

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 151 OF 2013

VALENTINE OMOLLO ONGESO.....PLAINTIFF

VERSUS

KENNEDY ONDENGE.....DEFENDANT

RULING

Judgment in this matter was delivered on 30/1/2020 in favour of the Plaintiff and the defendant's claim on adverse possession was dismissed. The Defendant did not attend court on the hearing date and therefore prays for the setting aside of the Judgment.

The grounds of the application are that the Defendant's advocate has been attending court without failure. The applicant/defendant blames the court clerk for the failure to place the matter aside and that sat on the file in collaboration with the secretary. The defendant's counsel learned of the Judgment on 20/5/2015 and that he did not learn of the same in time due to Covid 19 as all staff were on leave. The applicant should not be punished due to the counsel's mistake.

When the matter came up for hearing on 17th October 2019 counsel's clerk arrived in court late and was unable to place the matter aside and never informed the advocate of the predicament. He discovered that the matter was coming for hearing on 17/4/2020.

In the replying affidavit, the plaintiff/respondent states that the defendant's counsel was duly served with the hearing notice and affidavit of service duly filed. The respondent states that it is the advocate who failed to attend court and not the clerk. There is no copy of diary showing that the hearing was diarised for 17/4/2020.

The applicant does not explain what happened to the notice of entry of Judgment. The applicant has not annexed the names of the clerk and Secretary and has not exhibited the disciplinary action taken against them.

The applicant has come to court with unclean hands as the advocate is not truthful. The defendant has not claimed for adverse possession as a counter-claim.

I have considered the application, supporting affidavit of Helen Adoyo Kuke and the replying affidavit of David Owino Omollo and do find that the applicant's counsel has not demonstrated that there was any hardship in attending court on the scheduled date. Strangely, she sent a clerk to place the matter aside instead of attending court. How can an advocate send a clerk to place a matter aside? Definitely the clerk has no audience in court and in this case the advocate put the poor clerk in a predicament because he is not authorised to address the court. The counsel for Applicant states that the clerk and the secretary sat on the file but there is no evidence of any disciplinary action against the clerk.

This is a clear case of dereliction of duty by the advocate as she could have instructed another advocate to hold brief and explain any predicament.

The mistake made by counsel is not excusable because the advocate knew that the matter was coming for hearing but chose not to attend and sent a person not authorized to address the court.

I have looked at the defence and it raises no counter claim on adverse possession. It raises no issue related to, and particulars of, fraud. It is a bare defence. I do find the application not merited and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE