



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT AND LAND CASE NO.102 OF 2012

THE CHAIRMAN BOARD OF TRUSTEES NDALU MOSQUE.....1ST PLAINTIFF

SECRETARY BOARD OF TRUSTEE NDALY MOSQUE.....2ND PLAINTIFF

VERSUS

MARTIN MABELE.....1ST DEFENDANT

MOSES WAFULA.....2ND DEFENDANT

COUNTY COUNCIL OF BUNGOMA.....3RD DEFENDANT

RULING

When this suit came up for hearing on 13th June 2018, there was no appearance by the plaintiffs or their Counsel MR. KRAIDO. Both MR. OKILE and MR. MURUNGA Counsel for the 3rd defendant and the 1st and 2nd defendants respectively asked the Court to dismiss the plaintiff's case. As there was no explanation for the absence of the Plaintiffs and their Counsel yet the date had been taken in their presence in the Registry, the Court obliged and dismissed the plaintiff's suit with costs.

I now have before me the plaintiff's Notice of Motion dated 18th June 2018 in which they seek the main prayer that the order dismissing their suit on 13th June 2018 be set aside and their suit be reinstated for hearing. The gravamen of their application is that they were infact in Court on 13th June 2018 when the case was dismissed and that they should not be punished due to the failure by their advocate to attend. That is the gist of the affidavit by IBRAHIM BARAKA who does not even explain his relationship with the plaintiff's herein. I will however not penalize the plaintiff's for that lapse.

The application is opposed and the 1st defendant has sworn a replying affidavit in which he avers, inter alia, that when this suit was called for hearing on 13th June 2018 the 1st and 2nd defendants were present in Court but the plaintiffs and their Counsel were absent. The plaintiffs cannot now claim to have been present in Court because they are known to the defendants and they were not present.

This is a Court of record and the proceedings of 13th June 2018 are very clear. They read as follows in so far as is relevant for this ruling:

COURT: "The plaintiff is not present and neither is their Counsel. The hearing date was taken in the registry on 26th April 2018. There is no explanation for the absence of the plaintiff or Counsel.

In the circumstances, the plaintiffs 'suit is dismissed with costs to the defendants'

If indeed the plaintiffs were present in Court nothing was easier than for them to raise their hands or stand up and inform the Court that they were present. That is the normal practice in Court and unless they do so, the Court is entitled to conclude that they are not present or if they are, they are no longer keen on prosecuting their case. The Court has no personal knowledge of the parties that appear before it and even if it did, it cannot force or cajole a party to stand up and address it if he does not wish to do so. Litigation belongs to the parties and not to the Court or Counsel.

The 1st defendant having deponed in his replying affidavit that the plaintiffs were not present and in the absence of any other further affidavit to rebut that averment, this Court must accept that the plaintiffs were indeed not present in Court on the 13th June 2018 when their suit was dismissed due to their absence. They have also not explained why they did not attend Court and even their own Counsel MR. KRAIDO ought to have filed an affidavit explaining his absence.

That is a matter of simple courtesy expected of an Officer of this Court. It is clear to me that the plaintiffs are not deserving of the exercise

of this Court's discretionary power in their favour. Parties must be warned that Courts have now taken charge of the proceedings and will no longer take a laid back approach to litigation but will ensure that the overriding objective of the Civil Procedure Act and Rules are strictly adhered to so that matters are heard and determined expeditiously.

Having said so, however, this Court will bend backwards and accommodate the plaintiffs on the following conditions:

- 1. The order of 13th June 2018 dismissing the plaintiffs suit is set aside on the condition that the plaintiffs pay each of the defendants the sum of Ksh.5,000/- as costs within the next 14 days.**
- 2. In default, the order of dismissal dated 13th June 2018 shall revert.**
- 3. The suit should then be listed for hearing at the earliest convenient date if there is compliance with (1) above since this is a 2012 case.**
- 4. It is so ordered.**

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018

Ruling dated, delivered and signed in open Court this 15th day of November 2018 at Bungoma.

Mr. Tsimonjero for Mr. Kraido for plaintiff present.

Mr. Kweyu for Mr. Okila present.

BOAZ N. OLAO

JUDGE

15TH NOVEMBER 2018