



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 35 'A' OF 2012 (O.S)

1. SHADRACK KINYUA MBOGO.....1ST PLAINTIFF

2. ESTON NGARI MBOGO.....2ND PLAINTIFF

VERSUS

1. BENSON MBOGO GACHAU.....1ST DEFENDANT

2. SOLOMON PAUL MUCHIRI.....2ND DEFENDANT/RESPONDENT

3. STEVENS MUCHIRA NJAGI.....3RD DEFENDANT/RESPONDENT

RULING

On 26th April 2017 when this suit came up for hearing, neither the plaintiffs nor their counsel **MR. IKAHU NGANGA** were present yet the date had been taken by consent. **MR. KIGURU KAHIGA** counsel for the 2nd and 3rd defendants therefore applied for the dismissal of the suit and the discharge of the orders of injunction earlier issued.

The Court acceded and granted orders dismissing the plaintiff's suit with costs and discharging the order of injunction earlier granted to the plaintiff.

I now have before me the plaintiffs Notice of Motion dated 3rd May 2017 brought under the provisions of **Order 12 Rule 7 of the Civil Procedure Rules** in which the plaintiffs seek the following orders:

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to vary or set aside its orders of 26th April 2017 dismissing the plaintiffs' suit for non attendance and discharging the injunctive orders in force in favour of the plaintiffs.

4. That upon granting prayer No. 3 above, this Honourable Court be pleased to reinstate the suit for hearing on merit and the injunctive orders in force in favour of the plaintiffs be reinstated pending the hearing and determination of the suit herein.

5. That costs be provided for.

The application is based on the grounds set out therein and supported by the affidavits of **MARK IKAHU NGANGAH** counsel for the plaintiffs and **SHADRACK KINYUA MBOGO** the 1st plaintiff.

The gravamen of the application is that when the suit came up for hearing on 26th April 2017, counsel for the plaintiffs was absent as he was indisposed and communicated to his clients instructing them to have the suit adjourned. The plaintiffs were also delayed in coming to Court and by the time they arrived, the suit had been dismissed.

The application is opposed and the defendants have filed grounds of opposition to the effect that:

- 1. The application is frivolous, vexatious and an abuse of the Court process.***
- 2. That the application lacks merit and does not lie since no communication about counsel's illness was given to the Court and to counsel for the defendants prior to the dismissal and in any event, no evidence has been placed before the Court.***
- 3. The application is an after-thought as the orders sought are not available since injunctive orders once discharged cannot be reinstated after their validity has lapsed.***
- 4. That the application is not made in good faith since another application of similar nature had earlier been made and granted.***

The application has been canvassed by way of written submissions which have been filed both by **MR. IKAHU NGANGA ADVOCATE** for the plaintiffs and **MR. KIGURU KAHIGA ADVOCATE** for the 2nd and 3rd defendants.

I have considered the application, the supporting affidavits, the grounds of opposition and the submissions by counsel.

This Court has the discretion to set aside its orders but in doing so, it must act judicially and on the basis of evidence. As was held in **SHAH VS MBOGO 1967 E.A 116**, that discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. The discretion will therefore be exercised upon facts but not on whims or caprice – **SHABIR DIN VS RAM PARKASH ANAND 22 E.A.C.A 48**.

The first ground upon which this application is founded is that counsel for the plaintiffs was un-well. However, as rightly posed by the 2nd and 3rd defendants, no evidence has been placed before the Court to that effect. The easiest thing that counsel for the plaintiffs would have done was to have another counsel hold his brief and inform the Court about his illness. Instead counsel for the plaintiffs has deponed that he communicated to the plaintiffs and instructed them to adjourn the case and the 1st plaintiff has on his part deponed that due to delays in transport, they arrived at 9.45 a.m. when the case had already been dismissed. This Court is not satisfied about the bona fides of those reasons. Instead, this Court takes the view that for reasons which have not been disclosed, counsel for the plaintiffs did not turn up in Court and only communicated with the plaintiffs who chose not to attend Court. As I have indicated above, if counsel for the plaintiffs was indeed indisposed, nothing would have been easier than to communicate with counsel for the 2nd and 3rd defendants as both practices in this town. Alternatively, he would have asked another counsel to hold his brief and inform the Court about his illness. In short, the plaintiffs have not approached this Court with clean hands and are not deserving of this Court's discretion in this matter.

That the plaintiffs are not deserving of this Court's discretion is further exemplified by the fact that on 29th July 2013, the plaintiffs' suit was similarly dismissed for non attendance. On that occasion, the reason given was that the plaintiffs advocate had not kept them informed about the hearing of the suit. That order of dismissal was later set aside vide this Court's ruling dated 31st July 2014 primarily on the ground that the Court did not want to punish the plaintiffs for the mistake of their counsel. In the

circumstances of this application, however, this Court takes the view that there was a deliberate attempt by the plaintiffs and their counsel to obstruct or delay this case. I must put a stop to those schemes because they are not in keeping with the overriding objectives of the **Civil Procedure Act and Rules** which enjoin counsel and the parties to assist the Court in the just, efficient and timely disposal of pleadings before it. The plaintiffs and their counsel are clearly in contravention of those objectives which are provided for under **Sections 1A and 1B of the Civil Procedure Act**. I must therefore decline to set aside the orders of dismissal dated 26th April 2017.

With regard to the prayer seeking the reinstatement of the injunctive orders pending the hearing and determination of this suit, it is now clear that as the suit has been dismissed, there is nothing upon which the orders of injunction can be founded. That prayer must similarly be declined. In any event, the injunctive order was issued on 31st July 2014 and the law is that such an order lapses if the suit is not determined within twelve (12) months unless the Court, “**for any sufficient reason**” orders otherwise – **Order 40 Rule 6 Civil Procedure Rules**. That injunctive order ought to have been extended before it lapsed and since the suit on which it was grounded has been dismissed, there is nothing to reinstate.

Ultimately therefore, the plaintiffs’ Notice of Motion dated 3rd May 2017 is devoid of any merits. It is dismissed with costs to the 2nd and 3rd defendants.

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018

Ruling delivered, dated and signed in open Court at Kerugoya this 2nd day of February 2018

Mr. Njage for Mr. Ngangah for Applicants present

Ms Kimotho for Mr. Kiguru Kahiga for 2nd and 3rd Defendants present

2nd Plaintiff present.

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018