



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO. 650 OF 2013

JOHN KAMAU NJOROGE

STEPHEN MUYA NJOROGE (Suing as Administrators of the Estate of

ANNE MUGANE NJOROGE ALIAS

MUGANE NJOROGE & NJOROGE KAMAU).....PLANTIFFS

VERSUS

MARY NJERI KIMORI.....DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 12th February 2019 , which seeks to set aside this court’s orders of 7th February 2019 dismissing the Plaintiff’s suit for non-attendance. This suit was fixed for hearing on 7th February 2019. When the case was called out, Mr Kuria holding brief for Mr Kwengu for Plaintiff applied for adjournment on the ground that the Plaintiffs had discovered new evidence which they wished to put in within 14 days.

2. The application for adjournment which was opposed by counsel for the Defendant was rejected. The matter was placed aside for hearing after the court was through with mentioning matters on the day’s cause list. The file was called later but it turned out that neither the Plaintiffs advocate nor the Plaintiffs were in court. The suit was dismissed with costs to the Defendant for non-attendance as counsel for the defence and Defendants were in court.

3. The Plaintiffs advocate has now filed this application seeking to have the orders of 7th February 2019 set aside on the ground that the advocate who was in conduct of the suit was away in Homabay handling a succession cause and that the Plaintiffs had called him and informed him that they were bereaved . The Plaintiffs advocate sent an advocate to come to court and apply for adjournment which adjournment was rejected resulting in the suit being dismissed for non-attendance.

4. The Plaintiffs application has been opposed by the Defendant through a replying affidavit sworn by the Defendant on 18th April 2019. The Defendant contends that the Plaintiffs have given contradictory reasons for their non-attendance in court; that there is no evidence that the Plaintiffs were bereaved; that the Plaintiffs advocate has not annexed evidence of a succession cause in Homabay and that she is suffering prejudice as she has constructed on the suit properties but has been unable to put tenants in those properties since 2013.

5. I have considered the application by the Plaintiffs and the opposition thereto by the Defendant. I have also considered the submissions by the parties herein. The only issue for determination is whether the plaintiffs have shown grounds to enable the court to set aside the orders of 7th February 2019. It is clear from the affidavit of the counsel for the Plaintiffs that they are trying to look for grounds to set aside the orders.

6. The issue of the date for hearing having been taken before the 2019 diary was available does not arise. The Plaintiffs advocates were aware of the hearing date and that is why a counsel was sent to hold brief for Mr Kwengu and apply for adjournment. What is clear is that Mr Kwengu may have thought that by sending an advocate to apply for adjournment, that adjournment was going to be granted. Equally the issue of Mr Kwengu having gone to Homabay High Court is of no help to this application. If indeed Mr Kwengu had gone to Homabay , then the reason for adjournment should have been that he was away. The reason given was that some new evidence had been discovered.

7. However the contradictory reasons notwithstanding, this court should ensure that mistakes or blunders committed by Advocates are not visited upon clients. In the case of **Philip Chemwolo & Another Vs Augustine Kubende (1982-88) KAR 103, Apaloo J** (as he then was) stated as follows:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merits.”

8. In **Richard Ncharpi Leiyagu Vs IEBC & 2 Others CA 18/2013** , the Court of Appeal stated as follows:-

“ The right to a hearing has been a well-protected right in our constitution and is also the cornerstone of the Rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality”.

9. I have considered the circumstances of this case and the materials placed in the file by the parties. I have no doubt that what led to the dismissal of the Plaintiff’s case is as a result of a blunder of their advocate. This should not be visited upon the litigants. I therefore exercise my discretion in favour of the Plaintiffs and proceed to allow the application with the result that the Orders of 7th February 2019 are hereby set aside and this suit is reinstated for hearing. The Plaintiffs advocate shall personally pay throw away costs of **Kshs.20,000/=** to the Defendant before the next hearing date failing which the suit will stand dismissed with the Plaintiffs being at liberty to sue their advocates for negligence.

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:

Mr Mambiri for Defendant/Respondents and

M/s Wambui Kyama for Mr Kwengu for Plaintiff/Applicant

Court Assistant: Hilda

E.O. OBAGA

JUDGE