No. 221

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 95 OF 2004

THOMAS RATEMO ONGERI ……..……..……..…….. 1ST PLAINTIFF

PAUL ONDIGI ONGERI …….. 2ND PLAINTIFF

CHARLES MORIGA ONGERI ……..……..…….. 3RD PLAINTIFF

VERSUS

ZACHARIAH ISABOKE NYAATA ……..……..…..…..…….. 1ST DEFENDANT

AUGUSTINO OBAIGWA NYAKUNDI……..…….. 2ND DEFENDANT

RULING

1. What I have before me is the plaintiffs' application dated 14th August 2013 that was brought under Order 9 Rule 9, Order 10 Rule 11 and Order 22 Rule 22 of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act and Article 159 of the Constitution of Kenya. The application sought three (3) principal prayers namely, leave for the firm of G. M. Nyambati and Co. Advocates to come on record in this matter on behalf of the plaintiffs in place of the firm of Bigogo Onderi & Co. Advocates, a stay of execution of the decree of this court issued on 15th November, 2010 and, an order setting aside the said decree. The application was brought on the grounds set out on the face thereof and on the affidavit of the first plaintiff, Thomas Ratemo Ongeri sworn on 14th August, 2013.
2. The plaintiffs' application was brought on the grounds that; at all material times, the plaintiffs had instructed the firm of Bigogo Onderi & Co. Advocates to act for them in the prosecution of this suit. This suit was listed for hearing on 15th November, 2010 and their said advocates failed to notify them of the hearing date as a result of which they did not attend court and the suit was dismissed for non-attendance. Following this dismissal, the defendants have proceeded to extract a decree which they are now in the process of executing against the defendants. The plaintiffs contended that they have been condemned by the court unheard as a result of the failure on the part of their advocates to notify them of the hearing date for this suit. The plaintiffs' contended further that they have now engaged a new firm of advocates with a view to prosecute this suit to its logical conclusion and urged the court to grant leave to the said new firm of advocates to come on record and also to set aside the said decree of the court issued on 15th November 2010 in the interest of justice and fairness so that their claim may be heard and determined on merit.
3. In his submission in support of the plaintiffs' application, Mr. Nyambati, advocate who appeared for the plaintiffs argued that the plaintiffs should be given an opportunity to prosecute their case.

Mr. Nyambati submitted further that the dismissal of this suit has subjected the plaintiffs to great loss and damage. The plaintiffs' advocate argued that the plaintiffs were not aware of the dismissal of this suit until they were served with a notice to show cause dated 8th July 2013. The plaintiffs advocate submitted that the plaintiffs took steps immediately after learning of the said order of dismissal to have it set aside. The plaintiffs' advocate citing Article 50 of the Constitution of Kenya argued that no person should be condemned unheard. He submitted that the plaintiffs are ready and willing to pay to the defendants thrown away costs. The plaintiffs advocate submitted further that no prejudice would be suffered by the defendants if the orders sought are granted.

4. The plaintiffs application was opposed by the defendants through grounds of opposition dated 28th August, 2013. The defendants contended that the plaintiffs application has been brought under the wrong provisions of the law, lacked basis and had been brought after unreasonable delay which delay was not explained. In his submission in opposition to application, the defendants' advocate Mr. Soire informed the court that the defendants were not opposed to that limb of the application that sought leave of the court for the firm of G. M Nyambati & Co. Advocates to take over the conduct of this case on behalf of the plaintiffs from the firm of Bigogo Onderi & Co. Advocates. The defendants however were opposed to the other limbs of the application. Mr. Soire argued that the plaintiffs' application was incompetent to the extent that the same was brought under Order 10 Rule 11 of the Civil Procedure Rules instead of Order 12 Rule 7 of the Civil Procedure Rules. Counsel argued that Order 10 Rule 11 of the Civil Procedure Rules was not applicable in the circumstances of this case where a suit was dismissed for non attendance. Counsel urged the court to disallow the application on this ground as the jurisdiction of the court was wrongly invoked. On the merit of the application, counsel argued that the plaintiffs had not placed sufficient material before the court on the basis of which the court could exercise its discretion in granting the orders sought. Counsel argued that this suit was filed in the year 2004 and that the same was dismissed in the year 2010 after a lapse of a period of 6 years.
5. The defendants advocate argued that the plaintiffs have not explained at all the delay in bringing of this application since this suit was dismissed in the year 2010 and the application herein for reinstatement was not brought until the year 2013. Counsel argued that the plaintiffs are guilty of indolence and as such are not deserving the exercise of this court's discretion. Counsel invited the court to note that the hearing date of 15th November 2010 when this suit was dismissed was taken by the defendants which fortified his argument that the plaintiffs have not been diligent in the prosecution of this suit. The defendants advocate argued further that after the dismissal of this suit, the plaintiffs' previous advocates participated in several proceedings in the matter and as such the plaintiffs cannot be heard to say that they were not aware that this suit had been dismissed. In reply to the defendants' advocate's submissions the plaintiffs' advocate submitted that the plaintiffs application is properly before the court and that the court should exercise its discretion in favour granting the orders sought.
6. I have considered the plaintiffs' application together with the grounds of opposition filed by the defendants in opposition thereto. I have also considered the submissions by the parties respective advocates. As was stated by Potter JA. in the case of **Pithon Waweru Maina –vs- Thuka Mugiria (1982-1988) 1KAR 171**, the power to set aside judgment entered in default of a party to attend a hearing like in the present case is discretionary and that the discretion 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.
7. As was stated in the Court of Appeal case of **Harrison Wanjohi Wambugu –vs- Felista Wairimu Chege & Another [2013] eKLR**, what I need to determine in an application of this nature is whether the failure to attend court by the plaintiffs on 15th November 2010 constitutes an excusable mistake or error or it was meant to deliberately delay the cause of justice. The plaintiffs as I have already stated above have contended that their failure to attend court on 15th November 2010 was as a result of the failure on the part of their previous advocates to notify them of the

hearing date and that as soon as they become aware that this suit had been dismissed, they appointed the advocates on record to move the court to set aside the said order of dismissal. The court record shows that when this matter came up before Makhandia J. (as he then was) on 15th November 2010 for hearing, the plaintiffs then advocate Mr. Bigogo informed the court that he had no witnesses to call and that he wished to rely on the pleadings. When the defendants' advocate pointed out to the court the fact that directions had been given earlier that the matter be heard by way of viva voce evidence, the plaintiffs said advocate insisted that the court had a right to look at the pleadings and that the plaintiffs would have wished to be present to testify but for unknown reasons, they were able to attend court on that day.

8. It is after considering the foregoing submissions by the plaintiffs and the defendants advocates that the judge ruled that since directions had been given that the matter proceeds by way of viva voce evidence and the plaintiffs had not tendered any evidence in support of their originating summons, the plaintiffs had failed to prove their case and proceeded to dismiss the plaintiffs suit with costs to the defendants. After the dismissal of the suit, the defendants commenced the execution proceedings on 14th February, 2011 in which proceedings the plaintiffs' said former advocates participated fully until 8th July, 2013 when the defendants took out a notice to show cause why the plaintiffs should not be evicted from the parcels of land in dispute in this suit and also why the plaintiffs should not pay the defendants' costs that had been taxed at Ksh. 91,356.00.
9. It is clear from the foregoing that the conduct of the plaintiffs' previous advocates was wanting in every respect. First, when the matter came up for hearing, Mr.Bigogo, advocate who appeared for the plaintiffs informed the court that the plaintiffs had no evidence to offer and purported to rely only on the pleadings although the court had earlier given directions that the matter do proceed by way of viva voce evidence. The said advocate did not inform the court why the plaintiffs were not in court save only to state that they were not in court for unknown reasons. Secondly, although he informed the court that the plaintiffs would have wished to testify, he never sought adjournment of the matter. Thirdly, even after the suit was dismissed, the said advocate never took immediate steps to have the order set aside. He continued participating in the execution proceedings as if the suit had been determined on merit and that nothing was a miss. From this sort of conduct, I am inclined to believe the plaintiffs claim that they only became aware of the dismissal of this suit when the notice to show cause dated 8th July 2013 which was scheduled for hearing on 25th July 2013 was served upon them. I have noted from the affidavit of service of that notice on record that the said notice to show cause was served upon the plaintiffs on 12th July 2013. Immediately the plaintiffs had notice of the said dismissal, they took immediate steps to bring the present application to set aside the order. The present application was filed on 14th August 2013 slightly over a month after the plaintiffs became aware of the dismissal of this suit. The failure by the plaintiffs' previous advocates to notify the plaintiffs of the hearing date for this case cannot in the circumstances be termed an excusable mistake or error. The plaintiffs previous advocates did not inform the court on 15th October 2010 when this suit was dismissed why the plaintiffs were not in court. The said advocates continued handling the matter thereafter as if nothing had happened and did not file any affidavit in these proceedings to explain the circumstances that led to the dismissal of this suit. The said advocates conduct to say the least amounted to gross negligence if not professional misconduct.
10. In my view, generally in a case of this nature, the clients of such advocates should be directed to seek remedy from the advocates concerned instead of inconveniencing other parties and the courts. If the courts continue entertaining applications of this nature, it would be encouraging professional negligence among advocates. The courts would also not be able to effectively dispose of matters where parties are represented under Order 12 of the Civil Procedure Rules as any dismissal of a case under that rule would be liable to be set aside on the would be usual ground that the plaintiff(s) was not notified of the hearing date. This is a situation that would be unacceptable as it would go contrary to the objectives of the Civil Procedure Act and Rules as set out in section 1A of the Civil Procedure Rules and would also undermine the duty of the court in furthering the said objectives as set out in section 1B of the Civil Procedure Act. In addition, it would lead to a miscarriage of justice for those who will be affected by the review and setting aside of such dismissals. It cannot therefore be made a general rule that in every case where an advocate fails or is said to have failed to notify his client of a hearing date, the court proceedings

conducted in the absence of such client would be set aside. That said, each case will have to be considered on its own peculiar facts.

11. In the case before me, the plaintiffs' have claimed parcels of land which are registered in the names of the defendants. The plaintiffs have claimed that they have been occupying the said parcels of land since 1972 when their deceased father purchased the same and that the effect of the dismissal of this case would result in their eviction. In fact in the notice to show cause that I have referred to herein above, the plaintiffs have been called upon to show cause among others why they should not be evicted. This is notwithstanding the fact that the court order dismissing this suit did not include an order for the eviction of the plaintiffs from the said parcels of land. The plaintiffs' contention is that if the dismissal of this suit is left to stand, they would be evicted from the said parcels of land without having been heard on their claim against the defendants. I am persuaded that the loss to the plaintiffs if the orders sought are not granted is not capable of compensation by the plaintiffs' previous advocates if I was to dismiss this application and urge the plaintiffs as I have pointed out above to seek redress from the said advocates. I am of the opinion that this is among those few cases where mistakes of advocates should not be visited upon their clients. I am satisfied that this is an appropriated case in which this court should exercise its discretion in setting aside the order of dismissal of this suit that was made on 15th November 2010. I have considered the grounds of objection put forward by the defendants in opposition to the present application. I am of the opinion that none of them would justify the refusal of this application. The defendants have not indicated that they would suffer any serious prejudice or miscarriage of justice if the plaintiffs' application is allowed.

12. In the case of, **Philip Chemwolo & Another vs. Augustine Kubede (1982-1988) KAR 1036 at page 1042** Apaloo, J A. stated that,

> **"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."**

13. I am of the opinion that the prejudice and loss likely to be suffered by the defendants herein arising from the granting of the orders sought can be compensated for in costs. On the defendants' argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice pursuant to Article 159 (2) (d) of the Constitution of Kenya. On the issue of delay in bringing the application, I am satisfied that the plaintiffs brought the application at the earliest opportunity after they had notice of the dismissal of this suit. There is no evidence that the plaintiffs had notice of the dismissal earlier and failed to take action. On the merit of the application, as I have stated above, the plaintiffs have satisfied me that this is an appropriate case in which this court should exercise its discretion in favour of granting the orders sought by the plaintiffs.

14. The upshot of the foregoing is that, the plaintiffs' application dated 14th August 2013 is allowed in terms of prayers 2, 3 and 4 thereof. The plaintiffs shall jointly and severally pay to the defendants a total sum of Kenya Shillings Thirty thousand (kshs. 30,000.00) being thrown away costs and the costs of the application herein. That payment shall be made within 21days from the date hereof and in default, the defendants shall be at liberty to execute for the recovery of the same. Orders shall issue accordingly.

Delivered, dated and signed at Kisii this 28th day of February 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiffs

Mr. Soirefor the Defendants

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE