



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 88 OF 2017

GEOFFREY KITHOME NGEWA (suing on his

own behalf and on behalf of the Estate of

JOSEPH NGEWA KITOLE –Deceased.....PLAINTIFF/APPLICANT

VERSUS

GEOFFREY MWANGANGI MUTETI.....1ST DEFENDANT/RESPONDENT

JONATHAN PETER KILONZO.....2ND DEFENDANT/RESPONDENT

KATUKU NGITE.....3RD DEFENDANT/RESPONDENT

FRANCIS MUTISYA SILA.....4TH DEFENDANT/RESPONDENT

PAUL WAMBUA KYENGO.....5TH DEFENDANT/RESPONDENT

HARRISON MUTUA NZIOKA.....6TH DEFENDANT/RESPONDENT

JOELMALELU KIOKO.....7TH DEFENDANT/RESPONDENT

MULILU KIMONTHO ----- 8TH DEFENDANT/RESPONDENT

KYENZE MUIA.....9TH DEFENDANT/RESPONDENT

DAVID KIVIEKO MUTETI.....10TH DEFENDANT/RESPONDENT

THE LAND REGISTRAR

MAKUENI COUNTY.....11TH DEFENDANT/RESPONDENT

RULING

1) There is before me a notice of motion application expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Rules (Cap 21 Laws of Kenya) Order 12 Rule 7 and Order 51 of the Civil Procedure Rules for orders:-

1. This court's orders dismissing the Plaintiff's suit on 12/4/2018 be reviewed and/or set aside and the suit be reinstated.

2. Costs of and incidental to this application be provided for.

2) The application is dated 10th May, 2018 and was filed in court on even date. It is predicated on the grounds on its face and is supported by the replying affidavit of Morris M. Mulei, the counsel for the Plaintiff/Applicant, sworn at Makueni on the 10th day of May, 2018 contemporaneously with the application.

3) The Applicant filed a further affidavit on 20th July, 2018 the same was sworn at Machakos on 10th July, 2018 by Rhoda M. Kyalo,

the counsel who held brief for Mr. Morris M. Mulei.

4) The application is opposed by the first (1st) to tenth (10th) Respondents vide the replying affidavit of Maurine Muli Nzavi, their counsel herein, the same having been sworn on 5th June, 2018 and was filed in court. On the 11th June, 2018.

5) On the 11th June, 2018 the court directed that the application be disposed off by way of written submissions. At the time of writing this ruling only the Applicant's counsel had filed his submissions.

6) One of the grounds that the application is predicated on is that the counsel who had the conduct of this matter on the 12th April, 2018 when the suit was dismissed was held up in Machakos Court in Machakos High Court Misc No. 131/2016, High Court 406/2017 and ELC no. 4/2018. That there was a counsel who held his brief when the suit was dismissed.

7) In the supporting affidavit, there is annexed an affidavit the Plaintiff/Applicant who has deposed that he was present in court with his two witnesses ready to proceed with the hearing on the day that the suit was dismissed.

8) Mr. Nzavi has deposed in paragraph 6 of his replying affidavit that the counsel who held brief for Mr. Mulei deliberately refused to get into the court room when the matter was called out. He goes on to depose that the Applicant and his witnesses did not go into the court room either.

9) The Applicant's counsel in his submission cited the case of *Ivita V Kyumbu (1984) KLR 441* which set out the guiding principles on whether or not a suit should be reinstated for trial. In the aforementioned case, the court held that:-

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both Plaintiff and the Defendant, so both parties to the suit must be considered and the position of the judge too”

10) The counsel further cited Order 12 Rule 7 of the Civil Procedure Rules which gives the court the discretion to set aside the order dismissing the suit upon an application for reinstatement.

11) Having read the application together with the supporting and the further affidavits as well as the replying affidavit, it is clear that the counsel on record for the Applicant as well as the counsel who held brief for him are entirely to blame for the dismissal of the suit. There is no reason why Ms Kyalo who held brief for Mr. Morris M. Mulei could not have gone into the court room when the matter was called out at about 12.00 o'clock. The counsel could have advised the Applicant to enter into the court room instead of staying outside as he did on the material day.

12) The above being the case, it would be unjust to punish the Applicant who was all along within the court premises for the mistake of his counsel. In the circumstances, I hold that the application has merits and I will allow it subject to the Applicant paying thrown away costs to the Respondent. The thrown away costs are assessed at Kshs. 20,000/=.

Signed, Dated and Delivered at Makeni on this 29th day of October, 2018.

MBOGO C.G,

JUDGE

IN THE PRESENCE OF:

Ms. Kyalo for the Plaintiff

Mr. Nzavi for the Defendant

Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE,

29/10/2018