



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI**

**ELC CASE NO. 138 OF 2010**

**FLORENCE MUTHONI NJAU ( *suing as* ATTORNEY FOR**

**& ON BEHALF OF JOHN MBURU KARANJA.....1<sup>ST</sup> DEFENDANT**

**=VERSUS=**

**SAMUEL WANJOHI WAHOME.....1<sup>ST</sup> DEFENDANT**

**MIHAEL WAWERU MBUGUA.....3<sup>RD</sup> DEFENDANT**

**ANASTASIA KIMEU MUTHIKE.....3<sup>RD</sup> DEFENDANT**

**CONTINENTAL DEVELOPERS LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1. This suit had been filed against three defendants. A fourth defendant was later added. The first and second defendants have never entered appearance. On 25<sup>th</sup> May 2015, the suit was set down before Justice Mutungi for pre-trial conference. All the Advocates for the parties who had entered appearance including the plaintiff's Advocates were served with notice of the pre-trial conference by a court process server.

2. On the date for the pre-trial conference, only the third defendant's counsel appeared. Directions were given for filing of documents and the case set down for hearing on 2<sup>nd</sup> and 3<sup>rd</sup> February 2016. The court record shows that the case was placed before Justice Njoroge on 3<sup>rd</sup> February 2016 for hearing. On that day only the third defendant's advocate appeared. The Advocate for the third defendant applied for dismissal of the suit with costs to the third defendant.

**APPLICANT'S APPLICATION**

3. The Plaintiff's advocates filed an application dated 2<sup>nd</sup> March 2016 seeking to have the dismissed suit reinstated for hearing. The plaintiff's advocates contend that they were not aware that directions had been given by Justice Mutungi and that the matter had been fixed for hearing on 3<sup>rd</sup> February 2016, when it was dismissed. The Plaintiff's Advocates further contend that the hearing notice was served upon the firm of Antony Gikaria & Co. Advocates who were not the advocates on record for the plaintiff. That the

hearing notice which was served indicated that the case was to be heard on 2<sup>nd</sup> and 3<sup>rd</sup> February 2016 further causing confusion.

4. The Plaintiff's advocates further blame the advocate for the third defendant for applying for dismissal of the plaintiff's suit yet the plaintiff had previously invited them to come for fixing of a hearing date which could not materialize because no dates were available.

### **OPPOSITION TO THE APPLICATION**

5. The Plaintiff's application is opposed by the fourth defendant through grounds of opposition filed in Court on 16<sup>th</sup> June 2017. The fourth defendant contends that the Plaintiff's advocate has not demonstrated why they did not attend court yet they had been served with a hearing notice. That the plaintiff has not been keen to pursue her case and the dismissal was fair.

### **ANALYSIS**

6. Though the Plaintiff's advocate and the advocate for the fourth defendant agreed to put in written submissions, none were filed and in any case an application like this one did not require any written submissions. I have gone through the court record but I cannot see any evidence that the plaintiff's advocate and the advocate for the fourth defendant were served for hearing which had been fixed for 2<sup>nd</sup> and 3<sup>rd</sup> February 2016.

7. The Plaintiff's advocate contends that service of hearing notice was effected upon the firm of Antony Gikaria & Co. Advocates who were not the advocates on record for the plaintiff. The Court record shows that the firm of Waruhiu ,K'owade & Ng'Ng'a Advocates filed notice of change of advocates on 10<sup>th</sup> August 2011. The third defendant's advocate who effected the service did not file any replying affidavit and as such, the averment by the plaintiff's advocate remain unchallenged. It was therefore wrong to serve a law firm which was not on record.

### **CONCLUSION.**

8. The Plaintiff's current advocates were served for pre-trial conference. They chose not to attend Court. They cannot therefore claim that they were not aware that the case had been set down for hearing on 3<sup>rd</sup> February 2017. This notwithstanding, I will find that service of hearing notice was made on an advocate who had been replaced. The current advocates would not have known that the matter was coming for hearing when they had not been served. I therefore allow the Plaintiff's application dated 2<sup>nd</sup> March 2016 with the result that the orders of 3<sup>rd</sup> February 2016 dismissing the plaintiff's suit are hereby set aside. This suit is hereby reinstated for hearing. There shall be no order on costs.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 2<sup>ND</sup> day of November 2017.**

**E.O.OBAGA**

**JUDGE**

In the absence of parties who were aware of the date and time of delivery of Ruling.

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**

