



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 159 OF 2014

MUSILI KIVINGO.....1ST PLAINTIFF

KITHUKA MUSINGILA.....2ND PLAINTIFF

VERSUS

KITILI KILONZO.....DEFENDANT

RULING

1. In the Notice of Motion dated 13th September, 2017, the Defendant is seeking for an order setting aside the ex-parte Judgment and consequential orders of 22nd September, 2017.
2. According to the Affidavit of the Defendant, the court made orders as against him on 22nd September, 2017; that the 1st Plaintiff died on 1st March, 2017 before the matter came up for hearing on 12th June, 2017 and that he was never served with Summons to Enter Appearance.
3. The Defendant deponed that he learnt of the proceedings herein when he was served with an order on 7th October, 2017; that the proceedings of the Tribunal in LTDC 3/2000 is a subject of an Appeal No. 58 of 2000; that the said Appeal only involves the 1st Plaintiff and himself and that the only dispute between the 2nd Plaintiff and himself was LTDC No. 36 of 2006 in which the 2nd Plaintiff lost.
4. The Defendant finally deponed that initially, he filed a similar Application but it was dismissed on a mention day for being incompetent and that his Defence raises triable issues.
5. The Plaintiffs' advocate filed a Notice of Preliminary Objection in which he averred that the Application is incompetent, frivolous, vexatious and an abuse of the process of the court and that the Application is *res-judicata*.
6. In the Grounds of Opposition, the Plaintiffs averred that the Application seeks the same orders as the earlier Application dated 23rd November, 2017 which was dismissed on 31st July, 2018 for non-attendance and that the Application has been made in bad faith and is only aimed at delaying the disposal of the suit.
7. In his oral submissions, the Defendant's advocate submitted that the Defendant was never served with the Summons to Enter Appearance; that the 1st Plaintiff died on 1st March, 2017 and that it is the deceased Plaintiff, not the 2nd Plaintiff, who was the decree holder.
8. The Defendant's advocate submitted that although the Application that was dismissed by the court raised the same issues that have been raised in the current Application, the said Application was never heard on merit and is therefore not *res-judicata*.
9. The Plaintiffs' advocate submitted that the matter proceeded for formal proof after the court was satisfied that the Defendant had been served with the Summons to Enter Appearance; that the cause of action survived the 2nd Plaintiff and that the 2nd Plaintiff disclosed that the 1st Plaintiff was deceased.
10. The Plaintiffs' advocate submitted that in any event, the Defendant had filed a similar Application which was dismissed by the court for non-attendance and that the current Application is *res-judicata*.
11. The first issue I will determine is whether the current Application is *res-judicata*.
12. The record shows that this matter proceeded as undefended on 12th June, 2017 and Judgment was delivered in favour of the 2nd Plaintiff on 22nd September, 2017.

13. On 23rd November, 2017, the Defendant filed an Application dated 8th November, 2017 seeking to set aside the Judgment and all consequential orders of the court that were made on 22nd September, 2017. The grounds that the Application was premised on are the same grounds that the current Application is grounded upon.

14. When the Application dated 8th November, 2017 came up for hearing on 31st July, 2018, the same was dismissed by the court with costs as follows:

“The Defendant’s advocate has not complied with the orders of 27th February, 2018. The Application dated 8th November, 2017 is dismissed for want of prosecution. The Applicant to pay the costs.”

15. Instead of filing an Application seeking to set aside or review the orders of 31st July, 2018 dismissing the Application dated 8th November, 2017, the Defendant/Applicant has filed an Application similar to the one that was dismissed for want of prosecution. That in my view is an abuse of the court process.

16. In any event, the Defendant’s advocate has not informed the court why he did not comply with the orders of the court of 27th February, 2018 or why he was not in court on 31st July, 2018 to prosecute the Application dated 8th November, 2017. That being the case, the court cannot exercise its discretion in is favour by hearing a similar Application.

17. For those reasons, I dismiss the Application dated 13th September, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE