

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI LAW COURTS

CIVIL CASE NO. 88 OF 2009

NOAH NJUGUNA GATHENGEPLAINTIFF/APPLICANT

VERSUS

TERESIAH WANINI KIBUI1ST DEFENDANT/RESPONDENT

ALEXANDER KIMANI KIBUI2ND DEFENDANT/RESPONDENT

RULING

The Defendants in the suit had been ordered to exhume the remains of one Livingstone Kibue Methe from the suit land who is the late husband of the 1st Defendant vide the ruling of Hon. Sitati J delivered on 25th September 2009. The Defendants thereupon filed a Notice of Motion dated 16th October 2009 to seek orders that the said orders be reviewed, varied or set aside. The application was dismissed for non-appearance by the same Judge on 2nd March 2010. Thereupon the Defendants have filed the application dated 3rd March 2010 seeking now to set aside the orders issued on 2nd March 2010. This application came up for hearing on many occasions before several Judges. The Plaintiff also had filed an application dated 16th March 2010 to seek leave to file contempt proceedings against the Defendants. Apart from being given a hearing date on 20th July 2010 by this court, the Plaintiff said application has not been thereafter given any hearing date.

The present application is based on the grounds that Defendants, who are acting in person, were informed at the registry that their application dated 16th October 2009 was fixed for hearing on 3rd March 2010 but the same was instead listed on 2nd March 2010 and was dismissed in their absence. The Defendants have raised the issue that the deceased, whose remains are ordered to be exhumed, had purchased the suit land and had shown them his place of burial on the suit land where he was buried. The application is opposed on the grounds by the Plaintiff that the same is without merit, that it does not give reasonable explanation for the absence of the Defendants on the hearing date and that the court should not indulge the indolent.

I have considered the application with the grounds in support and in opposition thereof. I note that the date for inter parte hearing was taken by the defendant at the registry. I cannot just brush away the averment by the party appearing in person that he was told that the application is fixed for hearing on 3rd of March 2010 instead of 2nd March 2010. I am more fortified on my observation by the fact that this application was immediately filed on the same day, i.e. on 3rd March 2010 when they came to the court for hearing. Furthermore, the issue on hand is also serious in all respect.

In the premises, I shall exercise my discretion and review the order of 2nd March 2010 by setting aside the same. I further order that the registry should give a hearing date on priority to the application dated 16th October 2009.

The Defendants to pay the cost of this application dated 3rd March 2010.

Dated, signed and delivered at Nairobi this **30th** day of **November, 2011**

K. H. RAWAL

JUDGE
30.11.2011