



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 25 OF 2019

SUSAN ANNA KARANJA.....APPELLANT

AND

FRANCIS MUOKA MATHEKA.....1ST RESPONDENT

BENEDICT SYOMBUA MUSEMBI.....2ND RESPONDENT

AND

CRAWFORD KIOKO MATHEKA.....3RD RESPONDENT

LYDIA MWIKALI MUTHYA.....4TH RESPONDENT

BERITA MBITHE MUANGE.....5TH RESPONDENT

MARTHA MWIKYA MUTISO.....6TH RESPONDENT

RULING

1. Vide a Notice of Motion dated 7th February, 2020, the Appellant has sought for the following Orders:

- a) *This Honourable Court do set aside the dismissal order issued herein on 4th February, 2020 and all consequent proceedings.*
- b) *That the Notice of Motion Application dated 20th September, 2019 be reinstated for hearing and determination on merit on the date fixed of 20th February, 2020.*
- c) *That the cost of this Application be provided for.*

2. The Application was supported by the Affidavit of the Appellant's Advocate who deponed that the Appellant filed an Application dated 20th September, 2019 seeking for an order of stay of execution of the Decree and Judgment in CMCC. No. 552 of 2013 pending the hearing and determination of this Appeal and that he fixed the Application for inter-partes hearing for 20th February, 2020.

3. Counsel deponed that the Application dated 20th September, 2019 sought for stay of execution of the Judgment in CMCC No. 552 of 2013 in which the trial court ordered for cancellation of the Appellant's Title Deed over land Parcel Number Athi River/Athi River Block 1/208 (*hereinafter the suit property*).

4. Counsel deponed that he thereafter caused the said Application and a hearing notice to be served on the firm of Mulu & Co. Advocates for the 1st and 2nd Respondents and Sila & Co. Advocates for the 3rd to 6th Respondents and that his firm was subsequently served with an Application dated 26th July, 2019 and a Mention Notice dated 31st October, 2019 by the firm of Sila & Co. Advocates in ELC Misc. Application No. 39 of 2019.

5. It was counsel's deposition that the Appellant's Advocates were therefore under the impression that the matter was scheduled for Mention for directions on 4th February, 2020 in respect to the Application dated 31st October, 2019 and filed by the firm of Sila & Co. Advocates and that the Appellant was not opposed to the Application dated 31st October, 2019 and had given the said indication to counsel for the Appellants.

6. Counsel deponed that unless the Notice of Motion Application dated 20th September, 2019 is reinstated and heard on its merits, the Appellant stands to suffer substantial and irreparable loss and damage and that there was a high likelihood that the 1st and 2nd Respondents shall proceed to execute the decree and therefore have the Appellant's Title Deed over the suit property cancelled.
7. Counsel deponed that the entire Appeal will be rendered nugatory unless the Application dated 20th September, 2019 is reinstated for hearing on merit on a priority basis; and that as at 4th February, 2020 when the Application was dismissed for non-attendance, none of the Respondents had filed and/or served him with a response to the Application dated 20th September, 2019.
8. The Application was opposed vide a Replying Affidavit sworn by the Respondents' Counsel who deponed that the allegations by the Appellant's Advocate that none of the Respondents had filed a response to the Application were untrue as his firm filed a response by the 1st and 2nd Respondents.
9. Counsel deponed that the Applicant herein had a habit of failing to prosecute her Applications and later bombard the court with Applications for reinstatement and that a similar Application to reinstate an Application that had been dismissed for non-attendance in the lower court was also dismissed as no sufficient reasons were advanced for non-attendance.
10. Counsel deponed that if at all the Appellant's counsel who had sworn the Supporting Affidavit is the one who fixed the date, then the same deponent is misleading the court as the matter was fixed for inter- partes hearing on 4th February, 2020 and that no reason had been given as to why the Applicant's advocate did not attend court on 4th February, 2020 to prosecute their Application despite having fixed the date.
11. Counsel for the Appellant swore a Supplementary Affidavit and deponed that indeed the 1st and 2nd Respondents had not attached a copy of the Replying Affidavit nor proof of payment of filing fees in respect of the said Replying Affidavit and that the 1st and 2nd Respondents had not denied that the Application and hearing notice served upon the firm of Mulu & Co. Advocates on the 1st and 2nd Respondents indicated a hearing of 20th February, 2020. The Application was canvassed by way of written submissions which I have considered.
12. The record shows that on 23rd September, 2019, the Appellant filed a Notice of Motion dated 20th September, 2019. In the said Application, the Appellant sought for an order of stay of execution of the Judgment of the lower court in CMCC No. 552 of 2013 pending the hearing and determination of the Appeal. The court declined to certify the said Application as urgent.
13. The record shows that on 15th October, 2019, the Appellant's advocate's assistant fixed the Application dated 20th September, 2019 for hearing in the registry *ex parte*. The date that the Appellant's advocate was given was 4th February, 2020 whereupon he served the Respondent's advocate with a hearing notice.
14. Although it is the Appellant's advocate's Assistant who fixed the date of 4th February, 2020, the Appellant's advocate did not attend court on 4th February, 2020. The Application was dismissed by this court with costs for want of prosecution.
15. Counsel for Appellant deponed and submitted that the failure of the Applicant to be present in court on 4th February, 2020 was a *bona fide* mistake that resulted from an honest belief by the Applicant's Advocate that the matter was scheduled for 20th February, 2020 and not 4th February, 2020.
16. Counsel submitted that the court was clothed with the general discretion to reinstate a suit or an Application that had been dismissed for non-attendance so long as sufficient cause had been shown for the exercise of such discretion.
17. It is trite that if this court is to exercise its discretion in favour of a party, the party is obliged to place before it some material to justify the exercise of discretion in his favour, otherwise the exercise of discretion will be perceived as capricious or whimsical.
18. Although the Appellant's advocate has deponed that he was under the impression that it is the Respondent's Application dated 31st October, 2019 filed by the firm of Sila & Co. Advocates, and not his Application dated 20th September, 2019 that was coming up on 4th February, 2020, he has not explained why he did not diarize, after fixing the date *ex- parte*, the date of 4th February, 2020, which date was fixed by his office.
19. Having not explained satisfactorily why he did not attend court, or why he misdiarized the hearing date of the Application dated 20th September, 2019 for 20th September, 2020 and not 4th February, 2020, I find the Appellant's Application to be unmeritorious.
20. For those reasons, I dismiss the Application dated 7th February, 2020 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30TH DAY OF JULY, 2021.

O.A. ANGOTE

JUDGE