

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

LAND AND ENVIRONMENT CASE NO. 181 OF 2014.

WENSLEY BARASA.....APPLICANT

VERSUS.

SIMON WEKESA.....1ST RESPONDENT

MAURICE ANDALA NANDWA.....2ND RESPONDENT

IMMACULATE AWINO OBONGO.....3RD RESPONDENT

RULING.

1.This application is brought under Section 3 and 3A and 63(1) of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules. The applicant prays that the court to vacate and set aside or vary its orders made on the 19th May 2016 and reinstate the suit for Hearing. The suit had been dismissed for non-attendance of the applicant on the Hearing date.

2. The application is grounded on the fact that the applicants Court clerk who had fixed the suit for hearing did not diarize the same. That the same was a mistake by the applicants advocates office and that, in the interest of justice, the plaintiff should be afforded a chance to be heard. The application is supported by the Affidavits of Joseph Wafula Sichangi the Counsel on record and Wensley Barasa the Plaintiff herein.

3. The application is opposed by the defendants herein. The respondents swear that the case was fixed by consent of the parties. That it was so fixed on 11/12/2015 by the respective clerks for the plaintiff and the defendants. The defendants say that indeed, it was the applicant advocate that had invited the advocates for the respondent to do so via a Letter dated 7/12/2015. A copy of the same was annexed to their reply. The respondents therefore dispute that the applicants assertion that the matter was not diarized and they aver that, such a position cannot be so. The respondents state that the applicants copy of the diary for the day was not annexed. Further that the Cause list for the ELC Court for the week came out early in advance and that the applicant should have noted that the case was Cause listed since the Cause list was for a full week. They argue that the application lacks merit and should be dismissed.

4. I have carefully considered the argument and counter arguments by both sides. There is no doubt that the applicant is the one who invited the respondent to fix a hearing date on 7/12/2015. This was followed by a date taken by both clerks on 19/5/2016. On the date of the hearing there was no appearance by the applicants. All this is blamed on the clerk of the applicants. There is no affidavit by the clerk of the applicants to tell us what happened. There is no extract of the applicants diary for the day in question to show that indeed the matter was not diarized. The burden of proving that allegation fall squarely on the applicants. I am afraid they have not convinced the court that there was an oversight and or mistake in their diary. I am under the circumstances unable to grant the applicants application. The same is dismissed with costs to the respondents.

Judgment read in open court.

Dated, signed and delivered on 8th November, 2016.

S. MUKUNYA

JUDGE

In the presence of:

Court Assistant: Joy

Mr. Kweyu for Mr. Juma for the Respondent

Firm of Sichangi for the Applicant - Present