



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 154 OF 2007

1. ROSE RAO

2. PAUL
SCHYMANSKI.....PLAINTIFFS

VERSUS

1. DONALD NORRIE MACDONALD.....1ST
DEFENDANT

2. YAHYA MOHAMMED YUSU and

KARIMA YAHMA YUSUF.....2ND

DEFENDANTS

3. COMMISSIONER OF LANDS.....3RD
DEFENDANT

4. REGISTRAR OF LANDS.....4TH
DEFENDANT

R U L I N G

1. On 3rd March 2011 the Court (Dulu, J) dismissed the Plaintiffs' suit herein for non-attendance of the Plaintiffs or their advocate at hearing.
2. The Plaintiffs then filed this **notice of motion dated 9th March 2011** seeking an order to set aside the dismissal and reinstatement of the suit for hearing. The application is brought under **Order 12, rule 7** of the **Civil Procedure Rules** (the **Rules**) which donates to the Court an unfettered discretion to vary or set aside such orders of dismissal "upon such terms as may be just".
3. The main ground for the application appearing on the face thereof is that the failure to attend the hearing of 3rd March 2011 by the Plaintiffs and/or their advocates was due to an honest mistake and omission on the part of the advocates. The honest mistake and omission is explained in two supporting affidavits sworn respectively by the Plaintiffs' advocate, **Fredrick Otieno Okeyo** and his court clerk, **Margaret Wairimu**.

4. The explanation is that the hearing date, 3rd March 2011, was taken by the court clerk on 18th October 2010 when her firm of advocates, **Otieno Okeyo & Co.**, had not yet obtained diaries for the year 2011; that after purchase of the necessary office diaries for the year 2011 she inadvertently forgot to enter the hearing date in the new diaries for 2011; and that in the meantime she had served hearing notice upon the Defendants on 27th October 2010. The court clerk takes full responsibility for the mistake.

5. The 1st Defendant opposed the application by **grounds of opposition dated 8th April 2011**. Those grounds are that the application is misconceived and an abuse of the process of the court; that it lacks merit; and that the Plaintiffs have not demonstrated upon oath “that they are still intent on pursuing the suit”.

6. The 2nd Defendants have also opposed the application by a **replying affidavit filed on 29th February 2012**. The affidavit is sworn by **Karima Yahya Yusuf**, the second component of the 2nd Defendants. Grounds of opposition emerging from this affidavit include –

- (i) That this is an old suit that has never proceeded to hearing.
- (ii) That the Plaintiffs have never shown any willingness to prosecute the suit.
- (iii) That the reason given for failure to attend court on 3rd March 2011 is not credible.
- (iv) That the continued pendency of the suit will greatly prejudice the 2nd Defendants as they were “bona fide purchasers for value without notice”.
- (v) That it is in the interests of justice that the application be refused.

7. Apparently the 3rd, 4th and 5th Defendants did not respond to the application.

8. I have considered the submissions of the learned counsels. I have also perused the court record. I note that the case had been fixed for hearing by the Plaintiffs’ advocates for 6th November 2008 but apparently it was not listed. They again fixed the case for hearing for 8th and 9th June 2009. It was listed on 8th June 2009 but was adjourned for reasons recorded.

9. The Plaintiffs’ advocates subsequently fixed the case for hearing for 14th January 2010. Again for reasons recorded it did not proceed to hearing.

10. The 2nd Defendants’ claim that the Plaintiffs have never shown any willingness to prosecute the case thus rings hollow.

11. The reason given for failure to attend court on 3rd March 2011 is not outlandish or incredible; on the contrary, it is eminently possible for an advocate’s court clerk to forget to diarize a case, particularly when there are no diaries for the year available when she takes the date. I accept the explanation given.

12. Given the nature of this case, it is best that it be heard and determined on merit. I will therefore allow the application. The order of dismissal of 3rd March 2011 is hereby set aside and the suit reinstated for hearing. The Plaintiffs shall pay the 1st and 2nd Defendants’ costs of the application. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2013