



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 91 OF 2018**

**ALBERT KIGERA KARUME.....PLAINTIFF**

**VERSUS**

**ROBERT CULLY KIRURI MBUGUA.....DEFENDANT**

**RULING**

***(Application to reinstate an application that was dismissed for non-attendance; applicant explaining that the non-attendance was because the case was not in the cause list; position of cause list not superior to the order in the file; no excuse not to attend court only because a case is not in the cause list unless there is clear direction from the court that the case will not proceed; no good reason given for absence of applicant but in its own discretion, court allowing the application subject to payment of throwaway costs).***

1. The application before me is that dated 17 April 2018 filed by the plaintiff. It is an application seeking orders to have reviewed and/or set aside, the orders issued on 16 April 2018, dismissing the plaintiff's application dated 22 February 2018. That application was dismissed for the non-attendance of the plaintiff and/or his counsel on the appointed hearing date. There are various grounds listed in support of the application, but to me, the main ground is that the application was not cause listed. In the supporting affidavit sworn by the applicant, he has deposed inter alia that the matter was not cause listed and he has annexed a copy of the cause list of 16 April 2018. He has deposed that he has been informed by his counsel, that his counsel sought directions from the registry, when he was informed that the file has already been placed before the judge for hearing. He has asked that the confusion caused by the technicality of the cause list should be considered. He is also of opinion that his dismissed application has overwhelming chances of success.

2. The defendant has filed a replying affidavit to oppose the motion. He has pointed out that his advocate was in court, whereas counsel for the applicant was not, when the application was called out and dismissed for non-attendance. He is of the view that the explanation that the matter was not cause listed is an excuse that the court ought not to tolerate and that it was incumbent on the applicant to follow up on the position of the file.

3. I have considered the application and the submissions of counsel.

4. The suit itself was commenced by the applicant through a plaint which was filed on 22 February 2018. In the suit, the applicant pleaded that he is the rightful proprietor of the land parcel described as UNS. Gilgil Township Block 2/129 (hereinafter also referred to as "the suit property").

5. He pleaded that the respondent has illegally entered the suit property and commenced construction of temporary structures without his (applicant's) permission. In the plaint, the applicant has sought orders inter alia to have the respondent restrained from the suit property through a permanent injunction. Alongside the plaint, the applicant filed an application under Certificate of Urgency under the provisions of Order 40 of Rules 1, 2, 3 and 9, of the Civil Procedure Rules, 2010, vide which he sought an interlocutory injunction to have the respondent restrained from the suit property pending hearing of the case. The application was placed before the duty judge, Ohungo J, on 23 February 2018, and he directed that the application be heard inter partes on 16 April 2018 before me. On 16 April 2018, I noted that both the applicant and respondent were absent in court. Counsel for the plaintiff was absent whereas Mr. Katithi, learned counsel for the respondent was present. Mr. Katithi did pray for the application to be dismissed for the absence of the applicant and I duly obliged. It is then that this application was filed two days thereafter.

6. It is true that this case was not listed in the cause list of 16 April 2018. However, merely because a case is not cause listed, is not by itself, reason enough for a party or his counsel not to appear in court, and it is not reason enough for a matter not to proceed in court, unless the court orders otherwise. It is important for all of us to understand the place of the cause list in the administration of justice. What happens is that orders are issued by court and these orders are recorded in the respective court files. Some of these orders involve the giving of dates for the next court appearance. Courts do publish what is termed as a "cause list", which is nothing more than a description of the cases that are expected to be in court before a judicial officer on a particular day. A cause list is generated from the totality of the files meant to be before the judicial officer and the same specifies which case is before which court. This cause list is published in a conspicuous place within the

court precincts, and online, ordinarily in the preceding week. Its purpose is more or less to direct parties to the right court and to give information to the public on what case is before which court. Now, it should be understood that the cause list is not superior to the order given in the file. The order in the file remains and should be obeyed and followed, unless and until the court overrides it by another order or direction. Where a date has been given by a court, or registry, parties are well advised to attend court, irrespective of the fact that the case may not be in the cause list. If the case is not in the cause list, they should seek directions on whether or not the case is going to proceed as ordered in the court file. Alternatively, they should seek directions from the registry on why the case is not in the cause list, whether or not it will still be presented before court, or whether there are fresh directions on its hearing. I do not think that the first option of the party should be not to appear in court at all. The mere fact that a case is not in the cause list does not mean that the court cannot or should not follow the order given in the file. Thus, if the order is for hearing, the court is not bound by the cause list, and say that the said order is overridden by its mere omission in the cause list. Parties should always be ready and prepared to appear in court on the date noted in the file unless the court directs otherwise. If a party does not appear, such party should be prepared for the consequences of not following a court order. Thus, if the court proceeds with the matter, the person must bear the consequences of non attendance. In my view, to order otherwise can easily lead to a breakdown in the administration of justice and open a window for unscrupulous persons to improperly influence the publication of the cause list if they want a case to delay. The order in the file must remain superior and must be followed unless otherwise directed. If we are to elevate the cause list to be superior to the court record an absurdity will result. For example, if by error, a matter is in the cause list and there is no order for it in the file, the court will be forced to proceed with the case despite not having given an order for the case to proceed. On the flip side, if by say, a typing error, the typing clerk omits a case from the cause list, then the court will be bound by such error, which is clearly illogical. I emphasize that it is the court record and not the cause list which must be given prominence.

7. I find it interesting that in the circumstances of this case, the applicant, who was given the date, opted not to appear in court, yet the respondent, who was served by the applicant with the date, is the one who appeared in court. I am really not too persuaded by the reasons given by the applicant, for his absence and that of his counsel, at the appointed time for the hearing of his application. Although it is said that counsel went to the registry, I am not too convinced of this, for if he actually did appear at the registry at 9 am when matters generally begin, he should have known that the case file was in court as I ordinarily deal with applications after 10 am. I would readily dismiss this application, but I will, out of discretion, and so that the applicant can have an opportunity of being heard, allow this application and reinstate the application that was dismissed for non-attendance of the applicant. The applicant will however pay throwaway costs of Kshs. 5,000/= within 7 days.

8. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 4<sup>th</sup> day of July 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr. Okiro holding brief for Mr. Geoffrey Otieno for the applicant.

No appearance on the part of M/s Hari Gakinya & Company Advocates for the respondent.

Court Assistant :Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**