



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, OUKO & MURGOR, JJ.A)

CIVIL APPLICATION NO. NAI 296 OF 2009 (UR 204/2009)

BETWEEN

JAMES MWANGI CHEGE.....APPLICANT

AND

BERNARD KAMAU MATHU1ST RESPONDENT

DOMINIC NJOROGE MATHU.....2ND RESPONDENT

(An application for injunction pending the hearing and determination of Nairobi Civil Appeal No. 72 of 2009 bearing an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiero, J.) dated 19th February, 2009

in

H.C.C.C. No. 1587 of 2001)

RULING OF THE COURT

This is an application for the reinstatement of **Civil Application No. Nai 296 of 2009, James Mwangi Chege vs. Bernard Kamau Mathu & Another**, dated 3rd October, 2009. The application was dismissed by this court on 20th June, 2012 for the reason that the learned counsel for the appellant did not attend the hearing.

The dismissed application sought to restrain the respondents by an order of injunction from transferring, selling, charging, disposing or in any way dealing with the Title No. Ndumberi/Ndumberi/164 pending the hearing *inter-partes* of that application, and further that the District Land Registrar Kiambu be asked to effect a stay in the Land Register in terms of the order of the court.

Mr. Wanyaga, learned counsel for the appellant submitted that, the firm of Kinoti & Kibe Advocates had taken over the matter from M/S Gitonga Kinyanjui Advocates on 19th October, 2010, and had filed a notice of change of advocates. Despite this, the registry served the hearing notice for the application on the former advocates, M/S Gitonga & Kinyanjui Advocates, who in turn, in a letter dated 23rd March, 2012 notified them of a hearing date of 20th June 2012, for the main appeal and not the application.

According to Mr. Wanyaga, representatives of their firm had written to and visited the court registry severally, to enquire whether the application had been allocated a hearing date. They were allegedly informed that no hearing date had been allocated. That sometime in July, 2012 whilst pursuing the hearing date, they were informed that the application had been dismissed for non-attendance by the advocate when it came up for hearing before this Court.

Mr. Wanyaga contended that, they were genuinely unaware of the hearing date, which was the reason for their absence from court on the material date; that they had at all times been keen and available to prosecute their application; but without information regarding the hearing date, it had not been possible for them to attend. He therefore prayed for the reinstatement of the application, as the orders sought were necessary to preserve the suit property without which, grave prejudice would be visited upon his clients. They should not suffer such prejudice because of the errors or omissions on the part of their advocates; that no prejudice would be occasioned on the part of the respondents as they were in possession of the suit premises.

Bernard Kamau Mathu, the 1st respondent, who appeared in person, opposed the application for reinstatement, as in his view, the whole suit had been finalized. Further, he was the proprietor and owner of the land, could deal with the suit premises, in any way he deemed fit, since there were no restrictions on the land or court orders prohibiting them from such dealings.

Having read the materials and heard the submissions, the question that we pose is whether the appellant has provided us with sufficient and credible reasons to explain their absence on 20th June 2012 when the application came up for hearing.

This application is brought under **Rule 56(3)** of the **Court of Appeal Rules** which stipulates that where an application has been dismissed, the party in whose absence the application was determined may apply to the Court to restore the application for hearing, if he can show that he was prevented by any sufficient cause from appearing when the application was called on for hearing.

From the submissions, it is not in dispute that, the hearing notice was served on the former advocates Gitonga Kinyanjui, and not on the current learned counsel for the appellant. It is also clear that, when Gitonga Kinyanjui wrote to the appellant's counsel on 23rd March, 2012, he informed the appellant's counsel of a hearing date appertaining to the main appeal, instead of for the application. Additionally, when this information was sought from the Court registry, the hearing date was not readily available. In the circumstances, was there anything further that the Appellant could have done to inform itself of the hearing date that they in fact failed to do?

It is observed that, appellant took such steps as were necessary to ascertain the hearing date for the application, but it is apparent that this information remained elusive. Therefore, by the date of the hearing, this information would not reasonably have been within the knowledge of learned counsel for the appellant. We find that this is sufficient reason for the non- appearance in court on that particular morning, when the matter was called out.

The appellant's advocate subsequently established that, the application had been dismissed sometime in July 2012, whilst making further enquiries regarding the hearing date at the Registry. Soon thereafter, they filed this application before us seeking to have the application reinstated.

It is not lost on us that, the respondents are opposed to the reinstatement of the application for reasons that they verily believe that the entire suit has been heard and determined; and that there is nothing to stop them from dealing with the suit property as they deem fit.

While they may be correct in their belief with respect to the lack of preservation orders, there is an appeal from the decision of the High Court in respect of the suit property pending before this court.

We therefore allow the application, set aside the orders of 20th June 2012 and order that the application

dated 3rd October 2009 be and is hereby reinstated and be set down for hearing on a priority basis. We also order that costs be in the appeal.

Dated and delivered at Nairobi this 20th day of September, 2013.

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR