



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Environmental & Land Case 405 of 2009**

**CHARLES K. MURUTHI ..... PLAINTIFF**

**VERSUS**

**EBRAHIM NDUNGU ..... DEFENDANT**

**RULING**

The plaintiff brought this suit against the defendant claiming among other things ownership of the suit property and a permanent injunction to restrain the defendant from interfering with his land parcel No. Nairobi Block 117/412. Alongside the plaint, he filed an application for an injunction pending the hearing of the main suit.

This application was served upon the defendant who filed a reply thereto. The learned counsel for the plaintiff then sought leave to put in a supplementary affidavit on the grounds that substantial issues had been raised by the defendant's replying affidavit. Leave was granted and the plaintiff allowed to file a supplementary affidavit and serve the same within seven (7) days.

When the application came up for hearing on 11<sup>th</sup> November, 2009, the defence counsel was present but the learned counsel for the plaintiff/applicant was absent. This date was taken by consent. As at that date, the supplementary affidavit sought to be filed by the plaintiff had not been filed. The learned counsel for the defendant informed the court that, he had received a letter from the learned counsel for the plaintiff saying that they had not been able to file the affidavit because, they were conducting some search. The said search however had not been completed as at the time the application was called out for hearing.

The learned counsel for the defendant then submitted that the plaintiff had no case against the defendant who he said, owns the property and has title thereto, having given the details as to how he acquired the same. He then asked the court to dismiss the application and that the plaintiff be restrained from interfering with the defendant's property.

The court observed that, the hearing date was indeed taken in the presence of the counsel for the plaintiff, and leave to file a supplementary affidavit was also granted within a specific timeframe. The court also observed that counsel was absent and, had not complied with the court order to file the said affidavit.

Having so observed, the court went further to look at the documents on record and noted that the defendant had a stronger prima facie case vis-a-vis that of the plaintiff, and had exhibited the title with a chronology of steps taken to acquire the same. The court also noted that, the plaintiff's case or claim was based on the sale agreement annexed to the application which however could not stand. This is because, the agreement is not signed by the vendor and Section 3 of the Law of Contract Act Cap.26 Laws of Kenya which applies, had not been complied with.

That being the case, the court dismissed the Chamber Summons dated 19<sup>th</sup> August, 2009 with costs to the defendant. It was also further ordered that the plaintiff be restrained from interfering with the defendants interests in the suit property.

Following the said dismissal order on 16<sup>th</sup> November, 2009, the plaintiff filed an application by way of Notice of Motion under Section 3A of the Civil Procedure Act, seeking reinstatement of the application dated 19<sup>th</sup> August, 2009 and that status quo be maintained.

The grounds upon which the said application is based are that, the applicant has a good case with high chances of success and that, the dismissal of the application was caused by the mistake of counsel which should not be visited upon an innocent litigant. Further, in the interest of justice, the orders sought should be granted.

In support of the application, the learned counsel for the plaintiff/applicant has sworn an affidavit to the effect that on the morning when the application was dismissed, his car broke down along Jogoo road, and it was not until 9.00 am. that he got the help of his mechanic to fix the same. He tried to get in touch with his court clerk to come to court but it was too late as he found the matter had been called out. His two associates were on leave and one of his court clerks was also unwell.

Having written a letter to his colleague, this was indication of his willingness to address the matter and that his mistake should be excused. It is also his position that, his client is currently in occupation of the said property and that status quo should be maintained.

The learned counsel for the defendant has filed Grounds of Objection to the effect that the application should not be reinstated as it would be a waste of court's time and a total abuse of the court process. The application sought to be reinstated was not dismissed for non-attendance but rather on merit after submissions by counsel for the defendant and in any case, the plaintiff failed to comply with the court order to file a supplementary affidavit which shows he has no answer or reply to the weighty issues raised by the defendant.

I agree with the generally accepted submission that a mistake of counsel should not be visited upon a litigant, because the prejudice if any, does not impact on the counsel but the litigant in question. However, all matters must be taken into consideration to be able to accord that principle to a litigant in default. I am prepared to accept that counsel could not be in court in time to prosecute his client's application. However, even if he were to be present, the order of the court requiring the plaintiff to file a supplementary affidavit had not been complied with, and the said weighty matters raised by the defendants would still be in place.

The learned counsel for the defendant did not ask the court to dismiss the plaintiff's application for non-attendance only. He went further to argue the merits of the application which I have observed hereinabove. The position of the court is that, the application for reinstatement lacks merit because the application was dismissed not only for non-attendance, but also on serious legal and factual issues which had been raised in the replying affidavit of the defendant/respondent and which matters remained, as at the time of the hearing, uncontroverted by the plaintiff.

For those reasons therefore, the application dated 16<sup>th</sup> November, 2009 is hereby dismissed with costs to the defendant. The effect of the said order is that the plaintiff is restrained from interfering with the defendant's interest in the suit property as earlier ordered on 11<sup>th</sup> November, 2009.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of April, 2010*

**A. MBOGHOLI MSAGHA**

**JUDGE**