



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 181 OF 2012

JOYCE MWELU MULANI.....PLAINTIFF/RESPONDENT

VERSUS

TABITHA NDUKU MULANI....DEFENDANT/APPLICANT

RULING

1. The Plaintiff prosecuted her case and closed it on 21st February, 2018. In the absence of the Defendant and her advocate, the court closed the Defendant's case on the same day. The Defendant has now filed an Application dated 9th April, 2018 in which she is seeking for the following orders:

a. That the order closing both the Plaintiff's suit and the Defendant's case be rescinded and the court do order for a recalling of the witnesses who testified on behalf of the Plaintiff's case for purposes of cross-examination.

b. That the court do grant an order re-opening the Defence case and allow the Defendant and her witnesses to testify in response to the Plaintiff's case.

c. That the Defendant/Applicant be granted leave to file further documents in this suit to wit Title Deeds for L.R. No. Machakos Konza North Block 1/450, Konza South/Konza South Block 5 (Konza) 756 and ballot/allocation card for commercial Plot No.1065 Konza Kwa Mautio.

d. That the costs of this Application be in the cause.

2. The Application is premised on the grounds that the Defendant is elderly and has been ailing and that is why she did not attend court on 21st February, 2018; that the failure by the Defendant's previous advocate to attend court was a serious mistake which should not be visited on the Defendant and that the Defendant has since obtained title documents in respect of the suit land.

3. The Defendant deponed that the previous mistakes of her advocate should not be visited on her; that she will suffer great prejudice if the Application is not allowed and that she has a strong Defence.

4. In reply, the Plaintiff deponed that the Defendant was duly served with a hearing notice through her advocate on 30th November, 2017; that there is no evidence to show that the Defendant was unable to attend court due to sickness and that in any event, no reason has been given why her advocate did not attend court on 21st February, 2018 to defend the suit.

5. The Defendant filed a Supplementary Affidavit in which she deponed that its true her previous advocate was served with a hearing notice; that his mistake of not attending court should not be visited on her and that being the registered proprietor of the suit land, she stands to suffer prejudice unless her Application is allowed.

6. The Defendant's advocate submitted that Order 18 Rule 10 of the Civil Procedure Rules provides for the recall of witnesses who have been examined; that the Civil Procedure Rules are meant to ensure that justice is meted to all parties and that to deny a party the right to be heard should be the last resort.

7. The Plaintiff's advocate submitted that no sufficient cause has been demonstrated by the Applicant to warrant the court to exercise its discretion in her favour; that no evidence has been exhibited to show that the Defendant was unable to attend court due to illness and that the failure by the Defendant and her counsel to attend court was inexcusable.

8. The record shows that when this matter came up for hearing on 21st February, 2018, neither the Defendant nor her advocate were in court. The Defendant has admitted that her previous advocate was served with a hearing.. three (3) months before the date of hearing.

9. The Defendant has not denied that she was notified of the hearing date by her advocate. The only reason she has given for not being in court on 21st February, 2018 is that she is old and was sick on that day. However, the Defendant did not produce any treatment notes to show that she was on medication on the date the matter came up for hearing.

10. Although the Defendant has stated that she was sick on the date the matter came up for hearing, albeit without any evidence, neither the Defendant nor her previous advocate has explained why the advocate never appeared in court on the day the matter came up for hearing and sought to have the matter adjourned.

11. Indeed, having not offered any explanation as to why her advocate was not in court on 21st February, 2018, the court cannot exercise its discretion, which must be exercised judiciously, in favour of the Defendant. As was held in the case of **John Ongeru Mariaria & 2 others vs. Paul Matundura, Civil Application No. 301 of 2003 (2004) 2 EA 163**, clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders.

12. The Defendant has the option of suing his advocate for damages. However, the court cannot act on sympathy to set aside proceedings where no sufficient cause or reason has been given why a party did not attend court. Such an action will not only delay the finalization of the suit but will also set a bad precedent. As was stated the jurists of the yonder years, justice must look both ways, and the rules of procedure are not meant to assist the indolent.

13. For the reasons I have given, I dismiss the Application dated 9th April, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE