



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL SUIT NO.374 OF 2016

1. JOHN NGOWA ZIRO.....PLAINTIFF/APPLICANT

VERSUS

1. FELIX MUTHEE

2. BONFACE ONYANGO.....DEFENDANTS/RESPONDENTS

RULING

1. By a Notice of Motion dated 13th March 2017 made under Order 12 Rules 1 and 7 and Order 51 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law, the plaintiff/applicant seeks orders: -

ranted costs of this application.

2. The application is based on the grounds set out on the face of the application namely: -

a. At the time the order to dismiss the suit was issued on 13th March 2017, Hon. Justice Omollo who normally presided over this matter was on leave and the matter was listed before Hon. Justice Yano.

b. That the file was to be brought to court at 10.30 a.m.

c. The file was availed in court before 10.30 a.m. and the Notice of Motion application dated 2/12/2016 was heard ex-parte and the application dismissed.

d. The defendants were on 13/2/2017 ordered to file a Replying Affidavit within 14 days from 13/2/2017 but have not done so to date and maliciously applied for dismissal of the plaintiff's application.

e. The plaintiff/applicant was not properly afforded a chance to be heard before the said order was made.

f. It is in the best interests of justice and fairness that the prayers sought in the application be

granted.

3. The application is further supported on the grounds contained in the Supporting Affidavit of Elizabeth Kisingo, counsel for the plaintiff/applicant sworn on 13th March 2017 in which she has explained the circumstance in which the application was dismissed. It is deponed inter alia, that on 13/3/2017, the applicant's counsel was advised by the registry that the file would be availed in court at 10.30 a.m. but when she turned up at that time, the matter had already been called out and the application dismissed.

4. That application is opposed by the defendants who filed a Replying Affidavit sworn by Angelo Owino, counsel for the defendants sworn on 3rd April 2017. It was deposed on behalf of the defendants that the matter was listed in the day's cause list and was called thrice by the court clerk and since there was no representation on the part of the plaintiff, the court rightly dismissed the application.

5. I have considered the application. The application dated 2nd December 2016 came before Omollo J on 13th February 2017 and was fixed for hearing on 13th March 2017. Both parties were present in court when the hearing date was given. On 13th March 2017 when the application was scheduled to be heard, only the defendants' counsel was present in court and he applied for the dismissal of the application for non-attendance. The court, having satisfied itself, dismissed the said application for non-attendance. A few minutes after the application had been dismissed, the plaintiff's counsel came to court and requested for the file to be called out again for the court to reconsider the orders made but was advised to make a formal application, thus the present application.

6. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit. The Notice of Motion herein was filed on 13th March 2017 the same day the application dated 2nd December 2016 was dismissed. The same was therefore filed without delay. From the affidavit in support of the application and the court's own observation on the material day as already outlined hereinabove, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the applicant's counsel and the same should be excused. In the case of SHAH -VS- MBOGO (1967)E.A.116 it was stated that exercise of discretion of the court to set aside ex-parte orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error and not otherwise to delay justice. The overriding objective of the court would also come to the aid of the plaintiff. The defendants have not demonstrated that they will suffer prejudice if the orders sought are granted.

7. For the foregoing reasons, I am satisfied that the plaintiff's application dated 13th March 2017 has merit. The application is allowed. The order made herein on 13th March 2017 dismissing the plaintiff's Notice of Motion application dated 2nd December 2016 is set aside and the application reinstated for hearing on merit. Costs of the application shall abide the outcome of the application dated 2nd December 2016.

Dated, signed and delivered at Mombasa this 11th day of May 2017.

C. YANO

JUDGE