



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 841 OF 2007

CONSOLIDATED WITH ELC 910 OF 2007)

AFFILIATED BUSINESS CONTACTS LIMITED.....PLAINTIFF

=VERSUS=

PETER MWANGI (*Sued as the Chairman of*

Mukuru Kwa Reuben Self Help Group.....**1ST DEFENDANT**

NYAMWEYA ABUYA (*Sued as Vice-Chairman of*

Mukuru Kwa Reuben Self Help Group.....**2ND DEFENDANT**

FRANCIS NGUGI (*Sued as the trustee of Mukuru*

Kwa Ruben Self Help group).....**3RD DEFENDANT**

RULING

1. This is a Ruling in respect of Notice of Motion dated 4th July 2018. This application is brought by the Plaintiff in ELC 841 of 2007. ELC No 841 of 2007 was consolidated with ELC 910 of 2007. The application seeks orders setting aside the Court's Orders of 23rd April 2018, which dismissed ELC No.841 of 2007.

2. The two consolidated suits had been fixed for hearing on 23rd April 2018. When the files were called out, the plaintiff in ELC 841 of 2007 was not represented in Court. Mr Ndungu Counsel for the 1st defendant in ELC 841 of 2007 applied that ELC 841 of 2007 be dismissed for non-attendance so that ELC 910 of 2017 could proceed to hearing. ELC 841 of 2007 was dismissed for non-attendance. The plaintiffs in ELC 910 of 2007 proceeded with the hearing until conclusion. Directions were given that parties do file written submissions. The matter was then fixed for mention on 22nd May 2018 when a judgement date was set for 27th September 2018. Before the judgement could be written, an application was filed seeking to set aside the order of 23rd April 2018. Judgement writing was suspended pending hearing of the application seeking to set aside the dismissal order.

3. On 16th October 2018, the advocates for the plaintiff in ELC 841 of 2007 and the advocates for the plaintiff in ELC 910 of 2007 as well as the advocates for the 2nd and 3rd defendants in ELC 841 of 2007 entered into a consent allowing proceedings in ELC 910 of 2007 to start afresh. It was further agreed that the present application be allowed as against the 2nd and 3rd defendants in ELC 841 of 2007. The only advocate who opposed the application is the advocate for 1st defendant in ELC 841 of 2007.

4. The plaintiff/applicant's lawyer in ELC 841 of 2007 deponed that on the date when the case was dismissed, he had seen a notice which indicated that judges were to be way during the week beginning 22nd April to 26th April 2018 and that as a result, all matters listed on that week had been taken out. Based on this notice, he wrote a letter to his clients informing them that there will be no hearing on 23rd April 2018.

5. The applicant's advocate became aware of the dismissal on 31st May 2018 when they received a letter from the advocate for the 1st defendant in ELC 841 of 2007 asking for their costs arising from the dismissed suit. This is when the advocate sent their court clerk who perused the court file and discovered that the case had been dismissed and that ELC 910 of 2007 had proceeded to full hearing. The advocate contends that he was not served with any mention notice after the court gave directions on filing of submissions.

6. The applicant's advocate argues that failure to attend court was not deliberate as he was under a mistaken belief that all judges had gone for the annual conference.

7. The applicant's application was opposed by the 1st defendant in ELC 841 of 2007 through replying affidavit sworn on 12th October 2018. The respondent contends that there was no notice issued by this court to the effect that the court was not going to sit on 23rd April 2018; that this is an old case which should be concluded and that the applicant has come to court with unclean hands. The respondent further contends that the applicant has previously disobeyed court orders and that at some stage an application for contempt against the applicant was filed but it was put on hold in favour of full hearing of this case which the applicant seems not to be keen on prosecuting.

8. I have considered the applicant's application as well as the opposition to the same by the respondent. It appears that the respondent did not understand the applicant's application. It is not the ELC Court which issued a notice. The notice was issued in respect of High Court Judges. The applicant's Advocate has clearly indicated that he was under a mistaken belief that all judges were to be away.

9. I have seen the annexures in support of the application. The advocate wrote to his client informing them that there will be no hearing on 23rd April 2018 as the Judges were going to be away. It is common knowledge that a notice had been issued that High Court judges were to be away between 22nd and 26th April 2018. This notice however did not affect Environment and Land Court Judges or the Employment and Labour Relations Court Judges which have their own arrangements on annual conference.

10. It is clear that the failure to attend court was not deliberate. The discretion to set aside an order or proceedings is not to assist a party who is deliberately absenting himself from court. The discretion of the court is meant to help in cases where it is proved that failure to attend court was as a result of some excusable mistake. This was the holding in Shah Vs Mbogo (1967) EA 116.

11. The right to be heard is a valued right which can only be denied in a case where it is clearly shown that the applicant is abusing the process of the court after having deliberately absented himself from court when required. This is not the case herein. I therefore find that the applicant's application has merits. I allow the same with the result that the order dismissing ELC 841 of 2007 made on 23rd April 2018 is hereby set aside. ELC No.84 of 2007 is hereby reinstated for hearing. The proceedings which were taken on 23rd April 2018 in ELC 910 of 2007 and any consequential orders are hereby set aside. The applicant shall pay the 1st defendant/respondent in ELC 841 of 2007 costs of Kshs.10,000/= within 7 days from the date hereof. Parties to appear before the Deputy Registrar today for fixing a hearing date for this case before judges who will be at Milimani for service week.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 18th day of October, 2018

E.O.OBAGA

JUDGE

In the presence of;-

Mr Ndungu for 1st Defendant/Respondent

M/s Mueni for Mr Munge for Plaintiff/Applicant

Court Assistant : Hilda

E.O. OBAGA

JUDGE