



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC. CASE NO. 512 OF 2017

TONY NJOROGE MUNENE (*Suing as the Attorney of the*

Administrator/Executors of the Estate of JAMES FLAVIAN

CHEGE MUNENE (*deceased*).....**PLAINTIFF/APPLICANT**

VERSUS

ESMAIL HAJI EBRAHIM.....**1ST DEFENDANT/RESPONDENT**

NATIONAL LAND COMMISSION.....**2ND DEFENDANT/RESPONDENT**

HON. ATTORNEY GENERAL.....**3RD DEFENDANT/RESPONDENT**

EMRA LIMITED.....**4TH DEFENDANT/RESPONDENT**

CATHERINE MUTHONI KARUG.....**5TH DEFENDANT/RESPONDENT**

JAMES KUNGU KARIUKI.....**6TH DEFENDANT/RESPONDENT**

MUKAMART ENTERPRISES LTD.....**7TH DEFENDANT/RESPONDENT**

DEEKEI VENTURE LTD.....**8TH DEFENDANT/RESPONDENT**

GAMBADO LTD.....**9TH DEFENDANT/RESPONDENT**

RULING

1. In his Application dated 23rd November, 2018, the Plaintiff is seeking for an order reinstating the suit. The Application is premised on the ground that both the Plaintiff and the Defendants were not in court on 8th November, 2018 when the matter was called out; that the failure by the Plaintiff not to attend court on 8th November, 2018 was not intentional and that in the interest of justice, the suit should be reinstated.

2. According to the Plaintiff's deposition, his advocate informed him that the 1st Defendant was deceased; that his advocate informed him that it was essential that the 1st Defendant be substituted before the matter could proceed for hearing and that the failure to attend court on 8th November, 2018 was not intentional.

3. The 5th to 9th Defendants filed Grounds of Opposition in which they averred that the order which is sought to be impugned was made in the presence of both parties; that the Application is an invitation for the court to sit on its own Appeal and that the Application has no merit.

4. In his submissions, the Plaintiff's advocate submitted that the failure by the Plaintiff to attend court was an excusable mistake on the part of the Plaintiff's counsel which should not be visited on the Plaintiff and that the Application was filed within a reasonable time. Counsel relied on numerous authorities which I have considered.

5. The Defendants' counsel submitted that the Plaintiff did not attend court on the scheduled date; that the Application to have the matter

adjourned was disallowed and that the Plaintiff's remedy is to either file an Appeal or an Application for review of the order.

6. This matter came up for hearing on 8th November, 2018 during the "service week". On the said date, the Plaintiff was represented by an advocate who applied for an adjournment because "his client could not be granted leave to attend court". On the same day, the Defendants' advocate was also not ready to proceed with the matter. The court, after giving its reasons, declined to adjourn the matter. In the absence of the Plaintiff in court, the court proceeded to dismiss the matter for want of prosecution and attendance with no order as to costs.

7. Order 12 Rule 7 of the Civil Procedure Rules provides that where Judgment has been entered or the suit has been dismissed, the court, on Application, may set aside or vary the Judgment or order upon such terms as may be just.

8. Although the Plaintiff's advocate informed the court that the Plaintiff was unable to attend court on 8th November, 2018 because he was unable to get permission from his place of work, no evidence has been adduced to show that the Plaintiff is indeed working and that he was unable to get permission from his place of work to attend court. In fact, the Plaintiff has not alluded in his Affidavit that he was unable to attend court because his employer declined to give him permission. Instead, the Plaintiff's position is that it is his advocate who advised him not to attend court because the 1st Defendant had passed on.

9. Having failed to produce any evidence to show that he was on duty on 8th November, 2018, I find that the Plaintiff has not given a plausible explanation as to why he was not in court on 8th November, 2018. This court is therefore unable to exercise its discretion in his favour.

10. For those reasons, the Application dated 23rd November, 2018 is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14TH DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE