



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. APPLICATION NO. 9 OF 2017

NELLY WAITHERA MUHIAAPPLICANT

VERSUS

AUGUSTUS MWANZIA MUSE

MUIMI MUSEE (suing as the administrators of the estate of

MARGARET MWENDE MUSEE – (deceased).....RESPONDENTS

RULING OF THE COURT

1. The Applicant has filed a Notice of Motion dated 14/02/2017 seeking for the following prayers:-

(a) That the orders made on 13/02/2017 dismissing the Applicant's Notice of Motion dated 24/1/2017 for lack of appearance and want of prosecution be set aside and the Applicants' dismissed Application be reinstated for hearing and determination.

(b) That there be stay of execution of court's judgment and decree in Kithimani PMCC No. 185 of 2015 pending the determination of this Application as well as the Application dated 24/1/2017.

(c) That costs be in the cause.

2. The Application is supported by an annexed affidavit of **Jackson Muia** sworn on even date and further on the following grounds:-

(a) That the Applicant's Application dated 24/1/2017 had been inadvertently been diarized by counsel for the applicant to be for hearing on 13/03/2017 instead of 13/02/2017.

(b) That when the matter was called out on 13/02/2017, there was no appearance from the Applicant.

(c) That the failure by the applicants advocate to attend the hearing on 13/02/2017 was neither intentional nor deliberate but the same had been occasioned by the fact that the applicants advocate never knew the matter was scheduled for hearing on that day since it had not been adequately diarized.

(d) That the Application has been brought without undue delay.

(e) That the Applicant stands to suffer irreparable loss, harm and great injustice if the Application dated 24/1/2017 is not reinstated.

3. The Application is opposed by the Respondents who raised the following grounds of objection:-

(a) That the Applicant is not interested in prosecuting his application but only out to delay the Respondent's from enjoying the fruits of the judgment.

(b) The Applicants are the ones who had moved the court and should have been vigilant and their mistakes should not be visited upon the Respondent.

(c) There is absolutely no basis to reinstate the dismissed Application as Applicants were aware of the hearing and further this court should ensure that litigation should come to an end.

4. Parties filed submissions. It was submitted for the Applicant that this court do reinstate the dismissed application so as to enable the Applicant pursue an appeal against the judgement of the lower court. It was also submitted for the Applicant that an order of stay of execution is merited in order not to render the eventual appeal nugatory. It was further submitted for the Applicant that there had been some inadvertent mistake on the part of Counsel for the Applicant which is regretted and this court is now called upon to consider and reinstate the dismissed application in the interest of justice so as to enable the applicant proceed with the intended appeal. Counsel for the Applicant relied on the following authorities:-

(1) *PORTREITZ MATERNITY =VS= JAMES KARANGA KABIA C.A. NO. 63 OF 1997.*

(2) *BRANCO ARABE ESPANOL =VS= BANK OF UGANDA [1999] 2 EA 22.*

(3) *PHILIP CHEMSWOLO & ANOTHER= VS= AUGUSTINE KUBENDE [1986] KLR 492*

(4) *KATSURI =VS= NYERI WHOLESALERS LTD [2014] eKLR*

(5) *LUCY BOSIRE =VS= KENHACHA LAND DISPTUES TRIBUNAL & W OTHERS [2013] eKLR.*

5. It was submitted for the Respondent that the Applicant is not keen in prosecuting the application and the intended appeal and therefore is undeserving of the orders being sought. Counsel further pointed out that the Applicant has since made a payment of Kshs.500,000/= towards satisfying the claim and hence the Application and intended Appeal is mischievous. It was further submitted for the Respondent that the Respondents stand to suffer prejudice as they shall be kept away from accessing the fruits of the judgment.

The following cases were relied upon:-

(1) *PATEL =VS= E.A CARGO HANDLING SERVICES [1974] EA 75.*

(2) *EQUITY BANK =VS= WEST LINK MBO LTD C.A. NO. 78 OF 2011*

(3) *SHAH =VS= MBOGO [1967] EA 116.*

(4) *KENYA SHELL LTD =VS= KIBIRU [1986] KLR*

(5) *JOSEPHAT MUTHUI =VS= EZETEC LTD - INDUSTRIAL COURT OF KENYA AT NAIROBI*

6. I have considered the Applicant's Application dated 14/02/2017 as well as the rival affidavits. I have also considered the cited authorities. The issue for determination is whether the Applicant has given plausible reasons to warrant an order of reinstating the dismissed application dated 24/1/2017.

7. The Applicant has stated that the failure to attend court on the 13/2/2017 was not intentional since their

advocates had inadvertently diarized the matter for a different date. Indeed the Application is supported by the affidavit of the Advocate who explained the debacle. Indeed mistakes and blunders are part and parcel of human life and have to be appreciated. I am satisfied by the explanation given on behalf of the Applicant. The record reveals that immediately the Application was dismissed for non-attendance, the Applicant's moved to court the following day i.e. the 14/02/2017 and filed the present application which I find was made without undue delay. The Applicants have indicated that they are interested in prosecuting their Application dated 24/1/2017 to conclusion. On the other hand the Respondent seems to feel that the Applicants are dragging their feet in lodging the Appeal and thereby denying them the right to access the fruits of the judgement. This court must balance the interests of both the Applicants and Respondents so as to ensure none of them are prejudiced in any way. Indeed all the authorities cited herein give guidelines on how this balancing act has to be undertaken. I am guided by the said authorities save to add that it is sacrosanct to allow parties to a suit to have their day in court without undue hindrance. A perusal of the pleadings and documents herein confirm that the parties had been communicating with a view to settlement of the matter albeit on a without prejudice basis. In fact the counsel for the Respondent has confirmed in their submissions that the Respondents has since received a sum of Kshs.500,000/= from the Applicants towards the settlement of the decretal sums. That then denotes that the parties had been dealing with each other on the basis of utmost good faith as they sought to reach a settlement but it now seems they finally failed to reach an amicable settlement and hence the Applications by the Applicant. The Applicant should be given an opportunity to ventilate her case. The Respondent already has received a substantial sum of the decretal sums and therefore is not prejudiced in any way while the matter is canvassed before the court.

8. In the result, it is the finding of this court that the Applicant's Application dated 14/02/2017 is merited. The same is allowed in terms of prayers 3 and 4. The costs of this Application shall be to the Respondent.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **24th** day of **JULY**, 2017.

D. K. KEMEI

JUDGE

In the presence of:

C/A: Kituva