



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT 2173 OF 2007

WANGAI GATINU..... 1ST PLAINTIFF

JOHN GICHURU WANGAI..... 2ND PLAINTIFF

JOSEPH KIMANI KANYIRI3RD PLAINTIFF

JANE WAITHERA WANGAI.....4TH PLAINTIFF

SERAH NJOKI KIARIE..... 5TH PLAINTIFF

VERSUS

MIKINYA NJOROGE1ST DEFENDANT

GATHU WAMBURA..... 2ND DEFENDANT

MUNGAI WAMBURA..... 3RD DEFENDANT

RULING

1. On the 20/1/12 this was dismissed after the plaintiff was served with a Notice To Show Cause under order 17 rule 2(2) and 4 of the Civil Procedure Rules. The Court had noted that no action had been taken to prosecute the case for a period of more than a year.

2. On the 16/3/12 the plaintiff/applicant filed the current application under consideration by way of Notice of Motion under order 12 rule 7 of the Civil Procedure rules sections 1A, 1B and 3A of the Civil Procedure Act 2010 seeking orders that the orders issued this Court on the 20/1/12 dismissing the suit for non attendance and want of prosecution be set aside and the applicant's suit herein filed by way of a plaint dated 15/5/07 be reinstated. The applicant also sought that costs be in the cause. The application is based on the grounds stated on the face of the application together with the supporting affidavit of Munga Angela Ndegi an advocate of the High Court of Kenya that;

- a) Failure to attend Court in time by the plaintiff/applicants' Advocate was not deliberate/or intentional as the plaintiffs/Applicants' advocate was indisposed on the material day.
- b) The plaintiffs/applicants ought not to be denied their day in court on account of an occurrence over which they had no control over.
- c) This Honourable Court has powers and discretion to allow this application.
- d) It is in the interests of justice for this application to be allowed as prayed.

3. In the affidavit she explains that they were served on the 12/1/12 to to attend Court on the 20/1/12. That they filed an affidavit in response to the Notice To Show Cause sworn by Dominic Njuguna Mbigi dated 19/1/12 giving reasons for the delay in fixing the matter for hearing. That on the 20/1/12 she was allocated another matter but developed a very severe toothache and she sought medical attention. That she got a lawyer one Salim Ali to hold brief but he told that by the time he got to Court the matter had been dismissed for non attendance. That the failure to attend Court on the 20/1/12 was not deliberate but was as a result of her indisposition and that the plaintiff's desire is in pursuing her claim and that in the interest of justice and fairness the Court should allow the applications and reinstate the suit so that it can be heard and determined on the merits.

4. The respondent's Counsel did not attend the hearing of this application but they filed a replying affidavit sworn by Gachieno Gitau dated 7/5/12 where they deponed facts to oppose the application. He argues that no good reasons has been adduced by Munga Angela Ndegi, that her indisposition could not last from 20/1/12 to 16/3/12 when the application was filed, that id defies all logic that precious judicial time should be squandered on attempts at resuscitating a hopeless situation where a party is seeking to annul grant in a civil case as opposed to taking dismissal as to take up Court to follow the clearly laid out procedure where the law of succession and that indolence cannot help the case of the applicant.

5. I have considered the application and as correctly pointed out by the respondents Counsel. Their order being sought is discretionally. I have considered the reasons given by Munga Angela Ndegi and the affidavit of Mr. Dominic Njuguna Mbigi dated 19/1/12 where he states at paragraph 3 that the delay in fixing of a hearing date in that matter was occasioned by the fact that her client was still tracing same plots that emanated from the land subject matter of the suit. That it took a long time and eventually they requested her to write to the Land Registration Nairobi to assist. I note that there is no affidavit from the client to confirm the same. However I will not punish the plaintiff for acts of omission of his counsel. I will give the applicant a chance to be heard. I have gone through the Court record and note that the parties were last in Court in November 2009. I will exercise my discretion in favour of the applicant and set aside the Court order of 20/1/12 dismissing the suit for non attendance and want of prosecution. I reinstate the applicant suit filed by way of plicant dated 15/5/2007. The applicant shall ensure that they comply with the provision of order 11 within 60 days from today and fix the suit for pretrial conference where the Court shall give directions on the hearing. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 22nd day of June 2012

R. OUGO
JUDGE

In the Presence of:-

.....For the Plaintiffs/Applicants

..... For the Defendants/ Respondents

..... Court Clerk