

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

ENVIRONMENT & LAND CASE NO. 21 OF 2013.

JANET NYANDIKO ::: PLAINTIFF/APPLICANT.

VERSUS

KENYA COMMERCIAL BANK) ::

WATTS ENTERPRISES) ::::::::::::::::::::::::::::::::::::::DEFENDANTS/RESPONDENTS.

R U L I N G.

1. The applicant brought a notice of motion dated 31/10/2014 in which she seeks setting aside this court's order of 18/6/2014 which dismissed her application dated 21/2/2013 and that the dismissed application be reinstated and the same heard. The applicant contends that the first respondent took a hearing date for the application dated 21/2/2013 but did not serve the applicant with a hearing notice.
2. The applicant contends that one Mr. Simiyu went to the registry and purported to act for the applicant. He had the applicant's application dated 21/2/2013 fixed for hearing on 18/6/2014 but did not inform the applicant. On 18/6/2014 neither the applicant nor the respondents were in court. The application dated 21/2/2013 was dismissed for want of prosecution.
3. The applicant contends that the first respondent's advocates purported to be acting for the plaintiff and took a hearing date but failed to notify her. The applicant therefore contends that her non appearance in court was due to failure by the first respondent to inform her that they had fixed the application for hearing.
4. The first respondent opposed the applicant's application based on grounds of opposition filed in court on 8/12/2014. The first respondent contends that the applicant was served with a hearing notice by registered post and that the application is therefore without merit. The first respondent further contends that the applicant has been indolent in prosecuting the application which was dismissed.
5. I have gone through the applicant's application as well as the record herein and the opposition to the application by the first respondent. I now have to decide whether the applicant has shown sufficient grounds for the court to exercise discretion in her favour. A look at the record of proceedings of 7/5/2014 shows that one M/s. Simiyu for Manani Lilan & Co. Advocates went to the registry and took a date for the application dated 21/2/2013 which was fixed for 18/6/2014. According to the record M/s. Simiyu was taking that date on behalf of the firm of M/s. Manani Lilan & Co. Advocates who are recorded therein as acting for the plaintiff. This is not the correct position as M/s. Manani Lilan & Co. appear for the first respondent. The plaintiff was by then being represented by M/s. Gacathi & Co. Advocates.
6. When the application came up for hearing neither the applicant nor the first respondent was in court. This prompted the court to dismiss the application for want of prosecution. The applicant contends that she was not served with a hearing notice.

On the other hand M/s. Mufutu for 1st respondent contended that their firm took a date for the application dated 21/2/2013 and served the applicant through registered post. She argued that it is on the basis of the affidavit of service that the court dismissed the applicant's application. With respect to M/s. Mufutu, the applicant's application was not dismissed based on any affidavit of service. The application was dismissed for want of prosecution as neither the applicant nor the respondent were in court. The affidavit of service which M/s. Mufutu is alluding to is not in the court file and was never filed. There is no way the applicant would have known of the hearing of 18/6/2014 when she was not served. I find that the applicant's application is well merited. The

same is allowed with the result that this court's orders of 18/6/2014 dismissing the applicant's application dated 21/2/2013 are hereby set aside. The applicant's application of 21/2/2013 is hereby reinstated with its interim orders which were in force at the time of dismissal. Th applicant shall have costs of this application. The applicant is hereby ordered to fix the said application for hearing on a date to be given at the registry within 7 days from the date hereof.

It is so ordered.

[Dated, signed and delivered at Kitale on this 17th day of December, 2014.]

E. OBAGA.

JUDGE.