



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE 75 OF 2006

OMBORI MIGIRO PLAINTIFF

VERSUS

DENIS BASWETI DEFENDANT

RULING.

The plaintiff's suit was on 2nd February, 2009 dismissed for non attendance. On 3rd March 2009 he filed an application seeking to have the dismissal order set aside and the suit reinstated. In his affidavit in support of the application, the plaintiff deposed that on 2nd February, 2009 he reported at his advocate's office at 8.00 a.m. and was advised to proceed to court. He came to the court building but instead of getting into High Court No. 1 he went to the Chief Magistrate's court and sat there waiting for his case to be called out. The court adjourned at about noon when his matter had not been called out. He went to his advocate's office at around 12.15 p.m. only to be informed that the suit had been dismissed due to his non attendance. He returned to court with his advocate and showed him the court room where he had been. That is when he realized that he had gone to the wrong court.

The plaintiff further deposed that he stands to lose his parcel of land **NO. NYAMIRA/NORTH MUGIRANGO/BOKEIRA I/32** which is registered in his name but the defendant had unlawfully occupied the same. If the dismissal order is not set aside, the defendant will permanently settle on the aforesaid land.

The defendant filed a replying affidavit and disputed the plaintiff's averments. In particular, he denied that the plaintiff was within the court building on the material day as averred. He further stated that the plaintiff's suit was *res judicata* because in **Misc. Application No. 24 of 2005** at Nyamira SRM's Court between the same parties as herein, the plaintiff's suit in respect of a parcel of land known as **North Mugirango/Bokeira/Plot No. 15B**, the plaintiff's suit was dismissed. This is the land that is occupied by the defendant and not **Nyamira/North Mugirango/Bokeira I/32**, it was claimed. The defendant urged the court to dismiss the plaintiff's application.

I have considered the above arguments. On 2nd February, 2009 at about 9.15 a.m. when this matter was called out Mr. Nyasimi informed the court that his client was ready to proceed with the hearing. Counsel indicated that he required about 30 minutes and the hearing was set to commence shortly thereafter. At 10.20 a.m. when the hearing was to commence, Mr. Nyasimi sought an adjournment on the ground that though he had been with his client that morning at about 8.00 a.m. when he advised the

plaintiff to come to court, he did not know where he had gone to. Mr. Nyasimi added that the plaintiff is a fairly old man and he may have got mixed up and gone to the wrong court.

I think the plaintiff's explanation is reasonable and I am prepared to accept the same. This dispute is over a parcel of land and since the plaintiff has given an acceptable explanation regarding his failure to prosecute the case on 2nd February, 2009, it is only fair that I allow the application so that the dispute is determined on its merits.

As regards the actual parcel of land that is occupied by the defendant, this is an issue that can only be determined in a full hearing. For now it cannot be said that the plaintiff's suit is *res judicata* because the parcel of land that was cited by the defendant is different from the one referred to in the plaintiff's suit.

In the upshot, I allow the plaintiff's application dated 27th February 2009 and set aside the order dismissing the plaintiff's suit. I order that the suit be and is hereby reinstated to hearing. The plaintiff will bear the costs of this application.

DATED, SIGNED AND DELIVERED AT KISII THIS 6th DAY OF July, 2009.

D. MUSINGA

JUDGE.

6/7/2009

Before D. Musinga. J

Mobisa – C.c

Mr. Masese for Mr. Nyasime for the Plaintiff.

Mr. Sagwe for the Defendant.

Court: Ruling delivered in open court on 6th July, 2009.

D. MUSINGA,

JUDGE.