



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 26 OF 2006

DANIEL MASILA MUTISO.....PLAINTIFF/RESPONDENT

VERSUS

REUBEN MUNYAO.....1ST DEFENDANT/APPLICANT

BEN MWEU.....2ND DEFENDANT/APPLICANT

JULIUS WAMBUA.....3RD DEFENDANT/APPLICANT

CHARLES MUNYAO.....4TH DEFENDANT/APPLICANT

JAMES KIOKO.....5TH DEFENDANT/APPLICANT

HENRY KITHOME.....6TH DEFENDANT/APPLICANT

FRED NZIOKI.....7TH DEFENDANT/APPLICANT

FRANCIS KIIO.....8TH DEFENDANT/APPLICANT

FLORENCE KASWII.....9TH DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 19th April, 2018, the Defendants are seeking for the following orders:

a. That the ex-parte Judgment delivered on 10th July, 2017 be set aside on such terms as may be just.

b. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the 4th Defendant who has deponed that his advocate was served with the hearing notice of 15th May, 2017; that his advocate did not attend court on the said date because one of the joint Defendants was dead and that having not been informed of the hearing date by his advocate, he could not attend court.

3. In his Affidavit, the Applicants' advocate deponed that he acts for the 2nd, 7th and 9th Defendants; that the hearing notice that was served on him did not indicate if the other Defendants had been served; that the 8th Defendant was deceased as at the time the matter came up for hearing and that he honestly believed that the matter could not proceed for hearing on 24th March, 2017.

4. The Applicants' advocate finally deponed that the sub-division of parcel of land number Mbiuni/Kabaa/63 was unlawful because the order of inhibition was in existence and that the Sale Agreement which the Plaintiff relied on was not only forged but also contravened the provisions of Section 3 (3) of the Law of Contract Act.

5. In response, the Plaintiff's/Respondent's advocate deponed that the Plaintiff was given a final chance to prosecute the matter by the Court after being served with the Notice to Show Cause; that the Applicants' advocate was served with the hearing notice; that the Applicants have never filed Witness Statements or documents and that the Applicants' advocate cannot depone on matters pertaining to the authenticity of the Sale Agreement.

6. The Plaintiff's/Respondent's advocate deponed that the issues raised by the Applicants' advocate in respect to the decision of the court has come too late in the day and that the delay in filing the Application is inordinate.
7. In his submissions, the Defendants'/Applicants' advocate submitted that he did not inform the Applicants when this matter came up for hearing; that the mistake of Counsel should not be visited on the client and that the Defendants/Applicants were not served with a notice after the delivery of the impugned judgement.
8. The Plaintiff's advocate submitted that the Defendants' advocate failed to appear in court on two occasions; that the Plaintiff should not be made to shoulder the consequences of negligence of the Defendants' advocates and that the Defendants had a chance to raise the issue of the Merits of their Defence when the matter came up for hearing.
9. The record shows that this matter came up for the Notice to Show Cause why this suit should not be dismissed on 22nd March, 2017. On the said date, the Defendants' advocate did not attend court. The court fixed the matter for hearing on 15th May, 2017 after giving the Plaintiff the last chance to prosecute his claim.
10. The 4th Defendant has admitted that indeed his advocate was served with a hearing notice of 15th May, 2017. However, he did not attend court because his advocate did not inform him of the said date. The Defendants' advocate swore an Affidavit and stated that he did not attend court because the 8th Defendant having died the matter could not have proceeded.
11. The record shows that the firm of F.M. Mulwa advocates filed a joint Defence on behalf of the 2nd to 7th and 9th Defendants and not the 8th Defendant. Indeed, there is no indication that the 8th Defendant entered appearance in this matter.
12. The issue of whether the 8th Defendant was dead or not can only be raised by the said Defendants' representatives. Indeed, whether the 8th Defendant was dead or not as at the time of trial only affects the Plaintiff's suit if the court is shown that the claim by the 8th Defendant survived him. No such evidence has been placed before this court.
13. Considering that neither the Defendants nor their advocate appeared before the Court on 22nd March, 2017 and 15th May, 2017 despite being notified, I find that no good reason has been given why I should set aside the judgment of this Court. Indeed, even after knowing that the suit had been fixed for hearing on 15th May, 2013, the Defendants' Counsel did not check with the registry to find out what had transpired in court. Instead, the current Application was filed eight (8) months after the delivery of the Judgment, which, in my view, is inordinate delay. As was held in the case of *Water Painters International vs. Benjamin Kogoo T/A Group of Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR*, time has come for the legal practitioners to shoulder the consequences of their negligent acts of omission like other professionals do in their fields of endeavour. The Plaintiff cannot be made to shoulder the consequences of negligence of the Defendants' advocates.
14. For those reasons, I dismiss the Application dated 19th April, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE