



REPUBLIC OF KENYA
IN ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 66 OF 2013

ESTHER NZINGO KALUME.....PLAINTIFF

-VERSUS-

LAWRENCE SHSARRIF S. KATITE.....DEFENDANT

RULING

1. The plaintiff has moved the Court vide his application dated 31st August 2016 2016 seeking the following orders;

a) Spent

b) The ex parte judgement entered on 18th July, 2016 and the consequent decree issued on 2nd August, 2016 be set aside in their entirety and the plaintiff's suit be reinstated for hearing on merits.

c) The Defendant's Notice of Motion application dated 13th July, 2015 be re-listed for hearing de novo on the merits.

d) The costs of this application be borne by the Defendant/Respondent in any event.

2. The motion is supported by the grounds listed on the face of it and the affidavit of his advocate Billy Kongere.

3. The application is opposed by the defendant that the plaintiff/applicant advocate has not sufficiently explained to court why he did not appear on the date by consent. Secondly that the applicant is guilty of inordinate delay. Lastly that no useful purpose will be served for re-instating the suit as it was struck out for being res judicata.

4. The advocates argued orally in Court. Mr Kongere submitted that his failure to attend Court was an honest mistake as he had failed to diarise the case. On inordinate delay, he submitted that when the decree was served on their office on 1.8.16 he was away until the 29th of August. Thus the application could not be filed earlier. He presented to the Court a list of four cases to support his submission inter alia **Lucy Bosire vs Kehancha Land Disputes Tribunal & 2 others (2013) eKLR.**

5. The gist of the case law cited is that setting aside exparte orders is at the discretion of the Court which must be exercised on terms that are just. In **George Wilhamson vs Philip Kiplagat Kerich (2011)**

eKLR the Court of Appeal quoting **Shabir Din vs Ran Parkash Anand (1958) 22 EACA 48** stated that *“mistake of misunderstanding of the appellant’s legal advises even though negligent may be accepted as a proper ground for granting relief depending on the circumstances of each case.”*

6. Mr Kimani in response wondered how can the Court exercise discretion in light of section 2 (2) of the Evidence Act as Mr Kongere is merely reporting what he was told. According to him the proceedings of 18.7.16 were not *ex parte* as the plaintiff had filed their grounds to the preliminary objection. He also submitted that no purpose would be served to reinstate the suit since at is *res judicata* out of a consent judgment.

7. I have analysed the application and grounds given in its support. I have also considered the submissions rendered. The long and short of this matter is that the preliminary objection raised by the defendant was argued in the absence of the plaintiff. The date of 18.7.2016 was previously fixed in the presence of both advocates (Mr Mukomba advocate was holding for Mr Kongere). The result of their non-attendance was that the preliminary objection was allowed as there were no contrary submissions offered.

8. Mr Kongere has explained in his affidavit why he failed to attend Court on 18th July 2016 and urged this Court not to punish his client for his mistake by condemning the plaintiff unheard. The result of the order has closed the door for the plaintiff since his suit has been struck out. The purpose of setting aside is to enable parties have a trial where they can put their case broadly and properly so that the Court may hopefully come up with a fair decision.

9. In the circumstances of this case it will be just to grant the plaintiff an opportunity to defend his claim whether it is *res judicata* or not. The prejudice to be suffered by the defendant can be cured by payment of costs for attendance on the 18th July 2016 and for arguing this application. Consequently I do grant the application in terms of prayer (b) & (c) of the motion. The plaintiff shall pay the defendant thrown away costs of Kshs 10,000 within 30 days of this date. In default he can execute. Cost of this application to abide outcome of the suit or the Preliminary Objection.

Dated and delivered in Mombasa this 17th day of February 2017

A. OMOLLO

JUDGE