



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.70 OF 2016

**FERDINAND KIBANANI MATUMBAI (Suing on behalf of the estate of
ZEBEDAYO KIBANANI CHEBUKATI).....PLAINTIFF/APPLICANT**

VERSUS

RACHAEL NANJALA KUBENDE.....1ST DEFENDANT/RESPONDENT

NAOMI KILISWA.....2ND DEFENDANT/RESPONDENT

RULING

When this suit came up for hearing on 27th February 2018, there was no appearance by either the plaintiff or his Counsel **Ms. LUNANI** and on the application by Counsel for the defendant **Mr. KITUYI**, the plaintiff's suit was dismissed with costs.

I now have before me the plaintiff's Notice of Motion dated 19th March 2018 seeking the setting aside of the dismissal order and reinstatement of the suit.

The application is premised on the grounds set out therein and supported by the affidavit of **VIOLET ANYANGO LUNANI** Counsel for the Plaintiff. The gist of the application is that although Counsel was aware that the suit was listed for hearing on 27th February 2018, his clerk inadvertently diarized the date as 27th March 2018 and she only became aware about the dismissal of the case when a colleague notified her. She describes the error as excusable.

The application is opposed and the 1st defendant has filed a replying affidavit to the effect that the plaintiff was fully aware that the suit was coming up for hearing on 27th February 2018 and the excuse that the hearing date was not diarized does not add up. She depones further, which is not relevant to this application, that the plaintiff has no cause of action having sold the land in dispute to third parties who in turn sold it to the defendants.

The parties agreed that the application be canvassed by way of their respective affidavits.

I have considered the application and the rival affidavits. It is clear from the supporting affidavit of **MS. VIOLET ANYANGO LUNANI** that the failure by both her and the plaintiff was due to the fact that the hearing date was inadvertently diarized as 27th February 2018. Annexed to that affidavit are copies of the Counsel's diary showing that indeed this suit was diarized for 27th March 2018 and not 27th February 2018. I have no doubt that this was an excusable. I mistake by Counsel which should not be visited on the plaintiff. As **MADAN JA** (as he then was) stated in the case of **MURAI V WAINAINA (No.4) 1982 KLR 38** at page 47:

“A mistake is a mistake. It is not less a mistake because it is any unfortunate step. It is no less pardonable because it is committed by a senior Counsel though in the case of a junior Counsel the Court might feel compassionate more-readily. A blunder on a point of Law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better”.

The paths that Courts have taken in this Country in circumstances such as the one obtaining in this case is that litigants should not suffer due to the mistakes of their Counsel and the main concern of the Courts should be to do justice to the parties. **Order 12 Rule 7 of the Civil Procedure Rules** which has been cited by the plaintiff reads as follows:-

“Where under this order judgement has been entered or the suit has been dismissed, the Court, by application, may set aside or vary the judgement or order upon such terms as may be just”

The Court therefore has a wide discretion in setting aside *ex-parte* Orders but in so doing, will consider;

a. Explanation for non-attendance

b. If there has been any un-reasonable delay which has not been satisfactorily explained.

c. Any prejudice that will be caused to the other side.

In the circumstances of this case, the suit having been dismissed on 27th February 2018, this application was filed on 19th March 2018. It was therefore filed without un-reasonable delay. The explanation for non-attendance by the plaintiff and his Counsel was due to the mistake by Counsel which this Court finds to have been satisfactorily explained. No prejudice will be caused to the defendant and nothing has been placed before this Court in that regard. This is a relatively new matter by our standards having only been filed in 2016.

In the circumstances, the plaintiff's Notice of Motion dated 19th March 2018 is hereby allowed. The plaintiff will however meet the defendant's costs of this application.

Before I end, I notice from the agreement annexed to the 1st defendant's replying affidavit that the land in dispute was purchased at a consideration of Ksh.254,000. I intend to make orders transferring this suit to the subordinate Court unless good cause is shown by the parties why I should not do so.

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018

Ruling dated, delivered and signed in open Court this 18th day of October 2018 at Bungoma.

Mr. Amani for Ms. Lunani for the Applicant present

Mr. Onyando for Mr. Kituyi for Respondent present

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018

MR. ONYANDO: The suit can be transferred to the subordinate Court.

MR. AMANI: No objection to the transfer.

COURT: This suit is hereby transferred to the subordinate Court at Kimilili for mention on 1st November 2018 to fix a hearing date.

BOAZ N. OLAO

JUDGE

18TH OCTOBER 2018