



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 1417 OF 2014

EVANGELINE WANGARI KARIUKI.....PLAINTIFF

-VERSUS-

LA NYAVU GARDENS LIMITED & 3 OTHERS..... DEFENDANTS

RULING

1. This is a Ruling in respect of a Notice of Motion dated 18th June 2019. The application is brought by the Defendants/Applicants who seek to set aside the orders of Court made on 30th May 2019 in which the Applicants Notice of Motion of 30th November 2018 was dismissed for non-attendance. The Applicants contend that when their counsel appeared in Court on 28th February 2019 for the hearing of the motion dated 30th November 2018, Counsel for the Plaintiff/Respondent prayed for adjournment to enable her file a replying affidavit. This request was allowed and the application was adjourned to 30th May 2019.

2. On 30th May 2019 when the application was called out for hearing at 9.19 am, neither the Applicants counsel nor the Respondents counsel were present. The Court on its own motion dismissed the application for non-attendance. The applicants counsel has explained that failure to attend court was not deliberate and that it was due to failure to diarise the matter in the diary. The counsel for the Applicants has annexed a copy of an extract from her diary which shows that this case was not diarised.

3. The Respondent has opposed the Applicants application through a replying affidavit sworn by her counsel on 17th September 2019. The Counsel contends that the Applicants should not be granted the prayers they are seeking because there has been no explanation given why the counsel for the Applicant did not attend Court. The Respondent further contends that the Applicants have exhibited indolence in the past by not pursuing their applications which have been pending in court for over 3 years.

4. I have considered the Applicants application as well as the opposition thereto by Respondent. The only issue for determination is whether the order dismissing the Applicants' notice of motion dated 30th November 2018 should be set aside. The record shows that the notice of motion which was dismissed was seeking to set aside default judgement. The record further shows that the Respondent has applied for execution of the decree.

5. In exercising discretion to set aside an order for dismissal, the court has to consider the reasons given. In the instant case, it is clear that the Applicant was ready to go on with the Application which was dismissed to 30th May 2019 for hearing. Counsel for the Applicant seems to think that the date for 30th May 2019 was for mention. This is not correct as the application of 30th November 2018 was set for hearing. The Applicant has explained that the counsel was within the Court premises on that day but she was in a different court and that she was not aware that the matter was coming up on that day. This has been supported by an extract from her diary which clearly indicates that this suit was not diarised for 30th May 2019.

6. It has long been held that the discretion of the court is to be exercised to assist a party who through inadvertence or excusable mistake does not attend court. In this case I am convinced that the counsel's failure to attend court was inadvertent. The Respondent's counsel did not also attend. The Court cannot punish the Applicants for a mistake which has been amply explained. I therefore allow the application dated 18th June 2019 in terms of payers **(b)**, **(c)**, **(e)** and **(g)**.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 5th day of December 2019.

E.O .OBAGA

JUDGE

In the Presence of:-

M/s Wambui Kyama for Applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE