



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 89 OF 2008

JOHANNA ZOUARI GEISSBULHER.....PLAINTIFFS

=VERSUS=

1. VIOLI FREDRIGO

2. LUIGI FREGUGLIA.....DEFENDANTS

R U L I N G

1. What is before me is the Application by the Plaintiff dated 1st October, 2015 in which the Plaintiff is seeking for the following orders:-

(a) THAT the court be pleased to vary, and or set aside its orders dated the 2nd February, 2015 directing that this trial starts de novo upon such terms as appear just.

(b) THAT the costs of this application be paid by the respondent.

2. The Application is premised on the grounds that the Applicants advocate failed to attend court for the hearing of the Applications because it was not diarised; that there will be no prejudice occasioned to the 2nd Defendant if the court varies the orders of 2nd February, 2015 and that it will be difficult for the Plaintiff to get her witnesses to come and testify again in view of the fact that the Plaintiff is based in Switzerland and is undergoing treatment.

3. The Plaintiff's counsel has deponed that he was not aware that the Application dated 16th December, 2014 was coming up for hearing on 2nd February, 2015; that there was a slip in diarising the matter because the Application was filed on 14th December, 2014 during the holiday season and that he was under the impression that the court would be on the December vacation until 6th February, 2015.

4. In his reply, the 2nd Defendant's advocate deponed that the Plaintiff was duly served with the Application dated 16th December, 2015 and chose not to file a reply or attend court; that the reasons advanced for non-attendance do not hold water and that this is not the first time the Applicant has refused to attend court.

5. The 2nd Defendant's advocate deponed that if the Application is allowed, the 2nd Defendant will suffer serious prejudice especially against the background that the previous advocate for the 2nd Defendant colluded with the 1st Defendant to defeat justice.

6. The Plaintiff's/Applicant's advocate filed written submissions which I have considered.
7. The Plaintiff's counsel has admitted that he was served with the 2nd Defendant's Application dated 10th December, 2014 which had a hearing date of 2nd February, 2015.
8. The Plaintiff's advocate case is that the reason for non-attendance of the court was because he did not diarise the matter. The Plaintiff's advocate has annexed a copy of his diary for 2nd February, 2015 which shows that he did not diarise this particular matter.
9. Indeed, when the Application dated 10th December, 2014 came up for hearing, the Plaintiff's advocate was not in court and the same was allowed. The effect of the order of the court was that this suit, which was partly heard by Omondi J on 29th September, 2009 should be heard de novo.
10. Other than not attending court on 2nd February, 2015, the Plaintiff's advocate did not file any response to the said Application. This, coupled with the failure to diarise the Application, shows that the Plaintiff's advocate was not keen in opposing the Application.
11. After the Application dated 10th December, 2014 was allowed on 2nd February, 2015, it was not until 1st October, 2015 that the Plaintiff's advocate filed the current Application. The delay of eight (8) months in filing the Application in my view is inordinate and inexcusable.
12. In any event, considering that this matter was partly heard in the year 2009 by a Judge who has since been transferred, I do not see any prejudice that the Plaintiff will suffer if the matter starts de novo to grant the trial court an opportunity to listen to all the witnesses and observe their demeanor.
13. It is for the reasons I have given above that I dismiss the Plaintiff's Application dated 1st October, 2015 with costs.

Dated, signed and delivered in Malindi this 25th day of **November**, 2016.

O. A. Angote

Judge