



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.12 OF 2018

KIFALU KARISA KITSAO.....PLAINTIFF

VERSUS

MWALIMU KALUME

FRANCIS TSALWA.....DEFENDANTS

RULING

1. On 22nd January 2018, the Plaintiff filed this suit seeking:-

i) A declaration that he is the owner of Parcel Number Kilifi/Mtondia/116 measuring approximately 13 acres located at Kilifi County;

ii) A declaration that any purchase of the suit property by the 2nd Defendant from the 1st Defendant or any other person for that matter is null and void;

iii) An order that the 1st and 2nd Defendants together with their agents, servants, employees or any other person claiming under them, do give vacant possession of the suit property;

iv) Costs and interests at Court rates.

2. On 15th February 2018, the Defendants filed a joint Statement of Defence in which they inter alia asserted that the Plaintiff's suit herein is res judicata Kilifi SRMCC No. 211 of 2009.

3. Subsequently, by an application dated 24th May 2018 and filed herein on 28th May 2018, the Defendants sought to have this suit struck out and/or dismissed with costs for being res judicata the said ***Kilifi SRMCC No. 211 of 2009; Kifalu Karisa –vs- Mwalimu Kalume Francis Tsalwa.***

4. On the same date when the Defendant's application was filed, the parties met at the Court Registry and by consent fixed the application for hearing on 23rd July 2018. However on the date fixed for hearing, Counsel for the Plaintiff was not in Court and the Plaintiff had not responded to the Defendants' application. In the circumstances, this Court proceeded to strike out the suit as prayed in the Defendants' application.

5. On 26th July 2018, the Plaintiffs filed the present application before me urging the Court to reinstate the suit for hearing on merit. The application is premised on the grounds that Counsel for the Plaintiff was bereaved on the date fixed for hearing and that he had inadvertently failed to diarise the same and to file a response thereto.

6. It is the Plaintiff's case that this being a land matter is an emotive issue and that the error or mistake of Counsel should not be visited upon the Plaintiff who stands to suffer a grave injustice.

7. In a Replying Affidavit filed herein on 19th September 2018, the 2nd Defendant Francis Tsalwa objects to the grant of the orders sought by the Plaintiff. It is the Defence case that the Applicant was granted sufficient time within which to respond to the Defendant's application but he never did so.

8. The Defendants further aver that res judicata is purely an issue of law and not one of procedural fairness. They therefore urge the Court to consider the same *suo moto* based on the material before it. It is therefore the Defendants' case that no substance has been placed before the Court to warrant the setting aside of the orders of 23rd July 2018.

9. Order 10 Rule 11 of the Civil Procedure Rules provides that:

“Where Judgment has been entered under this Order, the Court may set aside or vary such Judgment and any consequential decree or orders upon such terms as are just.”

10. In *Patel –vs- EA Cargo Handling Services Ltd(1974) EA 75*, the Court of Appeal observed as follows:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the Parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

11. Again in *Shah –vs- Mbogo(1967)EA 166*, the same Court observed that:-

“This discretion to set aside an ex-parte Judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

12. In the matter before me, Counsel for the Applicant has explained that he failed to diarise the matter having taken the date by consent with the representatives for the Defendants who were the Applicants in the application dated 24th May 2018 and which application gave rise to the orders sought to be set aside. On the date the matter came up for hearing, Counsel for the Plaintiff had other matters before me but because he was bereaved, he instructed another Counsel to hold his brief in all those other matters but this one.

13. I have considered the circumstances herein and I see no reason why Counsel for the Plaintiff would have participated in fixing the date for an application seeking orders adverse to his client and then fail to turn up for its hearing. I am prepared to accept his explanation that he mistakenly failed to diarise this matter and hence his failure to instruct the Advocate who held his brief in other matters which came on the same date, to hold his brief in this particular matter.

14. As Apaloo J(as he then was) stated in *Philip Chemwolo & Another –vs-Augustine Kubede(1982-88) KAR 103:-*

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

15. For the foregoing reasons, I shall grant the Applicant herein the benefit of doubt. The orders of this Court issued on 23rd July 2018 are accordingly hereby set aside. The Defendants' application dated 24th May 2018 to be fixed for hearing afresh on a date convenient to the parties. The Plaintiffs has 7 days from today to file and serve a response to the said application.

16. The Plaintiff shall however pay a sum of Kshs 30,000/- to the Defendants being thrown away costs for the proceedings herein set aside.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

J.O. OLOLA

JUDGE