



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 214 OF 2008

MARY ELIZABETH WANGARE.....PLAINTIFF/RESPONDENT

VERSUS

TIMOTHY GITONGA.....1ST DEFENDANT/APPLICANT

THE DISTRICT LAND REGISTRAR KAJIADO.....2ND DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 19th May 2016, brought under Order 12 Rule 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks orders:-

(1) *Spent.*

(2) *That this honourable court be pleased to set aside the ex parte proceedings of 30th March 2016 and the order of this court dismissing the 1st defendant's notice of motion dated 12th January 2016.*

(3) *That this honourable court be pleased to re-instate the order dated 22nd January 2016 issued by Justice Okong'o which has since lapsed subsequent to the dismissal of the 1st defendant's application.*

(4) *That the 1st defendant's application dated 12th January 2016 be re-instated for hearing and the interim order dated 22nd January 2016 be re-instated pending the hearing and determination of the said application.*

(5) *That costs of this application be provided for.*

3. The grounds are on the face of the application and are set out in paragraphs (i) to (ix).

4. The application is supported by the affidavit of Ibrahim Mwangi advocate for the 1st defendant/applicant sworn on the 19th May 2016.

5. The application is opposed. There are grounds of opposition filed by the plaintiff/respondent dated 23rd June 2016 and filed in court on the same day. There is also a replying affidavit sworn by the plaintiff/respondent on the 22nd January 2018.

6. On the 4th October 2016, the court directed that the notice of motion be canvassed by way of written submissions.

The 1st defendant's/applicant's submissions

7. On the 16th February 2016, this Honourable Court fixed the matter for hearing on the 30th March 2016, when due to the advocates error there was no representation to prosecute the applicant's said application, and the same was dismissed for lack of attendance.

8. An advocate's honest mistake in the conduct of a matter should not be visited on the client. The failure to attend court was as a result of failure to diarise the matter in his court diary. It was not a deliberate attempt to frustrate this matter. He has put forward the case of **Edward Juma Malovi vs Peter Ndirangu [2006] eKLR** and **Chemwolo & Another vs Kubende [1986] KLR 492**.

9. The overriding objective of this court as per Section 1A and 1B of the Civil Procedure Act is to ensure that justice is done. He urges this court to allow the application.

The Plaintiff's/Respondent's submissions

10. No sufficient reasons have been adduced by the applicant's advocate for failure to attend court on the date fixed for the hearing of their application. The advocate personally took the date in court and should have noted the same.

11. This application has been brought after a long delay. After filing this application the applicant did not take any steps to prosecute the same until the court listed the matter for mention on 3rd May 2017.

12. The application will serve no purpose because the decree has been executed hence it has been overtaken by events. She prays that the application be dismissed with costs.

13. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the grounds of opposition, the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

14. I have gone through the court record. It speaks for itself, Judgment was delivered on 28th July 2015. Subsequently, the 1st defendant/applicant filed a notice of appeal dated 30th July 2015 and filed in court on 4th August 2015. The 1st defendant/applicant also filed a notice of motion dated 12th January 2016 seeking stay of execution pending appeal. The said application was scheduled for hearing on 30th March 2016 when it was dismissed for non-attendance of the applicant's counsel.

15. I have gone through the affidavit of Ibrahim Mwangi, advocate. The reason advanced for not attending court is that the clerk failed to diarise the matter. I am not convinced that this is sufficient reason to warrant this court to set aside the orders of 30th March 2016. The said advocate was personally present and took the date in court.

16. It appears after filing this application, the 1st defendant/applicant was not keen to prosecute it. The 1st defendant/applicant appeared in court after being served with a mention notice on 13th March 2017.

17. I have seen the notice of appeal dated 30th May 2015 and filed in court on 4th August 2015. It is not clear whether the said appeal has been filed. It is the plaintiff's/respondent's submissions that this application has been overtaken by events as the decree has been executed. It appears the decree was lodged in the land registry and registered on 22nd September 2015.

18. I find that no purpose will be served by reinstating the notice of motion dated 12th January 2016. In conclusion I find no merit in this application and the same is dismissed. Each party do bear his/her own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of MARCH 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd defendant

.....Court Assistant