



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 50 OF 2017

PETER KIMUNDIPLAINTIFF/APPLICANT

VERSUS

GOVERNMENT OF MAKUENI COUNTYDEFENDANT/RESPONDENT

AND

MUKAA TRADING COMPANY LIMITEDINTERESTED PARTY

RULING

1. What is coming up for ruling is the Plaintiff's/Applicant's undated application filed in court on 10th April, 2018 for orders: -

1) Spent.

2) That this Honourable Court be pleased to set aside and vacate the dismissal Orders and all other Orders made on the 7th November, 2017 and the notice of motion dated 13th June, 2017 be reinstated for hearing and determination and the orders issued on 15th June, 2017 similarly be reinstated.

3) The cost of this application be provided for.

2. The application is predicated on the grounds on its face and is supported by the supporting affidavit of Andrew Makundi, advocate on record for the Plaintiff/Applicant, sworn at Machakos on 09th April, 2018.

3. The Interested Party has opposed the application vide the replying affidavit of Joseph Kavingu, sworn at Machakos on the 14th May, 2018 and filed in court on 23rd May, 2018. Joseph Kavingu has in paragraph 1 of the replying affidavit deposed that he is the director of the Interested Party.

4. The Plaintiff's/Applicant's Counsel has deposed in paragraphs 2, 3 and 4 of his affidavit that the Plaintiff/Applicant herein filed the application dated 13th June, 2017 on 15th June, 2017 which application was certified as urgent and interim orders were issued on the same day, that the Counsel inadvertently failed to diarize the matter and hence he was unable to attend court on 07th November, 2017 when the matter was scheduled for mention and that the mistakes of an advocate should not be visited upon an innocent litigant.

5. On the other hand, Joseph Kavingu has deposed in paragraphs 4, 12 and 17 of his replying affidavit that the Plaintiff/Applicant has lost interest in the suit despite coming to court under certificate of urgency and has not taken steps to prosecute the suit or the dismissal application and had been enjoying interim orders granted being the very reason he failed to set down the matter of hearing, that he is advised by his advocate on record which advise he verily believes to be true that Section 1A of the Civil Procedure Act provides for the overriding objective of the Act and Rules which is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes governed by the Act and that equity aids the vigilant but not the indolent, the Plaintiff was awakened by a notice to demolish the illegal structures built on a road reserve and which block their premises access and therefore this application is brought in bad faith, were it not for the notice or threats to demolish, the application would not have been filed.

6. The Defendant/Respondent herein did not file its response to the application.

7. Both the Plaintiff/Applicant and the Interested Party have filed their submissions pursuant to the court's directions that the application be disposed off by way of written submissions.

8. The Plaintiff's/Applicant's Counsel in his submissions cited Article 50 of the Constitution 2010 which provides that every person has a

right to fair hearing. That the Plaintiff/Applicant has shown the reason why his Counsel did not appear in court on 07th November, 2017 which was the Counsel's failure to diarize the matter. The Counsel added that the Plaintiff/Applicant should not suffer for the honest mistake of his advocate. That it would be fair if the Plaintiff/Applicant was allowed to prosecute his application dated 13th June, 2017 and have the same determined on merit.

9. On the other hand, the Counsel for the Interested Party submitted that as per annexure JK1 to the Interested Party's replying affidavit, they notified the advocates for the Applicant vide the letter dated 02nd October, 2017 about their need to serve their submissions. The Counsel added that they further served the advocate with a mention notice annexured as JK2 which they duly stamped and later ignored it nor did they respond to the aforementioned letter. That as such, the Plaintiff/Applicant has no reason why they never filed their submissions. The Counsel went on to submit that the allegation that the Applicant's Counsel failed to diarize the matter and also failed to attend court is untrue. That the Interested Party did all what he could to comply with the court's directions which direction's the Plaintiff/Applicant chose to ignore. That to allow the application would in essence amount to defeating the very essence of the overriding objective provided for under Section 1A of the Civil Procedure Act and which object the Plaintiff/Applicant had chosen to ignore.

10. Having read the application together with the supporting and the replying affidavit as well as the submissions filed by the Counsel for the parties on record, my finding are as follows:-

11. Firstly, the Interested Party herein remains just "an Interested Party." No orders for or against can be issued against it. For the Interested Party to fully participate in these proceedings, it must choose either to be a plaintiff or a defendant.

12. Secondly, the Plaintiff/Applicant is out to urge this court to exercise its discretion so as to give him a chance to have his application dated 13th June, 2017 heard on merit.

13. In the case of **Shah vs. Mbogo & Another [1967] EA 116**, Harris, J held thus:-

"applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice, the motion should be refused."

14. I have considered the reasons that have been proffered by the Plaintiff's/Applicant's for his failure to appear in court on the 07th November, 2017 when the application dated 13th June, 2017 was dismissed. In my view, failure to diarize the date is an excusable mistake or error. It would be unjust to visit the mistake of the Plaintiff's/Applicant's Counsel on the Plaintiff/Applicant himself. In the circumstances, I hold that the application has merits and I hereby proceed to grant prayer 2 of the application with costs in the cause.

Signed, dated and delivered at Makeni this 30th day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Makundi for the Plaintiff/Applicant

Mr. Morara holding brief for Mr. Kamolo for the Interested Party

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

30/07/2019.