



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 86 OF 2015

SUSAN CHEBOSO MKANDA.....PLAINTIFF

VERSUS

ESHIKUKU GIRLS SECONDARY SCHOOL.....1ST DEFENDANT

JOSEPHINE KAGONYA MWAVALI.....2ND DEFENDANT

BOARD OF MANAGEMENT

ESHIKULU SECONDARY SCHOOL.....3RD DEFENDANT

THE LAND REGISTRAR

KAKAMEGA COUNTY.....4TH DEFENDANT

COUNTY GOVERNMENT OF KAKAMEGA.....5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. The applicant in the application dated 20/2/2020 is the plaintiff. She has brought the application under the provisions of **Order 12 Rule 7, Order 51 Rule 1** of the **Civil Procedure Rules** and **Sections 1A, 3, 5 and 63(e)** of the **Civil Procedure Act**.

2. She is not satisfied with the orders of this court dated 14/12/2018 hence the instant application seeking the following orders:

(a) ...spent

(b) ...spent

(c) That this court be pleased to review, vary and/or set aside its orders made on the 14/12/2018 and the plaintiff's suit be reinstated.

(d) That status herein be defined and *status quo ante* 14/12/2018 be adopted.

(e) That there be a stay of execution of the costs awarded to the defendants/respondents pending the hearing and determination of this application interpartes and the main suit thereafter.

(f) That costs of this application be borne by the defendants.

3. In the instant application which is supported by the affidavit of the plaintiff sworn on 20/2/2020, the grounds upon which it is premised are that on the 14/12/2018 the instant suit was dismissed for non-attendance on the part of the plaintiff and her counsel; that on that day of the hearing the plaintiff was engaged in the task of marking of national examinations; that the plaintiff's advocate failed to inform her that the matter had been slated for hearing on that date; that the plaintiff filed an application dated 29/4/2019 seeking reinstatement of the suit and that in that application this court held that there was no consent filed in the record under **Order 9 Rule 9 (b)** of the **Civil Procedure Rules** and on that basis dismissed the application on ground of incompetence on 30/9/2019. The plaintiff avers that on 6/4/2019 she was served with a notice to vacate the suit land and that she stands to be condemned unheard on account of her former counsel's omission.

4. The defendants oppose the application by way of grounds filed on **21/7/2020**, stating that it is bad in law, incompetent and misconceived; that a similar application has been dealt by this court and hence the instant application is *res judicata* within the terms of **Section 7** of the **Civil Procedure Act** and this court is therefore *functus officio* and devoid of jurisdiction and the leave application is an abuse of the process; that the application is premised on hearsay and seeks unclear orders; that failure to attend court on the part of the plaintiff and her counsel has not been explained adequately; that the plaintiff has not been vigilant over her suit and deserves no equity; that the plaintiff failed to prosecute her suit from **2015** to **2018** and when she was accorded an opportunity to be heard she squandered it and that reinstating the suit for hearing in the circumstances would be prejudicial to the defendants. There is no affidavit filed by the respondents on any averments of fact.

5. I have considered the application. This court dealt with the issue of whether or not to allow the plaintiff's new advocate to come on record when the application was first placed before it on **21/2/2020** and the objections of the respondents to the grant of those orders have come too late in the day; the pending issue in the application is whether the plaintiff's suit should be reinstated on the grounds that she has advanced.

6. The plaintiff's main ground is that she was not informed of the hearing scheduled for **14/12/2018** by her erstwhile counsel. She has now secured the services of another counsel. The plaintiff has not exhibited any evidence in support of the allegation that she was engaged in the marking of national examinations on the date of the hearing. This court has to rely on the probability that her conclusory statement that she was so engaged is true. However, absence of proof of that allegation notwithstanding, I have seen no substantive evidence from the respondents to disprove the plaintiff's averment that she was not aware of the hearing date or that the allegation that her counsel never communicated to her the date of hearing is untrue.

7. Being condemned unheard is an anathema to our constitutional dispensation and **Article 50** of the **Constitution** provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Further **Article 159 (2) (d)** provides that justice shall be administered without undue regard to procedural technicalities.

8. This suit was not heard on its merits. The plaintiff is of the view that her predicament arises out of her erstwhile counsel's omission to communicate to her the hearing date. If that is the case and this court has no basis not to believe the plaintiff, then it can not be deemed to be her fault that she was unable to attend the hearing on the date that the suit was dismissed for non-attendance on her part and her erstwhile counsel's part. The blame in respect of non-attendance of both must therefore be laid squarely on the part of her former counsel. There are numerous cases in which this court has been lenient on applicants who demonstrated that their counsel failed them at their hour of need : see **Philip Keiptoo Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492**, **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [eKLR]**, **Lucy Bosire -vs- Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR** and **Sheikh T/A Hasa Hauliers v Highway Carriers Ltd [1988] eKLR**.

9. For the reason that the plaintiff was failed by her counsel in her hour of need in this matter this court is inclined to exercise its discretion in her favour and grant the instant application.

10. I therefore grant the application dated **20/2/2020** in terms of **Prayers Nos. (c) and (d)** thereof to the extent that the order made on **14/12/2018** dismissing the plaintiff's suit for non-attendance is hereby vacated and the suit is now reinstated for an expeditious hearing, and the *status quo ante* **14/12/2018** shall be resumed and maintained till the hearing and the determination of this suit.

11. I have not been informed by the respondents that the plaintiff has been evicted from the suit land or that she had complied with the notice dated **6/4/2019** and therefore her possession of the suit land shall be respected as the *status quo* pending the hearing and determination of the suit. The costs of application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 4th day of September, 2020.

MWANGI NJOROGE,

JUDGE, ELC KITALE.