



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 359 OF 2017

PETER MWAURA KANYORO PLAINTIFF/APPLICANT

VS

NDUNGU MWANGI 1ST DEFENDANT/RESPONDENT

PUNDAMILIA FARMERS SOCIETY

LIMITED 2ND DEFENDANT/RESPONDENT

RULING

1. This ruling refers to the Notice of Motion dated 12/4/18 filed by the Plaintiff/Applicant under section 1A, Civil Procedure Act, Order 12 Rule 7 and Order 51 of the Civil Procedure Rules seeking the following orders:-

- a. The honourable Court be pleased to reinstate the Plaintiffs suit herein which was dismissed on the 29/1/18
- b. That this Court be pleased to set aside and or vary its orders of the 29 /1/18 dismissing this suit for want of prosecution
- c. The costs herein be in the cause.

2. The Application is brought on the grounds that:

- a. The Plaintiff/Applicant learned about the dismissal of the suit on the 29/1/18
- b. The Plaintiff/Applicant Counsel on record inadvertently failed to diarize this matter
- c. The Plaintiff/Applicant's advocates mistake should not be visited upon the Plaintiff
- d. The prejudice shall be suffered by the Respondents if this application is allowed.
- e. It is in the wider interest of justice that the orders sought herein are granted.

3. The Learned Counsel for the Applicant Mr. William Bwonwonga deponed in the affidavit in support of the application and reiterated the grounds on the face of the application and attached a copy of the letter dated the 1/3/18 inviting the Respondents to attend to the Court for purposes of fixing a date for pretrial. This is the time he learnt through his secretary from the ELC registry that the suit had been dismissed on the 29/1/18. He deponed that he inadvertently failed to diarize the matter and hence failed to attend Court on the 29/1/18. The Learned Counsel urged the Court not to visit his mistakes on the Applicant. That the Respondents stand to suffer no prejudice if the application is allowed and the suit proceeds to full hearing.

4. The 1st Respondent opposed the application and stated that the application is meant to delay and obstruct the ends of justice; the application is not meritorious as the reasons advanced are not plausible as the Plaintiff was aware of the hearing date. The Plaintiff was represented by Mr. Kagura Advocate on the date that the hearing was taken by consent of the parties. That the delay has not been explained rendering the application an abuse of the Court process; that the application is incompetent and deserves to be dismissed.

5. The 2nd Defendant did not file any response to the application and so it is unopposed.

6. The Applicant and the 1st Respondent filed written submissions which I have read and considered.

7. The power vested in the trial Court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 rule 7 of the Civil Procedure Rules. It is a discretionary power that is exercised by the Court.

8. Counsel for the Applicant has attributed his failure to attend Court to an inadvertent mistake in diarizing for the matter. The record shows that the hearing date was taken in Court by consent of the parties. The Plaintiff was duly represented by Counsel namely Kagura and he cannot be heard to say they were unaware of the date. On the hearing date, the matter was called out and neither the Applicant nor his advocate was present in Court. The Respondents were duly represented and ready to proceed with the hearing. Having admitted no part of the claim in the suit, the Court moved and dismissed the matter under Order 12 rule 3 for non-attendance. The question is whose instructions was Mr. Kagura advancing in Court when he agreed to the hearing date? The Applicant has not offered any explanation. The said Mr. Kagura has also not sworn any affidavit to explain the circumstances under which the Applicant did not attend Court on the date he consented to.

9. The 1st Respondent submitted that the Applicant has not given a good reason for not attending Court. That he is not serious in prosecuting the suit; that the delay in filing the application is inordinate and has not demonstrated good reason why the suit should be reinstated.

10. I have considered the rival submissions of the parties, the reason advanced and am satisfied that the non-attendance was an inadvertent mistake. I am satisfied that the Respondents will not suffer any prejudice and, in any event, the 1st Respondent did not demonstrate how he will be prejudiced if the application is allowed.

11. Consequently, I allow the Applicants application and set aside the dismissal order made on the 29/1/18 and reinstate the suit. The Applicant shall pay the costs of the application assessed at Kshs 10,000/- before the suit is given another hearing date.

12. The Applicant is directed to take steps to set down the matter for hearing within the next 30 days from the date hereof.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 27TH DAY OF SEPTEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Present in person

Wachira HB for Bwonwonga for the Plaintiff

1st & 2nd Defendants – Absent

Irene and Njeri, Court Assistants