



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 40 OF 2014

1. EMMANUEL TINDI MWANZAKA

2. CHIRINDO MWANZAKA TIND Suing on their own behalf of

Mwanzaka Tindi Dzengo - deceased..... PLAINTIFFS

-VERSUS-

JUNGO VINDI DANDASI.....DEFENDANT

RULING

1. By a notice of motion dated 26th April, 2019 brought under Article 48, 50, 159 of the Constitution, section 1A, 1B and 3A of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, the plaintiffs/applicants seeks to vacate and set aside orders made on 4th March 2019 withdrawing the suit against the defendants and for the suit to be reinstated.

2. The application is premised on the following grounds:

1. That the advocate who instructed this honourable court to withdraw the plaintiff's/applicant's suit against the defendant had no instructions to do so on behalf of the plaintiff's/applicant's advocate.

2. That the advocate who purported to withdraw this suit against the defendant misled this honourable court to believe that the said instructions emanated from the Plaintiff's/Applicant's Advocate on record.

3. That neither the plaintiffs/applicants nor his advocate on record instructed the said advocate to withdraw this suit against the defendant.

4. That this matter involves a land dispute which this honourable court ought to determine on merit so that justice and fairness is served to the parties.

5. That the plaintiffs/applicants stand to suffer irreparable damage and loss if this suit is not reinstated.

6. That the respondent will not suffer any prejudice if the order made by this honourable court is set aside.

7. That in the interests of justice and fairness, the said order ought to be vacated and the suit herein be reinstated and be heard on merit.

3. The application is supported by the affidavit of Seth Joel Ongiri Advocate sworn on 26th April 2019 in which he has deposed that the 1st plaintiff is currently deceased and has attached a copy of Death Certificate marked "SJO-1". Mr. Ongiri states that when this matter came up for hearing on 4th March, 2019, he instructed Mr. Muganda Advocate to hold his brief with a view of seeking an adjournment since he was in the process of registering a power of Attorney in which the 2nd Plaintiff herein was to donate power to one Joseph Mwambaji Mwanzaka to represent her in this matter for reason that she is old and currently indisposed and unable to attend court for hearing. That the request to adjourn the matter was not granted and the matter was set for hearing at 11.00 a.m.

4. Mr. Ongiri states that while he was making arrangements to have the 2nd plaintiff transported from Kaloleni to attend court to testify, another advocate without his knowledge and approval purported to hold his brief and informed the court that he had instructed her to withdraw the suit against the defendants. He denies that the instructions to withdraw the suit emanated from him. That following the withdrawal of the plaintiff's suit, the defendant served them with a hearing notice of the counter-claim which was slated for hearing on 9th May, 2019. That respondent will suffer no prejudice if this suit is reinstated as he will have a right to participate in the suit. It is stated that the suit property is currently occupied by the plaintiff and her family members who have lived on it for their entire lives, and that the plaintiff holds a valid title deed for the property.

5. In opposing the application, the defendant filed grounds of opposition dated 8th May, 2019 and a replying affidavit sworn on 14th October, 2019. The defendant avers inter alia, that the suit land is his ancestral land which belonged to his deceased father who was buried thereon. That the title issued in the name of Mwanzaka Tindi Dzengo, the plaintiff's deceased father was illegally and fraudulently obtained. The defendant has given the summary of the court proceedings since the filing of the suit till when the plaintiff's suit was dismissed. It is the defendant's contention that the suit was withdrawn by the plaintiff's advocate on record and the court has no power to reinstate the same.

6. I have considered the application. This matter came up for hearing on 4th March 2019. In the first instance Mr. Muganda held brief for Mr. Ongiri advocate for the plaintiffs while Ms. Ariga held brief for Mr. Asige advocate for the defendants. The record indicates that Mr. Muganda informed the court that Mr. Ongiri was not ready to proceed as he was in the process of filing a power of Attorney to replace the plaintiff who was aged over 83 years and had lost his memory. Although the application for adjournment was not opposed, the court declined to grant the adjournment sought. Later, when the matter was slated for hearing, Ms. Monari held brief for Mr. Ongiri and stated that she had instructions from Mr. Ongiri to have the plaintiff's suit against the defendant withdrawn. Since there was no objection from Ms. Ariga advocate for the defendant, the plaintiff's suit against the defendant was marked as withdrawn. Mr. Ongiri, learned counsel for the plaintiffs' has deposed that he instructed Mr. Muganda advocate to hold his brief with a view to seeking an adjournment since he was in the process of registering a power of Attorney. This deposition is in tandem with the court record. He further deposed that he never instructed Ms. Monari to withdraw the plaintiffs' suit against the defendant. It appears Ms. Monari applied to have the plaintiffs' suit against the defendant withdrawn when no such instructions had been given. Counsel may as well have had such instructions.

7. Be that as it may, given that parties have a right under Article 40 of the constitution for protection of property and Article 50 on the right to a fair hearing, and the fact that the defendant's counter-claim is yet to be heard, I am persuaded to grant the plaintiffs' another opportunity to prosecute their case. It is my considered view that the overriding objective of the court would come to the aid of the plaintiffs.

8. For the foregoing reasons, I am satisfied that the plaintiffs' application dated 26th April 2019 has merit. The application is allowed. The order made herein on 4th March 2019 marking the plaintiffs' suit as withdrawn is set aside and the case is reinstated for hearing on merit. Each party to bear own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mungoma holding brief fore Ongiri for Plaintiff/Applicant

Ojwang holding brief fore Asige for Defenant/Respondent

Yumna Court Assistant

C.K. YANO

JUDGE