

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC. NO. 61 OF 2006

SUSAN GACHERI RIMBERIA (Suing thro' her Attorney

SAMUEL MWENDA.....PLAINTIFF

- VERSUS-

AMINA BASHAN & 2 OTHERSDEFENDANTS

RULING

[1] The applicant has bought this motion praying that this court do set aside its judgment of 23rd August 2013 and allow the defendants be heard in defence of their case. The application is supported by the affidavit of Amin Bishar who swore on behalf of all the defendants. He stated that him and his co-defendants had instructed Okanga & Co. advocates and that the said firm was on record for them. He avers that him and his fellow defendants were not aware of the hearing dates and that they would have attended the court. He argued that him and his co defendants have a good defence, that the lease has expired that the respondent has not taken possession, that the plaintiffs suit is time barred and that they entered the suit without the consent of the plaintiff.

[2] The respondent filed a reply and said that the application as drawn is defective and frivolous and is an abuse of the process of the court. He stated that the application herein does not represent all the respondents since Musinga & Co act for Mohammed Abdulahi the 4th defendant. He avers that the applicants were aware of this case and its progress through their advocates as itemised by the court. That they were given several opportunities/adjournments to defend the case and failed to do so. That finally the expiration of the lease was not relevant in the way the applicants conducted themselves in this case and finally that the applicants did not prove their case of adverse possession at all.

Mr Abubarker tried to persuade the court to give the applicants another chance and that the applicants had a good case and a meritorious defence.

[3] Mr Koech for the respondent opposed such a move. He argued that the applicants were accorded numerous chances to appear in court. they were represented by counsel through out. He argued that cases must come to an end.

[4] In my judgment I enumerated in paragraph 3,4,5,6 and 7 the many, many times this matter come to court and the chances accorded by the court to the defendants. Infact, on 25th April 2013 Mr Okanga for the defendants said he (now) appeared for all the defendants and had one witness in court and he wanted an adjournment to have all the defendants come to court. This was met by protest from Mr. Mereka for the plaintiff, the advocates asked the court to give them time to discuss. They discussed and did come up with a consent as set out in my judgment. The defendants who were represented by Mr Okanga and one defendant knew the case was coming for hearing on 20th June 2013 (this was part of that consent). They did not honour that consent and both the advocate and the defendants did not attend the court on 20th June 2013. It is therefore not true for them to allege that they did not know of the hearing date. I still maintain, that from the conduct of the applicants,they did not want to have this suit heard. They did not honour their own consent which had been adopted by the court as a court order. They do not deserve the discretion of this court.

This application is without any merit and it is dismissed with costs.

Dated and delivered in open court this 6th day of November 2014.

S. MUKUNYA

JUDGE

6.11.2014

In the presence of:

Ms. Mwanakitina advocate for the applicant

Mr. Mareka & co. advocate for the respondent