



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 111 OF 2006

MOSES MUNYWOKI MWENDWA.....1ST PLAINTIFF

JOYCE MUENI KASWII.....2ND PLAINTIFF

VERSUS

JOHN MUTUA MUASYA.....1ST DEFENDANT

JULIUS NYELELE.....2ND DEFENDANT

RULING

1. In the Application dated 18th October, 2018, the Plaintiffs have sought for the following orders:

a. That the Applicant do have leave to act in person.

b. That the Judgment entered on 3rd March, 2017 and all consequential orders be set aside and the case be heard de novo on merit.

c. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 2nd Defendant, who has deponed that on 18th October, 2010, he filed a Defence and Counter-claim in this matter through the firm of D.M. Ndungi Advocates; that he was never served with an invitation to fix a mutually convenient hearing date at the registry and that this file was reconstructed on 3rd June, 2015 by the Deputy Registrar of this court.

3. According to the 2nd Defendant, since the file was reconstructed, he has never been served with any court document; that he was shocked when he discovered that the matter had proceeded for hearing without being served with hearing notices and that he has occupied parcel of land known as Ukia/Mukuyuni/1758 since the year 2000.

4. It is the 2nd Defendant's disposition that the 1st Defendant's parents and his wife are buried on the suit land; that the suit property borders the 1st Plaintiff's land which was originally owned by the late Kalunde Kilonzo and that before her demise, she sub-divided the suit land into two portions. According to the 2nd Defendant, he bought his portion of land from one Mbuthu Kilonzo and that he has an indefeasible title to the land.

5. In reply, the 1st Plaintiff deponed that this matter was heard and Judgment delivered; that his advocate then filed an Application to have the Judgment set aside; that the file disappeared and that the file was then reconstructed.

6. According to the 1st Plaintiff, the 2nd Defendant attended court and was heard and that after the Judgment, the Defendants were served with a notice to show cause why they should not be evicted from the land. It is the 2nd Defendant's case that although the Plaintiffs were evicted from the land, they later on returned. It is the Plaintiffs' case that the Defendants should comply with the order of the court.

7. In his submissions, the 2nd Defendant submitted that after this file was reconstructed, he had two case numbers, that is ELC. Case No. 327 of 2015 and 111 of 2006; that it is because of the two case numbers that he was not aware when the matter came up for hearing and that the two files confused them.

8. On his part, the Plaintiffs' advocate submitted that the 2nd Defendant has not complied with the court orders; that the 2nd Defendant participated in the main hearing of the suit and that the Application should be dismissed.

9. The record shows that this file got lost. Vide a Miscellaneous Application number 327 of 2012, the file was reconstructed on 25th March, 2015. After the file was reconstructed, the court gave directions on the filing of documents and witness statements on 30th August, 2016. The court then fixed the matter for hearing on 7th December, 2016.

10. On 7th December 2016, the matter proceeded for hearing. The 2nd Defendant/Applicant was present on the said date. Indeed, the 2nd Defendant participated in the proceedings by cross-examining the 1st Plaintiff. The 2nd Defendant/Applicant testified on the same day and was cross-examined by the Plaintiffs' advocate. The court then reserved its Judgment which it delivered on 3rd March, 2017. In the said Judgment, the court allowed the Plaintiffs' claim and dismissed the Defendants' counter-claim. It is therefore not true that the 2nd Defendant was never heard.

11. For those reasons, the Application by the 2nd Defendant dated 18th October, 2018 is not meritorious. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE