



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Environmental & Land Case 245 of 2008

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 245 OF 2008

LEAH WANJUKI NJOROGE.....PLAINTIFF

VERSUS

PAUL NJAU NJENGA & ANOTHER.....DEFENDANT

RULING:

1. By a Notice of Motion dated 16th October, 2013 the applicants herein sought for several Orders. Among the Orders sought are that the firm of **P.K Njiri & Co. Advocates** be allowed to come on record on behalf of the plaintiffs in place of the firm of **Onesmus Githinji & Co. Advocates**. The applicants also sought for Temporary Injunction against the Defendants from interfering or dealing whatsoever with parcel of land known as LR No. **Dagoretti/Ruthimithu/460** pending the hearing and determination of the suit.

The applicants also prayed to court to set aside to order of dismissing the plaintiffs suit for non-attendance and that the suit be reinstated, heard and be determined on merits. They also prayed for costs of the application.

2. The application was supported by the grounds on the face of the application and on the supporting affidavit of Leah Wanjiku Njoroge and Peter Kariuki Njiiri. The applicant averred that their advocate was not in Court when the suit came up for hearing on 7/7/2012 and that absence was not intentional as it arose due to miscommunication between their previous advocate and their new advocate P K Njiiri now on record. The applicants further stated that the family of late Ringiria Wangai reside on the suit land since 1960 and the Defendants have applied for consent to sell the parcel of land. If an injunction is not issued the family will be evicted and will be rendered homeless and they will undergo untold suffering .

Applicants also stated that for the interest of justice, they should be allowed to prosecute the suit and the same be determined on merit.3.

3. Mr. Peter Kariuki Njiiri Advocate also averred in his supporting Affidavit that he was instructed by the Plaintiff in June 2012. That when he took instructions from the firm of Onesmus Githinji the previous advocates on record, he erroneously noted the hearing date as 7/11/2012 instead of 7/6/2012 as per extract of his diary PK1. He further alleged that failure to attend court on the said date was not intentional but was due to an error on his part and his mistake should not be vested on the applicants . He also stated that the Defendants will not suffer any prejudice if the orders are set aside.

4. The 1st Defendant Paul Njau Njenga opposed the Notice of Motion. He filed a Notice of preliminary objection dated 6/11/2012 and stated that the issues raised by the plaintiff have been exhaustively and comprehensively addressed in *Succession Cause no. 1500 of 1995* and the Plaintiffs herein were party to the proceedings. That the suit has been dispensed with as it was consolidated with succession cause No. 1500 of 1995 and ruling delivered on 25/6/2008. In his Replying Affidavit, the 1st Respondents averred that the applicants are being dishonest and are deliberately misleading the Court to defeat the ends of justice.

He further contended that the issues that are being raised by the two plaintiffs in this matter have been substantively addressed by this Court and the plaintiffs who are his co-administrators are party to the proceedings. He also alleged that plaintiffs and his co administrators are vexatious litigants whose aim is to frustrate the ends of justice by filing multiple applications addressing the same issues. 1st Respondent prayed for dismissal of the applicants Notice of Motion.

5. The parties herein filed their written submissions. I have carefully considered the written submissions, the annexures thereon and the pleadings severally. There is no doubt that the plaintiff suit herein was filed on 22/5/2008 by the firm of Onesmus Githinji & Co. Advocates. There is also no doubt that the main suit had been set for hearing on 7/6/2012 before Justice Kimondo. On this particular day, the parties were not present. For that reason, the learned Judge dismissed the suit under Order 12 rule 3 of the Civil procedure Rules for non attendance of the plaintiff. Thus hearing date had been taken by the firm of Onesmus Githinji & Co. Advocate on 7/2/2012. After the dismissal of the suit, the firm of **P.K Njiiri & Co. Advocates** filed a Notice of change of Advocates on 17/9/2012.

6. In the supporting affidavits, the applicants and their advocate averred that their failure to attend Court on 7/6/2012 was not intentional but was due to the miscommunication between the two counsels. They further averred that the mistakes of the advocate should not be visited on the plaintiffs. I have perused Order 12 Rule 7 of the Civil procedure Rules under which the application is premised. The said Order states as follows:-

“Where under this order judgement has been entered or the suit has been dismissed, the Court on application may set aside or vary the judgement or order upon such terms as may be just”

I have also been guided by the case of **Invita Vs Kyumbu (1984) kLR uui** where it was held that *“the test to be applied by the Court on application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay”*

I have also relied on section 3A of the Civil Procedure Act which states that, *“nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders or may be necessary for the end of justice or prevent abuse of the process of court”*

I find that if it is true the plaintiffs were changing the Advocates in June, 2012, then it is possible that there was miscommunication between the two advocates on the hearing dates. Failure to attend Court would have been caused by the mistake of their advocate. This court will be reluctant to punish the plaintiffs due to such mistake by their advocates.

As was held in the case of **Commercial Bank of Africa Ltd Vs Martin Fares Miyesa , Civil Case No. 1250/2002** by Justice Anzangalala as he then was)

“ I ask myself whether litigant who has duly instructed an Advocate in these circumstances should be penalized because of the default of his Advocate. In my view, case belongs to the parties. In normal circumstances; it would be strange if the sins of the advocates are visited on the parties. This is not intended to be a general proposition to be applied at all times. I find that there is sufficient reason demonstrated by the applicants to warrant granting of an application for reinstatement of the suit which was dismissed on 7/6/2012 for non-attendance of the plaintiffs.

7. It is also not in doubt that by the time the notice of change of Advocates was filed on 17/9/2012, the suit had been dismissed. The Court will therefore allow the firm of **P K Njiiri & Co. Advocates** to come on record on behalf of the plaintiffs. In place of the firm of **Onesmus Githinji & Co. Advocates**.

8. The applicants have sought for Temporary Injunction restraining the Defendants from dealing with the land Parcel No.LR No. **Dagoretti /Ruthimithu/460** until the final determination of the suit

The applicants alleged that they have been living on the suit land since 1960's . They also alleged that the Defendants are intending to sell the suit land and that the family of **Ringiria Wangai** had been summoned to the D.O's office as the Defendant had applied for consent to sell the land. However, there was no evidence of such intention of selling the land. The 1st Defendant averred that the matter had been exhaustively determined through **Succession Cause No. 1500 of 1995** .

He attached a copy of the said Rulings **PNJ 3** and **PJN 4**. Ist Defendant also contended that he was in the process of distributing the Estate of the late **Peter Njenga Ringiria** as per the certificate of Confirmation of Grant. Indeed, the **Confirmation Grant marked PJN1** by the applicants show that **Hannah Wanjiku Njenga** and **Paul Njau Njega** wereregistered as proprietors in **Dagorretti/Ruthimithu /460** to hold in trust for themselves and the named beneficiaries. Some of the beneficiaries are **Stephen Gitau Njenga** (now deceased) and **Daniel Njoroge Njenga** also (deceased). The two applicants are their legal representatives.

There is no evidence that the 1st Respondent has failed to give the two applicants their rightful share. The applicants needed to demonstrate to this court that they have a **prima –facie case** with high probability of success and that they would sufferirreparable loss and damages if orders would not be granted.These principles elucidated in the case of **Giella Vs Cassman Brown Co.Ltd (1973) EA 358**, in which the Courts in Kenya has widely relied on it while considering grant if injunctive orders.

9. In the instant case, the applicants herein have failed to satisfy the threshold for the grant of injunctive orders. The application herein was filed on 16/10/2012. No evidence to-date that 1st Respondents have sold any portion of the suit land. The 1st Respondent raised preliminary objection which I have considered. They are valid points but the said objections should be raised during the hearing of the main suit but not at this stage of an interlocutory application. The issue of the suit property has been dealt with in the Succession cause No. 1500 of 1995. However, that is a matter to be considered while challenging the validity of the main suit.

10. Having now carefully considered the applicants Notice of Motion dated 16/10/2012, the court finds that the same succeeds only in terms of **Prayer 2 and No.6**-setting aside the orders of dismissal of the plaintiffs suit and reinstating it.

However, the Court disallows the applicants Prayer No.4 .

· Costs in the Cause.

· Dated, signed and delivered this 7th *day of June* 2013.

L.N. GACHERU
JUDGE

In the Presence of:-

Kariuki for the Plaintiff/Applicant

None attendance for the Defendant

Anne Court Clerk

L.N. GACHERU

JUDGE