



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 75 OF 2009

NANCY WAIRIMU NJAU.....1ST PLAINTIFF

GEOFFREY NJAU MUNGAI2ND PLAINTIFF

VERSUS

JOSEPH OKEMWA ONTWEKA.....1ST DEFENDANT

DICKSON NGECHU GATONGO.....2ND DEFENDANT

MRS. MICHAEL NJUGUNA.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 25th February, 2019, the Plaintiffs are seeking for the following orders:

- a. That leave be granted to the firm of M/S Guantai & Associates to come on record in this matter in place of the firm of M/S M. Mutinda & Associates for the Applicants.**
- b. That the dismissal order dated 21st February, 2018 be set aside and the suit herein be reinstated.**
- c. That this Honourable Court be pleased to set aside its orders dated 23rd February, 2018 dismissing the Plaintiff's suit for want of attendance.**
- d. That this Honourable Court does make any other or such further orders as it may deem fit, just and expedient to make.**
- e. That the costs of this Application be in cause.**

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that she had instructed the firm of M. Mutinda & Associates to act for her in this matter; that on 21st March, 2017, she went to court with her then advocate for the hearing of this matter and that on arrival, they were informed that this matter had been erroneously listed for hearing on 21st February, 2017 instead of 21st March, 2017 when it was dismissed for want of attendance.

3. According to the 1st Plaintiff, all along, he believed that his advocate had filed an Application to reinstate the suit as promised; that when he realized his then advocate had not filed the Application for reinstatement of the dismissed suit, he instructed his current advocate to file the current Application and that the suit was dismissed due to someone else's in action.

4. The Plaintiffs previous advocate swore an Affidavit in which he deponed that this matter was fixed for hearing on 21st March, 2017; that he later on learnt that the matter had been listed for hearing on 21st February, 2017 and dismissed for want of prosecution and that the dismissal of this matter was not due to his fault or his clients but the court officers.

5. The Defendants' advocate filed a Preliminary Objection, Grounds of Opposition and a Replying Affidavit. In the Preliminary Objection and Grounds of Opposition, the Defendants averred that the orders sought to be set aside have not been annexed on the Application.

6. In the Replying Affidavit, the 1st Defendant deponed that the suit will not serve any purpose even if reinstated because the suit was filed

out of time and without the leave of the court and that no reasonable explanation has been given as to why the Applicants were indolent in filing their Application for more than one (1) year after it was dismissed for want of prosecution. None of the parties filed written submissions.

7. I have perused the court file and noted that an Application dated 22nd March, 2017 which is similar to the current Application, was filed by the Plaintiffs' former advocates on 23rd March, 2017. The Application was dismissed by the court on 23rd February, 2018.

8. Having heard the Notice of Motion dated 22nd March, 2017 on merit, I find that the current Application is *res judicata*. On that ground alone, except for ground number 1, the Application dated 25th February, 2019 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE