



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC CASE NO.48 OF 2012(OS)

SUNDIATA NATHAN MUTENDE.....PLAINTIFF

VERSUS

WILLY MWOLOLO MUINDIDEFENDANT

R U L I N G

1. In a **Motion** dated **23.5.2013** filed on 23.5.2013 the Plaintiff/Applicant seeks orders of injunction against the Respondent in respect of **Machakos/Konza North Block 1/244 and 1/243** and also seeks enlargement of time within which undertaking as to damages amounting to KShs.700,000/- may be executed in line with the ruling of 28.9.2012.
2. The Application is based on order 40 Rules 1, 2, and 3, Order 50 Rule 6 Civil Procedure Rules 2010. Section 1A, 1B, 3A 63 (e) Civil Procedure Rules. The Motion is based on the grounds on the face of the Motion and supported by the Affidavit of Sundiata Nathan Mutende sworn on 23.5.2013. The Motion is opposed by the Respondent who has filed grounds of opposition dated 17.6.2013. Both sides have filed submissions to canvass the Motion.
3. The Applicant's case is that by a Motion dated 23.5.2013 the Plaintiff sought temporary orders of injunction which was granted on 28.9.2012 on condition that an undertaking was executed for KShs.700,000/- within 21 days. The aforesaid condition was not fulfilled as the Applicant aver that the advocate for the Applicant only communicated that application was granted but never indicate that the condition aforesaid was attached to the grant. The Applicant depones that it was only on 21.5.2013 that he realized there was a problem when the district surveyor proposed to go to the suit premises. On enquiry from his advocate, he realized that she had already become a judicial officer and that necessitated the change of advocates.
4. The Applicant attributes the omission on the part of his advocates and thus prays that same fault should not be visited on him. He seeks for the prayers the Respondent opposes the application as the grounds that same is being brought too late in the day as the injunction granted lapsed on 18.10.2012 (8 months ago). Further the Respondent avers that the application is Res judicata and thus offends Section 7 of Civil Procedure Act as it seeks injunction which had been granted that has lapsed.
5. Further as to the extension of time of executing the undertaking, the Respondent contend that the same cannot be available as same is being sought long after lapse of time granted to execute the same. Also the Respondent state that whereas the application seeks reliefs in relation to parcel No.1/244 and 1/243 the

OS does not seek injunction to the same effect nor does the main suit seek any relief in respect of 1/243. In his submissions the applicant relies on the case of **Civil Appeal Application 287/06 MSA, MASUDI MWABUMBA VS. ALICE MUTUNGA & OTHERS** where the court held:

“this application was brought 2 years and 8 months after the appeal abated. The explanation tendered is that the advocate failed to take steps because he did not have dates. Although no reason has been given for advocate’s failure, his failure or mistakes cannot be attributed to the applicant”.

The Applicant submit that since the advocate did not inform him about the requisite undertaking, the failure was on the advocate’s side and should not be attributed to the Applicant.

6. The advocate had become a judicial officer and thus the Applicant had to instruct another advocate. The Respondent relies on **ONGERI & ANOTHER VS. KYENZE (2009) EA** holding that;

“It is not all mistakes by an advocate which will avail the client. Where in action by advocate after instructions are given to them has never qualified as an excusable mistake and the remedy of the client is with the advocate”.

He submits that not only that application is *res judicata* but also that the mistake is in excusable.

7. I have gone through the affidavits, grounds of opposition and the submissions. The court finds that there is no explanation as to why the Applicant or the advocates or both never attended court on 28.9.2012 during the ruling. The court notes that usually, during the rulings of the applications, the advocates attends without party and/or sends an advocate to hold brief. It seems the advocate got information as to the result in bits as the aspect of the undertaking was not communicated. The court finds that in terms of Cap 21, the prayer No.2 of motion dated 23.5.2013 is *res judicata*.

8. However, in view of the application narrated by the applicant, the court is prepared to give a benefit of doubt to the Applicant and exercise discretion under section 13 (7) of the ELC Act, Section 1A, 1B and 3A Cap 21 to make the following orders:

1. The injunction issued on 28.9.2012 is reinstated on condition that the undertaking for KShs.700,000/- is executed within 30 days.
2. The Applicant shall pay to the Respondent KShs.10,000/- in costs within 30 days.

Signed and Delivered at Machakos this 30th day of January, 2015.

CHARLES KARIUKI

JUDGE