



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CASE NO. 64 OF 2011

JOSEPH MWORIA JOHN.....1ST PLAINTIFF

ELIZABETH KAGURI NGERA.....2ND PLAINTIFF

JACOB GITUMA.....3RD PLAINTIFF

VERSUS

LOWER IMENTI FORESTER.....DEFENDANT

R U L I N G

The application herein brought by way of Notice of Motion is dated 24th July, 2013 and seeks orders:

1. That this Honourable Court be pleased to hear this application exparte in view of its urgency.
2. That this Honourable Court be pleased to set aside dismissal orders dated 24.5.2013 and reinstate the application dated 12th March, 2013 for hearing.
3. That his Honourable Court be pleased to reinstate the exparte orders dated 6th May, 2013.

The application is supported by the following grounds:

1. The plaintiffs/Applicants were before Hon. Justice Makau on the day the application was dismissed.
2. The plaintiff's lawyer was not in Court to inform the case (sic) had been taken to Justice Njoroge.

Oral submissions were given on 19.8.2013. Mr. Anampiu submitted that when the application had been slated for Interpartes hearing on 5.6.2013 the plaintiff went to court number 2 and stayed there up to 3.00 p.m. He blamed Mr. Kimathi Kiara, their then advocate, who he said did not come to court to guide the plaintiff's to go to the right court, which was this Court. He, therefore, submitted that as the plaintiff's application had been dismissed exparte, it should be reinstated.

Miss Waithaka for the defendant vehemently opposed the application and relied on the Replying Affidavit of the defendant's advocate who averred that the plaintiffs were wasting the court's time as, if they had been aggrieved by the orders issued by this court, they ought to have filed an application for its review without delay. She further stated that the applicants had been ordered to file an application by 2nd August, 2013 and if they failed to do so, the court would fix a hearing date. They filed this application but withdrew it on 2.8.2013. As the court had already fixed the hearing date of the main suit to take

place on 14.10.2013, the application dated 24th July, 2013 should be dismissed as it was an abuse of the court process. In any case the plaintiffs had withdrawn it.

I have considered the pleadings, averments and the submissions of the parties.

It is not disputed that the applicants were not in court during the date fixed for inter partes hearing of the application dated 12th March, 2013. As they did not prosecute their application, I deem that the application was heard and that the orders issued were not strictly speaking ex parte. Their excuse was that they went to the wrong court. I find the applicants untruthful as on 6th May, 2013, they were in my court when Interim Orders were granted to them and Inter partes hearing was fixed to take place on 15.5.2013. Their non- appearance in court was intentional. Their non-appearance was intended to delay the hearing of the application as they continued to enjoy the Interim Orders this court had granted them on 6th May, 2013.

I note that the application had been listed for hearing ex-parte under a certificate of urgency on 20.3.2013. The parties did not appear in court. Again it was listed for ex parte hearing under a certificate of urgency on 29.4.2013. The Plaintiffs/Applicants did not appear in court.

I also note that on 2.8.2013 the advocate holding brief for Ayub Anampiu, advocate, told me that the plaintiffs wished to withdraw the application dated 24th July, 2013. As a result, a date for the hearing of the main suit was fixed. And yet this is the application the plaintiffs are pursuing. I take the view that this is an abuse of the court process. A party cannot willy nilly withdraw an application and then seek to have it reinstated, a while later.

In the circumstances, I dismiss the application with costs to the defendant/respondent.

I do note that the defendant is "Lower Imenti Forester." Whether the defendant has legal status or not can only be established after the hearing and determination of the main suit. As this suit was filed in 2011, it should be heard and determined expeditiously. I, therefore, direct as follows:

1. Parties must comply with order II of the Civil Procedures Rules within 30 days.
2. After the 30 days allowed for compliance with order II, the plaintiffs should set down the case for hearing at this court's Registry within 30 days.

Once again, I reiterate that this application is dismissed with costs to the defendant.

Dated and signed at Meru this 4th day of September 2013.

P. M. NJOROGE

JUDGE

Delivered in Open Court at Meru this 14th day of February, 2014 in the presence of:

Ayub Anampiu for the Plaintiffs/Applicants

Mutunga h/b for Kathungu for the defendant

P. M. NJORGE

JUDGE