



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 252 OF 2017

JOHN KIMEU MUTUA.....PLAINTIFF

VERSUS

JOHN KYULI KAMUTI.....1ST DEFENDANT

NDUTI KIVUVA.....2ND DEFENDANT

KYALO KIVUVA.....3RD DEFENDANT

MBALONZI KIVUVA.....4TH DEFENDANT

KAMUTI KIVUVA.....5TH DEFENDANT

RULING

1. In the Notice of Motion dated 21st February, 2018, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be pleased to grant leave to the firm of Ms. Andrew Makundi & Co. Advocates to come on record in place of Ms. Rombo & Co. Advocates and represent the Plaintiff, John Kimeu Mutua.

b. That upon grant of prayer 1 above this Honourable Court be pleased to set aside the orders made on 1st February, 2018 dismissing this suit for non-attendance of the parties.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that he learnt that the suit he had filed had been dismissed by the court for non-attendance; that his former advocates did not tell him why they had not informed him about the date the matter came up for hearing and that he is desirous of having his case heard on merits.

3. The 1st Defendant filed Grounds of Opposition in which he averred that the suit belongs to the Plaintiff and not his advocates; that it is the business of the Plaintiff to keep in touch with his advocates and that the Plaintiff's lack of seriousness to prosecute the suit should not be visited upon the Defendants.

4. The Plaintiff's advocate submitted that courts have unfettered discretion to set aside orders of dismissal for non-attendance; that the Plaintiff was never informed of the date of hearing of this suit and that the Plaintiff is desirous of prosecuting the claim. The Plaintiff's advocate relied on numerous authorities which I have considered.

5. This suit was filed on 14th November, 2014. On 11th October, 2017, the Plaintiff's advocate fixed the matter for hearing for 1st February, 2018. Although the date taken by the Plaintiff's advocate was ex-parte, he never served the Defendants' advocate with a hearing notice. The matter was dismissed by the court for non-attendance when it came up for hearing on 1st February, 2018.

6. The Plaintiff now blames his advocate for not informing him to attend court on 1st February, 2018. The Plaintiff's former advocate has not sworn an Affidavit to state why he was not in court on 1st February, 2018. In the case of ***Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR***, the Court of Appeal stated that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of litigation. The court further held that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.

7. There is no evidence before me to show the efforts that the Plaintiff took to ascertain the position of the matter between the time the matter was filed until when it was dismissed. If indeed he was never informed of the hearing date by his former advocate, then the said advocate should have sworn an Affidavit to explain why he never notified him of the hearing date. The failure by his advocate to attend court or to inform him of the hearing date cannot be visited on the Defendants, who had been waiting for more than three (3) years to have the suit litigated.

8. For those reasons, find that the Plaintiff has not given a plausible explanation as to why he did not attend court on 1st February, 2018. Save for prayer No. 1, the Application dated 21st February, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE