



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 61 OF 2014

ANTHONY KAPSAWE JEPTUM.....1ST PLAINTIFF

CATHERINE JEPKEMEI MENGICH.....2ND PLAINTIFF

VERSUS

NIXON KIPCHUMBA KAPSAWE.....1ST DEFENDANT

STANLEY KIPKORIR KAPSAWE.....2ND DEFENDANT

KENNEDY MAKORI.....3RD DEFENDANT

DAVID OMIKOKOSI.....4TH DEFENDANT

DORCAS MUKERE.....5TH DEFENDANT

JAMES ONSONGO.....6TH DEFENDANT

GILBERT M. BOSONGO.....7TH DEFENDANT

RULING

1. This is a ruling on the application dated 3/3/2020 which was filed in court on the even date. That application has been brought by the plaintiffs seeking orders that there be stay of all the proceedings and consequential orders made on 10/12/2018 pending *inter partes* hearing and further orders of the court; that the proceedings orders of this honourable court of 10/12/2018 and orders dismissing the plaintiffs' suit and all consequential orders thereto be reviewed and set aside; that the suit and all orders therein be reinstated and the suit be heard and determined on priority basis. They also pray for costs of this application be in the cause.

2. The grounds on which the said application is made are that on 10/12/2018, the court dismissed the suit due to non-attendance by the former advocate on record for the plaintiffs; that the absence of the advocate was due to the fact that by the time the notice of hearing was served to the firm of Ms. Lel & Bungei Advocates, the advocate whom the plaintiffs/applicant had personally instructed had already relocated to Eldoret and the clerks at the firm of Lel & Bungei Advocates inadvertently failed to inform advocate Murgor of the said hearing notice; that the advocate's absence was not intentional and ought not be visited on an innocent litigant; that the plaintiffs still desires to prosecute the case and prays that this court do reinstate the suit since denial of orders prayed will be prejudicial to them and the plaintiff will stand denied access the seat of justice; that it is in the interest of justice that the said orders made by this court on 10/12/2018 be reviewed and this suit be reinstated and heard on priority basis and be determined on merit; that this application has been made in good faith without undue delay. It is urged that the mistake of the advocate should not be visited on an innocent litigant.

3. The application is supported by the affidavit of **Catherine Jepkemei Mengich**, the 2nd plaintiff sworn on 3/3/2020. The said deponent reiterates the grounds earlier set out hereinabove in detail.

4. In their reply to the application, the defendants filed replying affidavit dated 5/5/2020 sworn by their advocate on record, Counsel Jeremiah Samba. Counsel argued that his firm was served with a hearing notice dated 23/11/2018 on 28/11/2018 by the court indicating that the case had been set down for hearing on 10/12/2018 which was service week for the Environment and Land Court; that counsel for the applicants was also served; that when the matter came up for hearing, the court, upon being satisfied that there was proper service upon the applicant's advocates dismissed the suit for want of prosecution and that the suit has been in court for over four years but the applicants have not been keen on prosecuting it.

Determination

5. I have considered the application before me, and the response thereto. The applicants attributes their situation to the mistake of their erstwhile advocate who is said to have relocated to Eldoret and who failed to update Advocate Murgor of the case.

6. In the case of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR** the Court observed as follows:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.

7. In **Belinda Murai & Others vs Amos Wainaina 1978** (as cited in **Harrison Wanjohi Wambugu vs Felista Wairimu Chege & Another 2013 eKLR**):-

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

8. In my view it is necessary for the ends of justice to allow the application so that the applicant, whom I deem to be innocent, does not suffer for the mistakes of his advocate.

9. I therefore exercise my discretion and grant the application dated 3/3/2020 as prayed in **Prayers No. (2) and (3)** thereof. The costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 11th day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.