



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO 54 OF 2007

MBAYA MUNGANIA.....PLAINTIFF/APPLICANT

VERSUS

KAIMURI MUNGANIA.....DEFENDANT/RESPONDENT

RULING

1. By a notice of motion dated 20th November 2018 the plaintiff sought orders to set aside the dismissal order dated 19th November 2018 and reinstate the suit back for hearing on merits and he also sought costs of this application.

2. The grounds in support of the application were stated on the face of the motion which was also supported by the affidavit sworn by the plaintiff on 20th November 2018. Therein, he avers that when this case was called for hearing on 19th November 2018, he was present in court but his lawyer was however absent. When asked whether he was ready to proceed he stated that he would not do so in his lawyer's absence.

3. The defendant in his replying affidavit dated 4th February 2019 reiterated what the plaintiff stated but added however that when the court inquired from the plaintiff if he wanted to proceed he said he did not wish to proceed and did not offer any reason why his advocate was not in court. The advocate for the applicant did not send any representative and an application for the matter to be dismissed for want of prosecution was presented.

4. I have carefully considered the application, affidavits and submissions. The issue to be determined herein is **whether to reinstate this suit or not?**

5. This matter was slated for hearing on 19.11.2018 and both counsels for the litigants were ready to proceed. Matter was allocated time for hearing at 10.00am but plaintiffs' counsel was nowhere to be found at 10.00am. The court gave the plaintiff an opportunity to proceed with his case but he declined.

6. This is a 2007 matter. It has been in court for a period of over 11 years!

7. In the case of **Tana & Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others, 2015 eKLR**, the court made reference to the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR**, where it was stated that;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

The court further stated that;

“While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that “mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant’s careless attitude.” The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned”.

8. I am unable to exercise court's discretion in favour of the applicant considering the fact that he had declined to tender his evidence because

of absence of his advocate yet on 26.3.2019, he had informed the court that he would act in person. The application is hereby dismissed with costs to respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 22ND MAY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriera holding brief for Kiome for defendant/respondent

Plaintiff/applicant

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE