

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 262 OF 2014

1. PATRICK ONGOYA WEBO

2. WILLIAM OKISAI ONDEGERO

3. BENSON BARASA SITABUKA

4. REBECCA BUSOLO

5. CLARE KIBABA.....PLAINTIFFS

VERSUS

1. REDEMPTOR NASIKE SIMATI

2. ANERIKO MASIKA SIMIYU

3. THE LAND REGISTRAR

4. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

The Plaintiffs/applicants have moved this court by their application dated 9th July 2014 seeking to set aside the ex parte proceedings of 19th June 2014. The application is opposed by the defendant through her replying affidavit. I have read the documents on record and considered the submissions offered. The events of 19th June 2014 are that this date was fixed by consent. The plaintiff's advocate nor his representatives appeared in court on that day. The plaintiff's were present except for the 1st and 5th plaintiffs. The matter was put off to proceed at 3 p.m to give the **plaintiffs** time to get in touch with their advocate. The said advocate did not appear on the time set and the plaintiffs declined to prosecute their case unless their advocate was present. The Plaintiff's case was therefore dismissed for want of prosecution and the court proceeded to hear the defendant's counter-claim. It is the order of dismissal of their suit and evidence of 1st defendant they want set aside so both parties can be heard.

The previous advocates on record Ms. Aburili & co. advocates has deposed a very sketchy affidavit indicating that his health is not good and he requires a lot of bed rest without any documentation to support that statement. This court is alive to the equitable doctrine that mistake of counsel should not be visited on a party. The plaintiffs have not told this court when they last spoke to their said advocate. The record also shows the plaintiffs are in the habit of changing advocates which has caused a delay in the conclusion of this case.

The respondent raised the issue that this matter is an abuse of the court process and res judicata the high court CA no. 94 of 1999 and court of appeal CA no. 227 of 2004. The proceedings before me now is an application to set aside the orders of 19th June 2014 so it cannot be res judicata orders made before the said proceedings had not taken place. On the aspect of abuse of the court process, setting aside is provided for in law and a party exercising that right cannot be accused of abusing the court process. Where the exercise of such is necessary. The applicant has not made any similar application.

I have taken into account all the issues raised and the law that setting aside is an exercise of discretion of the court. In the case cited by the respondent of Milimani civil case no. 43 of 1999, neither the plaintiffs nor their advocate attended court on the date set for hearing. In this instance, the plaintiffs were present without their advocate. The constitution grants parties right to be heard under article 50 (1). In this instance, it is a land matter which is generally emotive as it touches on livelihoods. It would be just in the circumstances to grant the plaintiffs an opportunity to present their case. However I will penalize them for not taking appropriate steps to prepare to prosecute their case on 19th June 2014 and for wasting the defendant's time. I will thus allow the application by setting aside the ex parte proceedings of 19th June 2014 with the costs of the application awarded to the respondent. Further the plaintiffs will pay Mr. Ocharo advocate his attendance costs of 19th June 2014 assessed as Kshs. 15,000/= and 1st defendant's transport and lunch allowance of Kshs. 5,000/=. This total sum is awarded as thrown away costs to be paid within 30 days of the date of this ruling in default, execution to issue. It is so ordered.

DATED, and DELIVERED at BUNGOMA this 7th day of October 2014

A. OMOLLO

JUDGE.