REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 65 OF 2016

FLORA ITUMBI.....PLAINTIFF/APPLICANT

VERSUS

WILLIAM KIVAI NDAISI.....DEFENDANT/RESPONDENT

RULING

1. This Ruling relates to the Plaintiff's/Applicant's Notice of Motion dated 6th August, 2019 that was brought under Order 51 Rule 1 of the Civil Procedure Rules, Articles 59 of the Constitution of Kenya 2010, Section 3 of the Judicature Act and Sections 1A, 1B & 3A of the Civil Procedure Act seeking for following orders:

> ***a) Spent;***
>
> ***b) That this Honourable Court Orders /Ruling dated 19th June, 2019 be reviewed set aside and the Applicant's Notice of Motion dated 26th November, 2018 be reinstated, considered and determined on merit.***
>
> ***c) That the Applicant's Application herein be determined on merit;***
>
> ***d) That the costs of this Application be in the cause.***

2. The Application is supported by the Affidavit of the Applicant who deponed that the court made an error in dismissing the Applicant's Application dated 26th November, 2018 for non- attendance with costs; that the Applicant is desirous of prosecuting the mentioned Application and that unknown to the Applicant, her previous advocate did not attend court on the date slated for hearing, which mistake ought not to be visited on the Applicant.

3. In response to the Application are Grounds of Opposition dated 18th September, 2019 and filed on an even date in which it was averred that the Application is misconceived, unfounded in law and generally lacking merit, and that the Application is an attempt to delay the final determination of the suit herein. According to counsel, the Applicant has not demonstrated legally justifiable grounds to warrant granting of the orders sought.

4. The Application was canvassed vide written submissions. In his submissions, learned counsel for the Applicant placed reliance on the case of *Ivuti vs. Kyumbi (1984) KLR,* where it was held that to dismiss a suit is a draconian move which the court should take as the last option, and that the mistakes of an advocate should not be visited on an innocent litigant.

5. It was submitted that the provisions of Section 1A of the Civil Procedure Act encapsulates the overriding objective which lies or tilts in favour of ordinary litigants such as the Plaintiff/Applicant herein; that the Plaintiff is the rightful owner of 11.8acres of land known as Mitaboni/Mitaboni/2596 *(the suit property)* and that the Plaintiff acquired the suit property vide contracts he entered into with the Defendant between 1986 and 1989.

6. It was submitted by the Plaintiff's advocate that it would be prejudicial to the Plaintiff if the Application dated 26th November, 2018 is not reinstated and determined on merits. Counsel cited the case of *Muyodi vs. Industrial and Commercial Development Corporation & Another [2006]* where the Court of Appeal rendered itself as follows:

> *"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."*

7. The court was urged to allow the Application dated 6th August, 2019.

8. In response, counsel for the Respondent submitted that the current advocate ought to have procured an affidavit from the previous advocate explaining the circumstances that led him not to attend court on the material day. According to counsel, this was not a proper case for the court to exercise its discretion in favour of the Plaintiff and that the Application should be dismissed.

9. The background to the Application is that there was a Notice of Motion dated 26th November, 2018 that was filed by the Applicant. In the Application, the Applicant sought to have the Respondent committed to jail for a period not exceeding six (6) months because the Respondent was in contempt of the orders of the court of 16th June, 2017.

10. When the Application came up for hearing on 14th March, 2019, the Respondent had not filed the Replying Affidavit. Despite objections from the Applicant's advocate, the court allowed the Respondent to file a Replying Affidavit within fourteen (14) days, whereafter parties were directed to file and exchange submissions.

11. When the Application came up for hearing on 19th June, 2019, the Applicant's advocate had not filed submissions, and the court dismissed the Application for want of prosecution.

12. It is trite law that the right to a fair trial in civil matters is guaranteed by Article 50 of the Constitution. In determining civil rights and obligations, a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

13. The Applicant moved this court vide the Notice of Motion dated 26th November, 2018 in which he complained that the Respondent had disobeyed the orders of the court. Having moved the court appropriately, it was the sole responsibility of the Applicant's advocate to file submissions as directed by the court.

14. Indeed, considering that the matter came up for the first time on 19th June, 2019 after the court gave its directions on the filing of the submissions, it is my finding that the Applicant had no control of the matter at that stage, and the sole responsibility of complying with the orders of the court was with his advocate.

15. The Applicant's advocate having not filed the submissions as directed, and the matter having come up for the first time after the court had given its directions, it is the advocate, and not the Applicant who should be blamed for failure of complying with the court's directions.

16. Indeed, it is always the responsibility of the litigants to ensure that their advocates prosecute their cases expeditiously and in accordance with the provisions of the law, and in the event they are not satisfied with the services being offered, instruct another counsel.

17. However, in the instant case, the Applicant did not have an opportunity to instruct another counsel to file submissions on his behalf. That being so, it will be prejudicial and unfair for the mistake of counsel to be visited on the Applicant.

18. Considering that the Application was filed within two months of the date that the Application dated 26th November, 2018, it is my finding that the Applicant was keen to prosecute the Application dated 26th November, 2018.

19. For those reasons, I allow the Application dated 6th August, 2019 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9TH DAY OF OCTOBER, 2020

O.A. ANGOTE

JUDGE