



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 121 OF 2009**

**RAPHEL MITAU KING'ALYA ..... 1<sup>ST</sup> PLAINTIFF**

**RICHARD MUEMA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KILONZO KING'ALYA ..... 1<sup>ST</sup> DEFENDANT**

**MUSILI KING'ALYA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MBUSI MULANGA ..... INTERESTED PARTY**

**RULING**

1. The Application in respect to this Ruling is dated 31<sup>st</sup> July, 2009 seeking orders to set aside orders of dismissal of an Application dated 23<sup>rd</sup> November, 2007 issued on 21<sup>st</sup> July, 2009 and the dismissed Application to be reinstated for hearing on merit.

2. The Application is supported by the Affidavit of Erick Mutua sworn on 3<sup>rd</sup> July, 2009. The Defendant did not file a Replying Affidavit to oppose the Application. The Plaintiffs filed a Replying Affidavit sworn by Julius Orange on 21<sup>st</sup> April, 2010. The Applicant's case is that the matter herein was transferred to Machakos from Nairobi on 24<sup>th</sup> March, 2009 and was fixed for hearing on 21<sup>st</sup> July, 2009. The Applicant's advocate deponed that he telephoned the Plaintiff's advocate and informed him that he was unwell and was to seek for an adjournment. He sent advocate Ogotti to hold his brief and adjourn the Application for him. It was his deposition that although Mr. Ogotti attended court, the matter was not listed as he was inadvertently looking for the original matter No. 473/1985.

3. According to counsel, the court had not communicated to the parties the new number upon transfer of the suit from Nairobi. Later, it turned out that the matter was listed under a new number and it was dismissed for non-attendance. The Respondents/Plaintiffs opposed the Application and submitted that that the instant suit was filed long time ago and that Judgment was entered in their favour on 25<sup>th</sup> April, 1990.

4. According to the Plaintiffs, the Interested Party never sought to be enjoined in the suit nor sought for the setting aside of the Judgment since 1990 (*over 20 years*). The Respondent averred that the right advocate to swear an Affidavit in respect to the current Application is the one who attended court in Machakos when the Application was dismissed and not Mr. Erick Mutua.

5. The Respondent submitted that the Applicants are deemed to have known the new number that was allocated to the matter since they are the ones who fixed the Application for hearing on 21<sup>st</sup> July, 2009. The Respondent submitted that the Applicant is concealing material facts; that the suit land was transferred to the Plaintiffs and that in view of the circumstances and age of the instant case, it would not serve any purpose in allowing the Application herein as this will give the Applicant a window of revisiting the Judgment that was delivered in 1990. Counsel submitted that litigation has to come to an end.

6. The court has gone through the averments by the parties and the submissions. Order 10 Rule 11 of the Civil Procedure Rules 2010 (*Order IXB of the old Civil Procedure Rules*) mandates the court to set aside Judgment or order upon such terms as are just. In the case of *Sameer Africa Limited vs. Aggarwal & Sons Limited (2013) eKLR* the court held that;

***“While the court would exercise its discretion to avoid injustice or hardships resulting from inadvertence or excusable mistakes or errors, it would not assist a person who has deliberately sought to obstruct or delay the course of justice.”***

7. However, the evidence before me shows that the Applicants' advocate was not aware of the new case number and could not trace the old

number on the cause list of 21<sup>st</sup> July, 2009. On that basis, the Applicants' counsel did not attend court out of a genuine mistake.

8. The court, guided by the *Sameer case (supra)*, finds that the Respondent has not demonstrated that the Applicant is trying to obstruct the course of justice or delay the same. The Applicant was not heard on his Application which was dismissed due to an honest mistake. The court finds that there is no prejudice to be occasioned to the Plaintiffs in reinstating the Application which was dismissed on 21<sup>st</sup> July, 2009.

9. The Respondent will have the occasion to raise all the issues as pertains to delay and prejudice when the Application will be heard. The court therefore makes the following orders:

*a. The orders issued on 21<sup>st</sup> July, 2009 are hereby set aside.*

*b. The Application dated 23<sup>rd</sup> July, 2007 is reinstated for hearing on a date to be fixed on priority basis.*

*c. The costs of the Plaintiffs is assessed at Kshs. 5,000 to be paid before the next hearing date.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF OCTOBER, 2018.**

**O.A. ANGOTE**

**JUDGE**