



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CIVIL CASE NO 10 OF 2018

JOEL ZAKAYO NCHOE.....PLAINTIFF

VERSUS

MUTERIAN OLE LANKE.....1ST DEFENDANT

EQUITY BANK [K] LTD.....2ND DEFENDANT

SANJOMU AUCTIONEERS.....3RD DEFENDANT

LEPEREN LENOLPASIRPIA.....4TH DEFENDANT

RULING

1. The plaintiff through his notice of motion dated 28th November 2018 filed pursuant to the provisions sections 1A (1), (2), 3A of the Civil Procedure Act (Cap 21) Laws of Kenya and article 159 (2), (d) of the 2010 Constitution of Kenya, seeks the vacation of this court's orders of 14th November 2018 that dismissed the notice of motion application dated 14th September 2018 and to reinstate the same for hearing and determination on its merits.

2. The application is supported by four grounds that are set out on the face of the notice of motion. The major grounds are as follows. The applicant has stated that Mr. Jaoko Alexander was unwell. As a result, his colleague, Mr. Nchoe, engaged Mr. Mungania (advocate) to handle the matter. Mr. Mungania arrived late in court, by which time the application had been dismissed for non-attendance. Additionally, the plaintiff has stated that he sought a temporary of injunction to stop the selling, leasing or charging of land reference No. Cis-mara/Oleleshwa 68, pending the hearing and determination inter-parties of the main suit. Finally, the applicant states that he risks losing Shs. 31,500,000/=

3. Counsel for the applicant has deponed to a 7 paragraphs affidavit in support of the application. Counsel has replicated in the affidavit the same matters that are set out on the face of the notice of motion. It not necessary to repeat them again.

4. The defendant has filed a 15 paragraphs replying affidavit in opposition to the application. He has deponed to the following matters. He has deponed that the dismissed application was set down for hearing on 14th November 2018. When the application was called for hearing, both the plaintiff and his counsel were not present in court. As a result, the application was dismissed. He has averred that the plaintiff remained silent until 28th November 2018, when he filed the instant application. He has further averred that the plaintiff '*has nothing to loose (sic) that cannot be compensated monetarily a fact which he is aware of.*'

5. I have considered the affidavit evidence of the parties in the light of the applicable law. As a result, I find the following to be the issues for determination.

1. Whether or not the orders of this court of 14th November 2018 should be vacated
2. Who bears the costs of this application?

Issue 1

6. I have considered the affidavit evidence of both parties. As a result, I find that the applicant's counsel was unwell on the material date. As a result, his colleague Mr. Nchoe engaged Mr. Mungania to handle the matter. I also find that Mr. Mungania arrived late in court, by which time the application had been dismissed for non-appearance. In the circumstances, I find that the applicant has shown good cause for the reinstatement of the application.

Issue 2

7. As regards costs I find that costs will be costs in cause.

8. The upshot of the foregoing is that the application is hereby allowed with costs to be costs in cause.

Ruling delivered in open court this 20th day of December, 2018 in the presence of Mr. Nchoe for appellant and Mr. Ombati for 1st defendant and in the absence of the 2nd and 3rd defendants.

J. M. BWONWONGA

JUDGE

20. 12. 2018