



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 472 OF 2017

DOUGLAS KARIUKI MACHARIA - 1ST PLAINTIFF/APPLICANT

MILKA MUTHONI MACHARIA - 2ND PLAINTIFF/ APPLICANT

MARY WANGARE MACHARIA - 3RD PLAINTIFF/ APPLICANT

VS

JAMES MACHARIA KARIUKI - 1ST DEFENDANT/RESPONDENT

PETER IRUNGU MOSES - 2ND DEFENDANT/RESPONDENT

RULING

1. On the 18/12/2017 this matter was certified ready for hearing and by consent of the parties a hearing date was fixed for the 17/4/2018. Come the 17/4/2018 all the parties and their advocates were absent in Court when the matter was called out for hearing. The Court proceeded to dismiss the matter for non-attendance. It is this dismissal that has triggered the Notice of Motion dated the 20 /4/2018 seeking orders to set aside the dismissal orders and reinstate the suit.

2. The Application is based on the grounds annexed thereto and the affidavit of the Karuga Wandai, Advocate and the 3rd Applicant both sworn on the 20/4/2018. Mr. Karuga stated that he arrived in Court around 9.15 am and found the Court in session and his matter had been dismissed. Mary Wangari Macharia deponed that she and her co-plaintiffs attended Court and also arrived at 9.15 am and did not hear their matter called until later when they learned from the Advocate that the matter had been dismissed prior to their arrival.

3. The application has been opposed by the 2nd Respondent who has deponed via his Replying affidavit sworn on the 25/5/2018 that the application is meant to delay the case and obstruct the end of justice; that the application is unmeritorious and is an abuse of the Court because the Applicants were aware of the hearing date; The Applicants have not demonstrated to the Court that they were present when the matter was called out in Court and neither have they advanced plausible reasons to warrant review or variation of the orders issued on 17/4/2018.

4. The power vested in the trial Court to set aside an 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.

5. I entirely concur with the Respondents that neither the Applicants nor their advocate has explained the reasons why they came to Court late. It is matter for judicial notoriety that Court sittings begin at 9 am. Coming to Court at 9.15 am as the Applicants and their advocate did is taking a risk of their matter being dismissed on account of non-attendance and or want of prosecution, like it happened in this instance.

6. The Respondents have averred that the Applicants conduct is such that is meant to delay the case and obstruct the ends of justice. No evidence has been adduced to support this averment. I am satisfied that the failure to attend Court by counsel and the Applicants was inadvertent and was not intended to delay or obstruct the course of justice. The Respondents have also not explained to the Court the prejudice that they stand to suffer if the matter is reinstated so that each party may have their day in Court.

7. The justice of this application is to allow it but on condition that the Applicants will pay to the Respondents costs in the sum of Kshs 10,000/- as throw away costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH SEPTEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Mr. Githinji HB for Mr Karuga Wandai for the 1st, 2nd & 3rd Plaintiffs/Applicants

Mr Peter Muthoni HB for Mr Kinuthia for the 1st and 2nd Defendants/Respondents

Ms.Irene and Ms Njeri, Court Assistant