



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 161 OF 2013**

**MONICA WAMBUI KAMAU**

**ZACHARIA NJENGA KAMAU** (Suing as legal representatives of the estate of

**JAMES KAMAU THIONG'O.....PLAINTIFFS**

**VERSUS**

**GOLDEN SPARROW TRADING COMPANY LTD.....1<sup>ST</sup> DEFENDANT**

**MJAD INVESTMENTS LTD..... 2<sup>ND</sup> DEFENDANT**

**THE AFRICAN GAS AND OIL COMPANY LTD.....3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF TITLES (MOMBASA) .....4<sup>TH</sup> DEFENDANT**

**RULING**

***(Application to reinstate a suit dismissed for non-attendance; Order 12 Rule 7; applicants stating that they were never served with the hearing notice; no evidence of service of the hearing notice; application allowed and suit reinstated)***

1. The plaintiff has filed the application dated 7 March 2019, seeking orders for the reinstatement of this suit which was dismissed on 4 December 2018 for non-attendance. The main ground upon which the application is based is that counsel for the plaintiff was not served with any notice that the matter would be in court on 4 December 2018. The application is opposed by the defendant who has filed Grounds of Opposition, inter alia stating that the plaintiff is guilty of laches that this application has been filed after inordinate delay, and that no sufficient grounds exist to warrant a reinstatement of the suit.

2. To put matters into context, this suit was commenced by way of a plaint which was filed on 2 August 2013. In the plaint, the applicants suing as the legal representatives of one James Kamau Thiong'o (deceased), contended that the deceased was the proprietor of the land parcel known as Plot No. 755/VI/MN whereas the 1<sup>st</sup> defendant/respondent was the registered proprietor of the land parcel MN/VI/4737. They averred that the 1<sup>st</sup> respondent's title was fraudulently obtained through an illegal subdivision of the title of the deceased. In the suit, they asked for an order inter alia declaring that the Plot NO. MN/VI/4737 encroaches on the Plot NO. 755/VI/MN. The plaint was later amended to add Mjad Investments Limited and African Gas and Oil Company Limited as additional defendants as they also had interest in the land in issue. There were a couple of applications and the matter was then fixed before the Deputy Registrar for pre-trial directions culminating in the appearance of 16 August 2018, when the Deputy Registrar directed the parties to take a hearing date in the registry.

3. There was a service week in this station (a system where some matters are earmarked for disposal and hearing dates given by court) and pursuant thereto, this case was fixed by the Court for hearing on 4 December 2018. I have seen the hearing notice addressed to all counsel on record but the only proof of service of that notice that I have is service upon the Attorney General who represents the Land Registrar, sued as the 4<sup>th</sup> defendant. The matter was placed before Matheka J, for hearing on 4 December 2018, but there was no appearance for the plaintiff. Only counsel on record for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants was present and he asked that the case be dismissed. The court duly obliged and dismissed the suit for non-attendance.

4. It will be noted that through this application, the plaintiff wants the suit reinstated. There are two affidavits in support of the motion, one sworn by Vivianne Wachanga, an advocate practising in the law firm of M/s J.M Njenga & Company Advocates, who practice in Nairobi,

and who are on record for the applicants, and the other sworn by Benjamin Kimani Njoroge, an advocate practicing in the law firm of M/s Njoroge & Katisya Advocates, in Mombasa. The gist of these two affidavits is that upon the matter being certified ready for hearing, Ms. Wachanga, sought the assistance of the law firm of M/s Njoroge & Katisya, to fix a hearing date but no dates were fixed because they were informed that there are no dates for the year 2018. Mr. Njoroge later went to follow up on dates in the month of December 2018, when he was informed that 2013 cases had been listed during service week. He checked the service week cause list but did not find this matter cause listed. He followed up only to learn that the case was fixed for hearing on 4 December 2018 and had been dismissed for non-attendance. Ms. Wachanga, has deposed that her law firm was never served with notice of the hearing of 4 December 2018. She has also pointed out that the file has been fairly active and that the plaintiffs are keen to prosecute this matter.

5. In opposing the motion, Mr. Busieka argued that the only avenue that the applicants had was to either appeal the decision dismissing the suit or seek its review.

6. I have considered the motion. This application has been brought pursuant to the provisions of Order 12 Rule 7 which provides as follows :-

***Setting aside judgment or dismissal [Order 12, rule 7.]***

*Where under this Order 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.*

7. Order 12 deals with hearings and the consequences of failing to attend at a hearing. Under Rule 3, when on the hearing date, the plaintiff does not appear but only the defendant/s appear and admit no part of the claim, the suit shall be dismissed unless for good reason. It will be noted that Rule 7 above, permits a party to set aside any order made by the court pursuant to Order 12, and it will be seen that one of the orders that may be made under Order 12 is the order of dismissal for non-attendance of the plaintiff. It is not therefore correct, as urged by Mr. Busieka, that in an instance where a suit has been dismissed for non-attendance, the only recourse that the plaintiff has is to file an appeal or a review.

8. Turning to the main prayer of the motion, I have actually no evidence of service of the hearing notice upon counsel on record for the applicants. I have no reason to doubt the deposition that the law firm representing the applicants was never served with the hearing notice for 4 December 2018. Without service, there was no way that counsel for the applicants would have known that the matter was coming up for hearing. In my view, the absence of the applicants and their counsel in court on 4 December 2018 is well explained. I have also seen from the record that the applicants have actively been pursuing the matter and I do not think that it can be said that they have been indolent.

9. Given the above, I am persuaded to allow this application and reinstate the applicants' suit for hearing and disposal. I therefore set aside the order of dismissal of this suit. I make no orders as to costs.

10. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 9<sup>th</sup> day of October 2019.**

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**MUNYAO SILA.**

**JUDGE.**

**IN THE PRESENCE OF:**

No appearance on the part of M/s J. M Njenga & Company for the applicants.

Mr. Busyeka present for 1<sup>st</sup>-3<sup>rd</sup> respondents.

Mr Makuto present for 4<sup>th</sup> respondent.

Mr Koitamet; Court Assistant.