



No. 220

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 38 OF 1993**

**GETEMBE OMOI**

**JOHN MOMANYI RAGIRA**

**SIMEON MOSE**

**SIMEON OBARI**

**MANGA RAGIRA ..... PLAINTIFFS**

**VERSUS**

**PAULINA KEMUMA MOGENI ..... DEFENDANT**

**RULING**

1. On 24<sup>th</sup> November, 2011, the firm of G. J. M. Masese Advocate who is on record for the plaintiffs in this suit listed the same for hearing on 16<sup>th</sup> February 2012. According to the court record, when the matter came up for hearing on 16<sup>th</sup> February 2011 before Sitati J., Mr. Omwega advocate appeared for the defendant while Mr. Ombui, advocate held brief for Mr. G. J. M Masese advocate for the plaintiffs. Mr. Omwega for the defendant informed the court that he had just been instructed in the matter and that although the matter was coming up for hearing, the parties had not exchanged bundles of documents. On account of the foregoing, he urged the court to remove the matter from the hearing list for the day. On his part, Mr. Ombui told the court that he was not sure of the whereabouts of Mr. G. J. M. Masese advocate. He also urged the court to give the parties another hearing date. In her ruling, Sitati J. noted that the matter had taken several years in court and that the plaintiffs' and their advocate seemed to have lost interest in the matter. For that reason, she dismissed this suit for non-appearance with costs to the defendant.

2. On 18<sup>th</sup> May, 2012 about three (3) months from the date of the dismissal of the suit, the plaintiffs filed an application of the same date seeking an order to set aside the said court order that was made on 16<sup>th</sup> February, 2011 so that this suit may be reinstated for hearing on merits. That is the application which is the subject of this ruling. The plaintiffs application was brought under order 12 rule 7 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The same was brought on the grounds that the plaintiffs were in court on 16<sup>th</sup> February 2011 when the matter was scheduled to be heard and that they did not appear before Sitati J. on that day because the clerk to the judge had informed them that this case had been removed from the hearing list for the day and a direction had been given that they take another date at the registry. The Plaintiffs waited in the court premises until Sitati J. finalized her cause

list for the day after which the plaintiffs together with their advocate proceeded to the court registry to fix a new hearing date. It is at the registry that the Plaintiffs learnt that this case had in fact been dismissed for non-attendance. The plaintiffs contended that they were ready to go on with the case on 16th February, 2012 and that their failure to appear before the judge when the case was called out for hearing was due to the misleading information that was given to them by the clerk to the judge. The plaintiffs contended that they have a good case against the defendant and that it would only be fair and just if this case is reinstated for hearing on merits.

3. The plaintiffs' application was opposed by the defendant. Through her replying affidavit sworn on 12<sup>th</sup> June, 2012, the defendant contended that the plaintiffs' affidavit in support of the application herein is full of falsehood. The defendant contended that she was present in court on 16<sup>th</sup> February 2011 together with her advocate and that the plaintiffs who are all well known to her were not present. The defendant contended that this case was called out both inside and outside the court and there was no response from the plaintiffs or their advocate on record. It is after this that this suit was dismissed by the court. The defendant dismissed the plaintiffs claim that the judge's clerk had informed the plaintiffs who were present in court that the case had been removed from the hearing list as lies. The defendant contended further that the plaintiffs' application seeking to set aside the court order of 16<sup>th</sup> February 2012 was made after unreasonable delay. The defendant contended that the plaintiffs have not been keen at all to have this case heard and determined and as such the dismissal of the case by the judge was justified.

4. On 6<sup>th</sup> May, 2013, the parties agreed to argue the plaintiffs' application by way of written submissions. The plaintiffs filed their written submissions on 5<sup>th</sup> June, 2013 while the defendant filed her written submissions on 15<sup>th</sup> July, 2013. I have considered the plaintiffs' application together with the affidavit of the 1<sup>st</sup> plaintiff filed in support thereof. I have also considered the defendant's affidavit in opposition to the application and the parties respective written submissions. The application before me is not seeking the review of Sitati J's order of 16<sup>th</sup> February 2012. I will therefore not consider the merit or otherwise of the said order. The plaintiffs' application is brought under Order 12 Rule 7 of the Civil Procedure Rules which confers upon the court, the power to set aside an order for dismissal of a case for non-attendance by a party. Whether or not to exercise the power is a matter for the discretion of the court. Like any other judicial discretion, the same must be exercised judiciously on well established principles. As was stated by Potter JA. in the case of **Pithon Waweru Maina –vs- Thuka Mugiria (1982-1988) 1KAR 171**, the discretion of the court to set aside judgment entered in default of a party to attend a hearing like in the present case is not limited or restricted save that the main concern of the court should be to do justice to the parties and if the court exercises its discretion to set aside the judgment, it does so on such terms as may be just. In the case of **Shah –vs- Mbogo and Another [1967] E. A 116**, it was held that the court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.

5. What I need to determine is whether the failure by the plaintiffs to attend court on 16<sup>th</sup> February, 2012 constituted an excusable mistake or error or it was meant to deliberately delay the cause of justice. The other issue connected to that is whether it would be just for all the parties to this suit that the orders of 16th February, 2011 be set aside. I am of the opinion that a party who seeks the exercise of the court's discretion in its favour must lay a basis on which that discretion should be exercised and should also demonstrate that it is deserving the exercise of such discretion. The plaintiffs had a duty to demonstrate that their failure to attend court was as a result of an excusable mistake or error and that in the circumstances it would be just that the order made in their absence be set aside. The plaintiffs have contended that they were in court on 16<sup>th</sup> February 2012 ready to proceed with this case and that their failure to appear before Sitati J. for the hearing was because they were misled by the clerk to Sitati J. that the case had been removed from the hearing list and would be assigned a new hearing date at the registry. The plaintiffs did not give the name of the clerk who informed them that the case had been removed from the hearing list and at what time they received that information. The plaintiffs have claimed further that they discovered that this suit had been dismissed when they went to the registry on the same day with their advocate to fix another hearing for the case.

6. As I have already stated above, the plaintiffs have not disclosed the name of the clerk who informed them of the fact that the case had been removed from the hearing list for the day and the time they received that information. The plaintiffs have also not explained where their advocate was at the material time since information relating to their case was supposed to be obtained by them from their advocate. Again, although the plaintiffs claim to have become aware of the dismissal of this case on the same day namely, on 16<sup>th</sup> February 2012, the plaintiffs who were fully cognizant of the consequences of the dismissal of this case did not move the court to have the order set aside until after three (3) months from the date the order was made. In addition, there is also no evidence that the plaintiffs sent a protest letter to the court about the alleged misleading information that was allegedly given to them by Sitati J.'s clerk. From the totality of the foregoing, there is every indication that the plaintiffs were not in court on 16th February, 2012 as claimed by them. The plaintiffs' are therefore not candid with the court. From the conduct of the plaintiffs, I am inclined to accept the defendant's contention and submission that neither the plaintiffs nor their advocate were in court on 16<sup>th</sup> February 2012 when this case was dismissed. I am of the view that a party lacking in candor is not deserving the exercise of the court's discretion in his favour and that applies to the plaintiffs herein.

7. I have noted that when this suit was dismissed on 16<sup>th</sup> February 2012, it had been pending in court for about 19 years. The plaintiffs have not explained why the case had not proceeded earlier and attempts if any that they had made to have the case heard. If this case was to be reinstated, this would mark its 21st anniversary in court. The plaintiffs are seeking the revocation of a grant of letters of administration that was issued in 1992 with respect to the estate of a deceased person who died in 1988. I doubt if justice can still be done to all the parties in this case if this suit was to be reinstated for hearing on merits. As correctly submitted by the defendants, public policy demands that there be an end to litigation. I have not been persuaded by the plaintiffs that they deserve the exercise of this court's discretion.

8. In conclusion, it is my finding that the plaintiffs have not laid a proper basis on which this court can exercise its powers under Order 12 Rule 7. The plaintiffs and their advocate who did not file any affidavit in support of the plaintiffs' application have not given any credible explanation for their failure to attend court on 16<sup>th</sup> February 2012. Without such explanation, the only conclusion the court can make is that the plaintiffs failed to attend court deliberately with a view to delay the hearing and disposal of this case. This coupled with the plaintiffs' failure to bring the present application without unreasonable delay makes the application dated 18<sup>th</sup> May 2012 unmeritorious. The said application is hereby dismissed with costs to the defendant.

**Delivered, dated and signed at KISII this 28<sup>th</sup> day of February 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

N/A for the plaintiffs

N/A for the defendant

Mr. Mobisa Court clerk

**S. OKONG'O**

**JUDGE**