



REPUBLIC OF KENYA
IN THE
ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 694 OF 2013

NATHAN MUNYAO MUTISO.....1ST PLAINTIFF/APPLICANT

WAYUWA NGETI GACANGI.....2ND PLAINTIFF/APPLICANT

VERSUS

SABAN SAID GATHURI.....1ST DEFENDANT

FRANCIS KARIUKI MARIRA.....2ND DEFENDANT

LAND REGISTRAR, KIRINYAGA.....3RD DEFENDANT

COUNTY COUNCIL OF KIRINYAGA.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

MORRIS GIKURI KARIUKI.....6TH DEFENDANT

RULING

The application before me is the Notice of Motion dated 14th February 2020 seeking the following orders:-

1. That this application be certified as urgent and a date be issued on priority basis.
2. That this Honourable Court be pleased to review and/or set aside orders issued on 5th day of February 2020 by Hon. Judge E.C. Cheronu dismissing the suit for want of prosecution and proceed to stay the proceedings and the intended judgment reserved for the 13th day of March 2020.
3. That the suit be reinstated and do proceed for full hearing and determination on merit.
4. That the proceedings by the defendants on the counter-claim be set aside and the plaintiff be granted an opportunity to be heard on merit.
5. That the costs of this application be in the cause.

The said application is premised on grounds apparent on the face thereof and a supporting affidavit sworn by the 1st plaintiff/applicant and a further affidavit filed on 9th March 2020. The 2nd & 6th respondents filed grounds of opposition to the said application dated 18th February 2020. The 1st and 2nd interested parties also filed grounds of opposition dated 21st February 2020 together with a replying affidavit sworn on 10th March 2020 opposing the said application.

APPLICANTS CASE

The 1st plaintiff who is also the 1st applicant in the application stated that when this matter came up for hearing, he was in Court but his advocate had called to inform him that he had a sick child and was looking for an advocate to hold his brief. The 1st plaintiff/applicant also deponed that by the time he got another advocate to hold his brief, the Court had already dismissed the suit and the Court proceeded with the hearing of the counter-claim despite the fact that the defendant had not complied with the Court's orders of 26th July 2020. The applicants further stated that they have never sought adjournment previously as they have always attended Court whenever the case comes up for hearing. He stated that it is for the interest of justice that they be accorded the opportunity to be heard and the suit be determined on merit.

2ND & 6TH RESPONDENTS CASE

The 2nd and 6th Respondents filed grounds of opposition and submitted that the application is frivolous, vexatious and an abuse of Court process. The 2nd and 6th respondents further contend that the application dated 14th February 2020 is brought under the wrong provisions of law as the same ought to have been brought under the provisions of *Order 45 Rule 1 CPR* for review of judgment. The 2nd and 6th respondents also submitted that the said application is bad in law and breaches the principles of Res-judicata as a similar application to set aside dismissal was ably argued by Ms Nyangati Advocate holding brief for the advocate for the applicant which application was dismissed and the case proceeded for the hearing of the counter-claim and that the current application seeking similar orders is Res-judicata and an abuse of process of Court.

1ST & 2ND INTERESTED PARTIES CASE

The 1st and 2nd interested parties filed a replying affidavit in addition to grounds of opposition and stated that the instant application is res-judicata since a similar application seeking similar orders was made on 5th February 2020 which application was heard and determined on merit. The 1st and 2nd interested parties also contend that this Honourable Court is now functus officio having already heard and determined the matter on merit. They stated that the applicant is an indolent litigant and that no sufficient cause has been shown for the grant of the orders sought. In conclusion, the 1st and 2nd interested parties stated that the instant application does not meet the threshold necessary for issuance of the orders sought.

LEGAL ANALYSIS

I have considered the Notice of Motion and the supporting affidavit dated 14th February 2020. I have also considered the response by the respondents and the submissions by counsels both in support and in opposition thereto and the applicable law. The applicants have invoked this Court under the provisions of *Order 12 Rule 7 CPR* to have the orders of this Court issued on 5th February 2020 dismissing this suit for want of prosecution set aside. The guiding principle in the Court's exercise of its judicial discretion was laid down in the case of *Mbogo & Another Vs Shah (1967) E.A. 116* where the Court stated that the Court's discretion to set aside an ex-parte order of the nature of a dismissal is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. However, the Court stated that the discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

The applicant in his supporting affidavit has stated that he was present in Court during the hearing date on 5th February 2020 but his advocate had called him saying that he was attending a sick child. When Ms Nyangati who was holding brief for Mr. Osoro for the plaintiff/applicant made the application for adjournment on the said date but failed to present the medical documents or treatment notes, this Court which is a Court of record for good reasons disallowed the said application. The applicants have now annexed copies of treatment notes to the supporting affidavit. The treatment notes indicate that the patient was seen at the facility on 1/2/2020. I am satisfied that the counsel for the applicant has given excusable reasons for failure to attend Court during the hearing of this case on 5/2/2020.

I therefore exercise this Court's discretion and set aside the order dismissing this suit for want of prosecution on 5th February 2020. I also set aside the judgment for the 2nd and 6th defendants on the counter-claim and all consequential orders. The plaintiff shall pay the defendants thrown away costs as follows:-

- 2nd and 6th defendants to be paid Ksh. 5,000/= and the 7th and 8th defendants (otherwise referred as the 1st and 2nd interested parties) to be paid a further sum of Ksh. 5,000/= making a total of Ksh. 10,000/=.
- The plaintiff to take steps to have this suit set down for hearing within three (3) months from today.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 17th day of July, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of: