



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT NO.5911 OF 1992

EUNICE WAMBUI KIGERA
PETER MUIRURI KIGERAPLAINTIFFS
VERSUS
JOHN GITAU GATHENYA.....1ST DEFENDANT
DAVID MWAURA GATHENYA.....2ND DEFENDANT

RULING

1. On 14th May, 2009, the plaintiff's application dated 25th November, 2004 was dismissed for non-attendance. The plaintiff is now pleading with this court to reinstate the said application. His advocate Gachoka Mwangi has sworn an affidavit in support of the application. The advocate takes responsibility for failure to attend court, explaining that his former clerk did not record the matter in his diary. Counsel pleads that his absence was not intentional but as a result of a genuine mistake.
2. The defendants objects to the application contending that the reasons given for non-attendance is not convincing. It is maintained that the plaintiff's suit abated sometime back after the death of the original plaintiff, and that the substitution of Eunice Wambui Kigera was irregular. It was contended that the application sought to be reinstated, which seeks to substitute Eunice Wambui Kigera with Peter Muiruri Kigera will serve no meaningful purpose as Eunice Wambui Kigera was not properly on record. Counsel for the respondent further argued that the application has been overtaken by events as Eunice Wambui Kigera who was sought to be substituted due to senility had already died.
3. I have given due consideration to this application. Counsel for the plaintiff has given a plausible explanation for his failure to attend court. The plaintiff ought not to be made to suffer for a mistake which was not of his making. The respondents have opposed the application questioning the merits of the application sought to be reinstated. However, it would be premature for the court to go into the merits of that application at this stage. It is fair and just that the application be reinstated to hearing and that the parties be given an opportunity to fully ventilate their arguments.
4. Accordingly, the chamber summons dated 15th June, 2010 is allowed and the order of dismissal made on 14th May, 2009 set aside and the application dated 25th November, 2004 reinstated to hearing. The applicant shall pay costs of the application.

Dated and delivered this 5th day of November, 2010

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiffs absent
Ms Kisa H/B for Ngugi for the defendants
B. Kosgei - Court clerk