



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 111 OF 2016**

**STANLEY KIGOTHO MIANO.....PLAINTIFF**

**VERSUS**

**JOB KIGOTHO MIANO.....1<sup>ST</sup> DEFENDANT**

**JOHN MURIMI MIANO.....2<sup>ND</sup> DEFENDANT**

**RULING**

The plaintiff filed the Notice of Motion dated 13<sup>th</sup> November 2018 under **Order 12 Rule 7, Order 51 Rule 1 CPR, Section 3A CPA, Article 159 (2) of the Constitution of Kenya, 2010** seeking the following orders:

- 1. That the Honourable Court be pleased to review and/or set aside the orders issued on 4<sup>th</sup> October 2018 dismissing the Plaintiff/Applicant's suit for want of prosecution and hereby reinstate the subject main suit for hearing.***
- 2. That the Honourable Court be pleased to reinstate the orders issued on 14<sup>th</sup> July 2019 by Justice B.N. Oloo restraining the Defendant/Respondent from interfering with the suit property pending the hearing and determination of the main suit.***
- 3. Costs of this suit be provided for.***

The application is based on eight grounds apparent on the face of that application supported by an affidavit sworn by the Plaintiff/Applicant on 13<sup>th</sup> November 2018. The application is further supported by travel documents.

That application is opposed with two replying affidavits sworn by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents. When this matter came up for hearing on 30<sup>th</sup> September 2019, the parties through their legal representatives agreed to dispose of the said application by affidavit evidence and written submissions.

**PLAINTIFF/APPLICANT'S CASE**

The Plaintiff/Applicant in his affidavit in support of this application stated that he is the legal and registered proprietor of all that freehold property No. KIINE/KIANGAI/3399 which is the subject of this suit. He stated that this suit came up for hearing on 4<sup>th</sup> October 2018 on which date he was out of the country and could not therefore attend Court personally. He further stated that he travelled out of the country from 22<sup>nd</sup> September 2018 to 8<sup>th</sup> October 2018. The Applicant also stated that his hitherto advocates M/S Viola & Onyango Advocates failed to attend Court during the hearing on 4<sup>th</sup> October 2018 leading to the dismissal of this suit for non-attendance which was inadvertent or in bona fide omission and/or mistake. He stated that he has been advised by his current advocates on record which he believes to be true that his hitherto counsels were under the mistaken belief that matters which had been listed for hearing before the late Justice S. Mukunya were to be allocated fresh dates and that failure to attend Court on the said date is not as a result of negligence on his part. The Applicant contends that the bona fide mistake and/or omission that led to non-attendance in Court by his previous legal representative should not be visited on him as he has a new advocate on record. He said that he is still interested in prosecuting this suit. He stated that he require to be afforded an opportunity to be heard in accordance with the Constitution and the rules of Natural Justice so as to ventilate the real issues in dispute on merits otherwise he will be condemned unheard. He stated that failure on the part of his previous counsel should not be visited upon him as he is just an innocent party seeking justice for a wrong occasioned upon him and his personal property. Finally, the Applicant contends that the orders sought will not prejudice the Respondent and that it is in the interest of justice that his matter gets a fair and unbiased hearing.

**1<sup>ST</sup> RESPONDENT'S CASE**

The 1<sup>st</sup> Respondent contends that this suit was dismissed for want of prosecution and non-attendance by the plaintiff and his advocate. He

stated that this Honourable Court on 14<sup>th</sup> July 2017 ordered this suit to be set down for hearing and determination within 12 months from the date thereof failing which the same was to stand dismissed for want of prosecution. On 4<sup>th</sup> October 2018, the plaintiff fixed this case for hearing but neither the plaintiff nor his advocate were present leading to the case being dismissed. He stated that no reason has been offered why the plaintiff had to wait until the case is dismissed to change his advocate.

## **2<sup>ND</sup> RESPONDENT'S CASE**

The 2<sup>nd</sup> Defendant/Respondent contends that this case was fixed for hearing by the Plaintiff's hitherto firm of Viola & Onyango Advocates who served their advocates with a hearing notice. The 2<sup>nd</sup> Respondent further stated that the Plaintiff/Applicant knew all along that he will be travelling outside the country on the 4<sup>th</sup> October 2018 and that he cannot claim that his non-attendance was not intentional or in bad faith. He stated that the plaintiff ought to have been courteous and communicate to the Court and to counsel for the Defendants through his advocate that he would not have been available to attend Court on 4<sup>th</sup> October 2018. The 2<sup>nd</sup> Defendant stated that the plaintiff cannot blame his previous advocate since a matter does not belong to an advocate but to a litigant and should always be vigilant. It is also the 2<sup>nd</sup> Defendant/Respondent's contention that even if his previous counsel was present on 4<sup>th</sup> October 2018, the matter would not have proceeded since the plaintiff was outside the country and did not find it necessary to communicate to other counsels on record.

## **ANALYSIS, EVALUATION AND DETERMINATION**

The nature of the application before me is of a discretionary nature which must be exercised judicially. It is to be noted from the record that this suit was fixed for hearing by the firm of Viola & Onyango & Co. Advocates for the plaintiff on 8<sup>th</sup> May 2018. When the matter came up for hearing on 4<sup>th</sup> October 2018, there was no attendance by either the plaintiff or his advocate. There is no affidavit by the firm of Viola & Onyango Advocates explaining their reasons for failure to attend Court on the 4<sup>th</sup> October 2018 during the hearing of this case. There is no discernable reason or explanation why the hitherto advocate did not attend Court. The only inference one can draw from the failure to get an explanation from the plaintiff's advocate who fixed the case for hearing and failed to attend is that they had lost interest in prosecuting this case. It is only by giving reasonable explanation why the previous advocate failed to either attend Court or inform the plaintiff that this Court can exercise its discretion otherwise the Court's discretion cannot be exercised on nothing. I also note that cases belong to parties and that it is always the duty of the litigants themselves to follow up the progress of their cases.

In the case of *Savings and Loans Limited Vs Susan Wanjiru Murithi - Nairobi (Milimani) HCCC No. 397/2002*, the Court expressed itself as follows:

***“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case”.***

I agree with the decision by the learned Judge in that decision. The Court's discretion to set aside an Ex-parte order can only be done based on sound reasons. The Court cannot exercise its discretion by the Applicant engaging a new advocate. In the upshot, I find the application dated 13<sup>th</sup> November 2018 lacking merit and the same is hereby dismissed with costs.

***READ, DELIVERED and SIGNED in open Court at Kerugoya this 7<sup>th</sup> day of February, 2020.***

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**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

*In the presence of:*

1. M/S Ann Thungu holding brief for Kiboi for the Plaintiff
2. 1<sup>st</sup> Defendant – present
3. 2<sup>nd</sup> Defendant – present