



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 173 OF 2019

JOEL RADUMA RAMOGO.....1ST PLAINTIFF

MARY ATIENO ONDORO.....2ND PLAINTIFF

VERSUS

INTEGRITY HOLDINGS LIMITED DEFENDANT

RULING

1. On or about 21/5/2021, the defendant brought a notice of motion dated 11/5/2021, seeking, among other reliefs, an order reviewing and/or setting aside the orders issued by this court on 15/4/2021. The import of the order of 15/4/2021 is that this court restrained the defendant against continuing any works of building and/or construction on Land Parcel Number **Dagoretti/Kinoo/5214**, pending the hearing and determination of this suit. When the said application dated 11/5/2021 came up for hearing before Gacheru J, there was no attendance on part of the plaintiff. Consequently, the application was dismissed and parties were directed to comply with pre-trial requirements. Subsequently, the defendant brought a notice of motion dated 21/10/2021, seeking an order reinstating the dismissed application dated 11/5/2021. The said application dated 21/10/2021 is the subject of this ruling.

2. The application was supported by the affidavit of **Charles Kuria**, a director of the defendant, sworn on 21/10/2021. He deposed that the dismissed application was initially scheduled for hearing on 16/6/2021 but on that day their advocate was unable to log into the virtual court. He added that counsel for the plaintiff did not thereafter notify them about the subsequent hearing date. He further deposed that on the morning of 27/7/2021, counsel for the plaintiff emailed to their advocate a replying affidavit sworn on 10/7/2021 but did not notify them about the hearing which was scheduled for the same day. He added that later the same day, the plaintiff's advocate served their advocates with a pre-trial notice, indicating that the matter was scheduled for pre-trial on 20/9/2021. It was his case that their advocate learnt about the dismissal order when he attended the pre-trial on 20/9/2021.

3. The plaintiffs opposed the application through grounds of opposition dated 27/10/2021, in which they contended that the application: (i) was bad in law and an abuse of the process of the court; (ii) was frivolous and vexatious; (iii) was intended to delay justice and waste time; (iv) was disguised when in fact it was an application for review of a decision against a review application; (v) lacked merit and was made in bad faith.

4. The application was canvassed through written submission dated 31/5/2022. The plaintiffs filed written submissions dated 5/1/2022 opposing the application.

5. The court has considered the application, the grounds of opposition and the parties' respective written submissions. The court has also considered the relevant legal framework and jurisprudence. The key question to be answered in the application is whether there is merit in the plea for an order reinstating the application dated 11/5/2021.

6. The plaintiffs elected not to file a replying affidavit. They instead opted to file grounds of opposition. Consequently, the depositions in the supporting affidavit sworn by Charles Kuria are uncontroverted. Secondly, I have looked at the coram and proceedings of 16/6/2021. There was attendance by Mr Kirimi for the plaintiffs but there was no attendance on part of the defendant. On that day, Mr Kirimi requested for 14 days within which to file a replying affidavit to the application. He was granted the 14 days. The court fixed the application for interpartes hearing on 27/7/2021 and directed Mr Kirimi to serve the applicant/defendant with a hearing notice. There is no evidence that the applicant was subsequently served with a hearing notice as directed by the court.

7. It does therefore emerge that the day the dismissal order was made, the applicant had not been served with a hearing notice. In my view, counsel for the plaintiff had a duty to inform the court that he did not serve a hearing notice as directed by the court. He failed to disclose that information to the court.

8. Our courts have been consistently categorical that every party to a suit is entitled to be notified about scheduled court activity going on in the suit and any exparte orders procured in contravention of this requirement are liable to be set aside. [See the Court of Appeal decision in

James Kanyiita Nderitu & another v Marios Philota Ghikas & another [2016] eKLR.

9. It is therefore my finding that because the applicant was not aware of the hearing scheduled for 27/7/2021, the dismissal order made on the said day should be set aside *ex debito justitiae*. It is so ordered. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MR BARIKI FOR THE PLAINTIFFS

MR KINGORI FOR THE DEFENDANT

COURT ASSISTANT: LUCY MUTHONI