gone to sleep and are only belatedly waking up because of the dismissal they are now challenging. This Court refuses to buy their arguments.

10. The Application also falls short for want of form. It is filed under Order 40 rules 1 (a) and (b) of the Civil Procedure Rules 2010 that provides for injunctive orders as opposed to Order 12 rule 7. The Applicant has prayed for priority hearing of the case on its merits despite being accorded numerous opportunities for the same, mostly at the behest of the Defendant. Justice cuts both ways. It is also not lost on me that the Applicant himself has not sworn an affidavit demonstrating his interest in the case yet as the litigant he is the party that stands to be affected by these orders.

11. The upshot of the foregoing is that the Notice of Motion Application dated 24th October 2018 is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Busia this 27th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Applicant: Absent

Defendant/Respondent: Present

Counsel of the Plaintiff: Absent

Counsel of the Defendant: Present

Court Assistant: Nelson Odame