



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 57 OF 2014

STEPHEN MUIGI RURI.....PLAINTIFF

VERSUS

FRANCIS NJOGU

STANLEY NGARI.....DEFENDANTS

PETER NJAGI

RULING

By a plaint filed herein on 26th June 2003, the plaintiff sought the main order that the boundary between his land parcels No. MUTITHI/STRIP/515, 516, 514 and 512, the 1st defendant's land parcel No. MUTITHI/STRIP/367, the 2nd defendant's land parcel No. MUTITHI/STRIP/366 and the 3rd defendant's land parcel No. MUTITHI/STRIP/511 be rectified and set out accordingly.

The 1st, 2nd and 3rd defendants initially filed separate defences before the 1st and 2nd defendants filed a joint statement of defence on 23rd October 2015 in which they pleaded that the Land Registrar Kirinyaga has infact been to the land in dispute and taken the respective measurements of the parties parcels of land.

By an application dated 13th August 2015, **MADRINE WANGUI NJAGI** and **JOAN NYAWIRA NJAGI** sought to be enjoined herein as interested parties. That application was allowed by consent on 6th October 2015 after which they filed their defence to the plaintiff's claim as well as a counter-claim seeking orders that the plaintiff removes the trees he has planted on the boundary of their land parcels No. MUTITHI/STRIP/507-511.

The record shows that the dispute was by consent of the parties referred to District Surveyor but for some reasons, no report was filed and on 11th October 2016, the Court directed that the parties file another consent to be adopted by Court. Nothing appears to have been done by the parties and this suit was among many other listed for dismissal on 23rd January 2018 and notices were issued to the parties.

On 23rd January 2018 when this suit came up for dismissal, only counsel for the defendants was present and on application, the plaintiff's suit was dismissed and the defendants' counter-claim was listed for hearing on 9th May 2018.

By a Notice of Motion dated 21st February 2018 and which is the subject of this ruling, the plaintiff seeks

the main order that this Court sets aside its order dated 23rd January 2018 and reinstate his suit for hearing. The gist of the application which is predicated on the grounds set out therein and supported by the plaintiff's affidavit and also the affidavit of **LEAH MUTHONI MAGONDU** a clerk in the office of **NGIGI GICHOYA ADVOCATES** who are on record for him is that the said clerk in-advertently forgot to diarize the matter in their diary and therefore counsel did not attend Court on 23rd January 2018 when the suit was dismissed. Annexed to that affidavit is a copy of counsel's diary for that day.

The application is opposed and both the 1st and 2nd defendants as well as **MADRINE WANGUI NJAGI** the interested party have filed replying affidavits in which they have deponed, inter alia, that this case is very old having been in Court for the last 15 years. They also refer to the various attempts to have this dispute settled through the office of the Land Registrar but with no tangible results. Most important, though, is the averment in the replying affidavit of the 1st defendant **FRANCIS NJOGU** and which is supported by the other defendants where he states in paragraphs nineteen (19) and twenty (20) as follows:

19: "That on 23.1.2017, the plaintiff was in Court and was seated next to me and I was seated behind him and he is lying when he alleges that he was not in Court"

20: "That when our matter was called out, he even stood but did not say anything and we applied through our advocate to have the case dismissed and the Court obliged".

There was no further affidavit to rebut that averment and yet in support of his application, the plaintiff had pleaded in paragraph three (3) of his supporting affidavit as follows:

"That I and my advocate failed to attend Court on 23rd January 2018 when the matter came up for dismissal for the reason my advocate's clerk one LEAH MUTHONI MAGONDU failed to dialyze (sic) the same (annexed hereto and marked SMR is a copy of the Court order)".

By consent of the parties, the application was disposed off by way of the parties' respective affidavit.

I have considered the application and the parties' respective affidavits. The plaintiff claims that he was not in Court on 23rd January 2018 when his suit was dismissed because his counsel's clerk failed to diarize the matter. In his replying affidavit however, the 1st defendant **FRANCIS NJOGU** has deponed in paragraph eighteen (18) as follows:

"That when we received the notice of withdrawal of the case, we sent the letter of the Court to the plaintiff through the area chief though that was the work of the Court".

That was also confirmed by the 2nd defendant and also the interested party in their replying affidavits. Again, this was not rebutted by the plaintiff. It is clear therefore that not only was the plaintiff and his counsel aware that the suit was coming up for dismissal on 23rd January 2018, but further, that the plaintiff was infact in Court on that day but did not bother to address the Court when the matter was called out. Litigation belongs to the party and not to his counsel. He should therefore be vigilant to ensure that his case is prosecuted and all orders made by the Court in that respect are complied with. It is not clear why the plaintiff, though present in Court on 23rd January 2018 did not address the Court. If he had, his address would have gone on record and most probably, his suit would not have been dismissed. That he failed to do so demonstrates a lack of interest in his case.

The other ground however is that his counsel's clerk forgot to diarize the case when he was served. This was a mistake on the part of his counsel and ordinarily, it should not be visited on his client. In **PHILIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBENDE (1982-88) K.A.R 103, APALOO J.** (as he then was) rendered himself thus:

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

merits I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.

Therefore, while the plaintiff's failure to address the Court on 23rd January 2018 cannot be excused, the absence of his counsel was clearly due to a mistake on his part which has been satisfactorily explained. It will be harsh to punish the plaintiff due to the mistake of his counsel. This is a proper case to set aside the dismissal order dated 23rd January 2018.

I have also considered the likely prejudice to the other parties. It is common knowledge that the interested parties still have a counter-claim to prosecute against the plaintiff who will of course have to defend it. The interests of justice will best be served by allowing all the parties to ventilate their respective cases. The only prejudice to the defendants is the further delay in this matter which, as rightly pleaded by the defendants, has been in Court since 2003. An order for costs will however be sufficient to cushion the defendants. I am therefore persuaded that this application is for allowing.

The up-shot of the above is that the plaintiff's Notice of Motion dated 21st February 2018 is hereby allowed in the following terms:

1. The order dated 23rd January 2018 dismissing the plaintiff's suit is set aside and the suit is reinstated for hearing and determination.

2. The plaintiff shall pay to the defendants costs which I assess at Ksh. 10,000 within 30 days of this ruling and in default, the order dated 23rd January 2018 shall revert.

Having said so, it is clear to me that this dispute can very easily be determined by the District Surveyor and District Land Registrar Kirinyaga. I note from the record that indeed that was the path taken by the parties as far back as 25th September 2006 when they appeared before the late **JUSTICE KHAMINWA**. That is the same route that the dispute took when it was mentioned before **JUSTICE W. KARANJA** between 29th October 2008 and 24th November 2010 before it was transferred to this Court on 9th September 2013 by **JUSTICE ONG'UDI**. The parties are hereby directed to vigorously pursue that route and have this dispute determined once and for all.

It is so ordered.

B.N. OLAO

JUDGE

20TH MARCH, 2018

Ruling dated, delivered and signed in open Court at Kerugoya this 20th day of March 2018

Ms Nyangati for Mr. Ngigi for Plaintiff/Applicant present

also holding brief for Ms Thungu for Defendants/Respondents.

B.N. OLAO

JUDGE

20TH MARCH, 2018