



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 17 OF 2014

PATRICK MUSA KATIKUPLAINTIFF

VERSUS

REGINA NGII TUMBO.....1ST DEFENDANT

FRANCIS MUTISYA TUMBO.....2ND DEFENDANT

CHRISTOPHER MUSEMBI MUTISO3RD DEFENDANT

RULING

1 In the Application dated 1st March, 2018, the Applicant is seeking for the following orders:

a. That the Honourable Court may be pleased to review and set aside the order of the court dismissing the suit herein against the Plaintiff.

b. The suit filed and dated 6th March, 2014 be reinstated for hearing.

2. The Application is premised on the ground that there was a mis-diarization of the hearing date; that the Applicant's advocate only realised that he had failed to attend court after the matter had already been dismissed and that the mistakes of the advocate should not be visited upon his client.

3. In his Affidavit, the Applicant's advocate deponed that this matter was set down for hearing for 30th January, 2018; that instead, he recorded in his diary the date of 31st January, 2018 and that when they tried to trace the file, they could not get it.

4. In her Replying Affidavit, the Respondents' advocate deponed that the Application has not advanced sufficient grounds to warrant issuance of the orders of review and setting aside; that the hearing date was fixed in court in the presence of both advocates and that the Defendants have already prosecuted their Counter-claim and will be prejudiced if the orders of setting aside are granted.

5. The Plaintiff's advocate submitted that the court has unfettered jurisdiction to set aside its own orders; that the Plaintiff has approached the court with clean hands and that mis-diarization of a date is a human error which should not be visited on a litigant.

6. The Defendants' counsel submitted that the Applicant has not demonstrated any good reason why he did not attend court and that the Application is an abuse of the court process. Counsel relied on several authorities which I have considered.

7. The record shows that this suit came up for hearing for the first time on 5th October, 2017. On the said date, the Plaintiff's advocate was ready to prosecute the suit. However, the Defendants' counsel applied for adjournment on the ground that the advocate whom he was holding the brief for was involved in an Election Petition in Kitui High Court. The matter was then adjourned to 30th January, 2018.

8. On 30th January, 2018, neither the Plaintiff nor his advocate were in court. The court proceeded to dismiss the Plaintiff's suit and heard the Defendants on their claim. The current Application was filed when this matter was pending Judgment.

9. The record shows that the Plaintiff has always been desirous of prosecuting his claim. Indeed, the suit was adjourned by the Defendants when it came up for hearing on 5th October, 2017. Considering that it is another advocate who held the brief of the Plaintiff's advocate when the date of 30th January, 2018 was fixed, it is possible that there was miscommunication on the hearing date which led to the Plaintiff's advocate mis-diarizing the same for 31st January, 2018.

10. In view of the fact that the Plaintiff has always been ready to prosecute his claim, it will be in the interest of justice to give him an opportunity to do so. The reason given by the Plaintiff's advocate as to why he did not attend court on 30th January, 2018 is plausible.

11. For those reasons, I allow the Application dated 1st March, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE