



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 277 OF 1990

IN THE MATTER OF THE ESTATE OF SAMWEL KABAIKU GICHARU (DECEASED)

DAVID KARANJA KABAIKU.....APPLICANT

-VERSUS-

HANNA NJOKI KABAIKU.....RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 14/3/2017. The Applicant seeks orders;

1. **Spent**

2. **THAT** the Honourable Court be pleased to reinstate the Applicants application dated 3rd March, 2015 which was struck out on 6th March 2017, when the same was struck out for want of prosecution.

3. **THAT** costs of this application be provided for.

2. The application is supported by grounds on the face thereof namely;

(i) **THAT** the application dated 5th March, 2015 was coming up for hearing on 6th March, 2017.

(ii) **THAT** the hearing could not proceed owing to the absence of counsel and the applicant in court and as such the Application was struck out for want of prosecution.

(iii) **THAT** counsel was attending JR 26 of 2010 which matter was proceeding before the environment and land court at Nakuru at the same time when this matter was called out to proceed with hearing thereof.

(iv) **THAT** the Applicant stands to suffer irreparable harm if the stated application is not urgently reinstated and set down for hearing.

(v) **THAT** the application is further made on the directions of the court that the applicant does move the court formally.

(vi) **THAT** the application is made in good faith.

3. In addition, Peter Chege Advocate has sworn a supporting affidavit.
4. The gist of the grounds and the supporting affidavit is that the Applicant's application dated 31/3/2015 was struck out on 6/3/2017 for want of prosecution. It is stated that counsel for the Applicant was not in Court as he was attending to JR 26 of 2010 before the Environment and Land Court when this matter was called out.
5. It is urged that the applicant stands to suffer irreparable harm if the application is not reinstated.
6. It is explained that the application dated 5/3/2015 was set down for hearing on 6/3/2017. On the particular day the Court was not sitting for reasons that the day had been gazetted as a national holiday. In a strange twist a causelist for day (6/3/2017) is annexed and mark "PC1".
7. It is urged that the application has been made in good time and without undue or inordinate delay. The failure to attend Court was not deliberate and any omission or oversight on the part of counsel ought not to be visited on the Applicant as his case has high chances of success.
8. The application is opposed. In addition to an attempt to urge the strength of the claim which is not really necessary by the very nature of this application, it is urged that in paragraph 3 of the supporting affidavit, the applicant has made a false allegation that the Court was not sitting on 6/3/2017 for reason that the day was a national holiday.
9. It is contradictory that counsel states that the Court was not sitting yet he at the same time depones that he was before the Environment and Land Court in JR 26 of 2010. It is urged that the deponent is not certain of what he is actually claiming. The application is only meant to delay the enjoyment of the fruits of the outcome of the case by the Respondent.
10. The power of the Court to set aside its judgment or order is bestowed on Court to avoid hardship or injustice being visited on a party on account of an excusable error or mistake. The same, however, is not exercisable in favour of a party intent on obstructing the cause of justice.
11. The record of Court shows that on the 6/3/2017 the Court was sitting. The Applicant's brief was held by Mr. Njoroge who indicated "It is for hearing Mr. Chege is ready, Ms Njeri for Respondent was equally ready." The Court dutifully slated the matter for hearing at 11.05 a.m.
12. Come 11.05 a.m. Mr. Chege was absent. Ms Njeri was present. Ms Njeri counsel for the Respondent moved the Court to dismiss the applicant's application dated 3/3/2015.
13. The Court in a brief but concise ruling dismissed the application for want of prosecution.
14. The applicant has filed this application timeously. However, a look at the grounds upon which the application is anchored demonstrates either a lack of seriousness or ineptitude.
15. It is urged that the Court should set aside the orders of 6/3/2018 as counsel was engaged in case JR 26 of 2010. No explanation whatsoever is given why Mr. Njoroge who held brief for Mr. Chege earlier in the day did not either appear or inform Mr. Chege that the matter was slated for 11.05 a.m.
16. To a discerning mind and in the circumstances stated, the Court may be inclined to entertain the existence of a lapse in communication between the two (2) counsels reading to a costly error on the part of the applicant and proceed to, for the sake of the litigant, save the ship from capsizing.
17. But alas! Any such an inclination that the Court may harbour are whitewashed completely by what is deponed by counsel for the applicant at paragraph 3 of the affidavit supporting the application. Counsel deposes as follows;

"THAT on the particular day the trial court was not sitting for the reasons that the day had

been gazetted as a national holiday and hence the interim orders therein lapsed by operation of law.”

18. At paragraph 4 he takes a complete aboutturn stating he was before the Environment and Land Court prosecuting JR 26 of 2010.

19. These are 2 contradicting statements made on oath. The begging question is which of the two explains the absence of counsel in Court?

20. Paragraph 3 of the supporting affidavit is outrightly false. The record of Court shows the Court was sitting. The application is thus pegged on a false affidavit.

21. In the totality of the material before me, no excusable error or mistake is demonstrated. The Court has been treated to an inexplicable charade of contradiction which exposes the current application to inevitable peril.

22. With the result that the application before Court is completely without merit. The same is dismissed with costs to the Respondent.

Dated and Signed at Nakuru this 12th day of June, 2018.

A. K. NDUNG'U

JUDGE