



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 282 OF 2017

JULIUS KYALO MUSYOKI.....PLAINTIFF/APPLICANT

-VERSUS-

JOSEPH MUSAU MUSYOKI.....1ST DEFENDANT/RESPONDENT

ROSE NDUKU KILAVI.....2ND DEFENDANT/RESPONDENT

NOEL MULWA.....3RD DEFENDANT/RESPONDENT

RULING

1. The application before court for ruling is the Plaintiff's/Applicant's notice of motion application dated 07th May, 2019 and filed in court on 09th May, 2019 for orders: -

1) THAT the court sets aside its order dated 29th April 2019 and reinstate this suit for hearing.

2) THAT costs of this application be in the cause.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Julius Kyalo Musyoki sworn at Nairobi on 07th May, 2019 as well as the affidavit of Benjamin Mwikya Musyoki sworn in Nairobi on 23rd July, 2019.

3. The application is expressed to be brought under Order 12 Rule 7 of the Civil Procedure Rules and all other enabling provisions of the law.

4. The Defendants/Respondents have opposed the application vide the replying affidavit of Joseph Musau Musyoki, the 1st Respondent herein sworn at Nairobi on 15th July, 2019 and filed in court on 17th July, 2019.

5. The application was disposed off by way of oral submissions.

6. Ms. Jepkorir for the Applicant submitted that they were not in court on 29th April, 2019 as they misdiarised their diary during the last time they were in court on 28th January, 2019. That it later came to their attention that the date for hearing was on 29th April, 2019. That when they came to court on 28th February, 2019, it was not sitting and that when they went to trace the file in the registry on 23rd May, 2019, it could not be located and that they later learnt that the matter was dismissed on 29th April, 2019 for non-attendance.

7. It was further submitted that the Applicant has attached a copy of their diary of 28th February, 2019 which shows case number 510/15 with an office reference number BMJ/264 while the case file number is 282/17. The Counsel pointed out the former was previously a criminal case against the Applicant in Kilungu Senior Resident Magistrate Court. That paragraph 7 of the plaint filed in court on 09th January, 2019 refers to the same criminal case. The Counsel added that the annexure refers to the criminal case and that the said annexure is from the master diary. That the affidavit sworn by Benjamin Mwikya Musyoki on 23rd July, 2019 who is the advocate on record for the Applicant, has an annexure of his diary that indicates that the hearing of Makueni ELC No.282/17 Ref Number BMJ 264 of 2015. That with that in mind, it would be fair and just to have the suit heard and determined on merit instead of being dismissed on technicality. The Counsel went on to submit that the Respondents will not suffer prejudice if the suit is reinstated. The Counsel pointed out that the court has the discretion to set aside the order that was issued on 29th April, 2019 and can do so on conditions that are fair to the Applicant who is willing to abide on any terms that the court may impose.

8. Lastly, the Counsel cited Article 50 of the Constitution which provides for fair hearing.

9. The Counsel for the Respondents submitted that on 28th January, 2019 when they appeared in court, there was a representation of the Applicant by a Counsel, one Mr. Anyasi, who held brief for Mr. B. M. Musyoki. The Counsel went on to submit that the matter did not proceed to hearing owing to the fact that there were documents which the Respondents had not filed and sought leave to do so. That leave was granted in addition to the court fixing the matter for hearing on 29th April, 2019. The Counsel pointed out that the date was picked by consent of the parties' advocates. The Counsel further submitted that he was with the Counsel in court who actually sought to confirm the date from the court's record and perused the file as is reflected in paragraph 8 of the replying affidavit.

10. The Respondents' Counsel further submitted that in annexure JM-1 in the supporting affidavit that the court is being pointed to, there are matters in the copy of diary and this matter is not one of them. It was also submitted that it has been put across that ELC No.510/2015 was erroneously listed as opposed to the same number being a criminal case at Kilungu which the Counsel submitted that it would not justify number 510/2018 and 282/17 so as to reflect one and the same matter.

11. It was also submitted that annexure JM2 in the supporting affidavit has numbers listed therein with some of the matters being ELC No.20/19 and ELC No.214/16 and that paragraph 12 of the supporting affidavit indicates that those matters were heard and/or mentioned. The Counsel was of the view that had the Applicant's Counsel been keen, he would have noticed that there were other matters in the cause list that emanated from his office that came up for hearing on the same day.

12. Regarding the attempt to fix a hearing date in this matter on 21st March, 2019, where there was invitation to the defendant's Counsel, the Counsel added that between 28th February, 2019 to 29th April, 2019 when the matter was dismissed, there was no attempt to know the status of the case by the Plaintiff's Counsel. The Counsel was of the view that no tangible evidence had been presented to enable the court grant the orders sought.

13. In reply, the Applicant's Counsel reiterated her earlier submissions.

14. Having read the application, the replying affidavit as well as the oral submissions made by the Counsel on record for the parties, it is clear that the mistakes herein were made by the Applicant's Counsel. It has been stated by the Courts on several occasions that mistakes of the advocates should not be visited upon their clients. Further, I do note that no prejudice will be occasioned to the Respondents if the application were to be allowed. The Respondent can be compensated by way of costs. In the circumstances, therefore, I find merit in the Applicant's application and I will proceed to allow it in terms of prayer 1 with an order that the Applicant meets the costs of the application.

Signed, Dated and Delivered at Makueni this 29th day of November, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Hassan holding brief for Mr. Nzaku for the Defendant

No appearance for the Plaintiff

Mr. Kwemboi – Court Assistant

MBOGO C. G., JUDGE,

29/11/2019.