Odero v Ongili (Being Sued for and on behalf of the Estate of Margaret Owuondo Ongili - Deceased) (Environment & Land Case E016 of 2021) [2023] KEELC 91 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 91 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND CASE E016 OF 2021

A OMBWAYO, J

JANUARY 19, 2023

BETWEEN

DAN ONYANGO ODERO .... PLAINTIFF

AND

JORIM ODHIAMBO ONGILI (BEING SUED FOR AND ON BEHALF OF THE ESTATE OF MARGARET OWUONDO ONGILI - DECEASED) ..... DEFENDANT

RULING

1. Dan Onyango Odero hereinafter referred to as the Plaintiff filed a Notice of Motion application under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 and Order 12 Rule 1 of the *Civil Procedure Rules* seeking for orders that this honourable court be pleased to set aside orders dismissing the application dated October 12, 2020 for non-attendance and the same be prioritized for inter parte hearing. That costs of this application be provided for.

2. The application is based on the grounds that the plaintiff's application datedOctober 12, 2020was scheduled for inter parte hearing on April 25, 2022 but the same was dismissed for non-attendance by the plaintiff. That counsel for the plaintiff had joined the court vide the link provided by the court but unfortunately could not address the court as the matter was being heard physically without his knowledge. That the application was brought on good grounds seeking for orders of specific performance of the agreement dated April 8, 2005 and renewed on 22nd February 2016 to compel the defendant to transfer land parcel No. Kisumu/Songhor/852 that the plaintiff had bought from the late Margaret Owuongo Ongili. That the mistakes of counsel should not be visited on the litigant and that the plaintiff will suffer loss if the court fails to intervene.

3. The application is supported by the affidavit of Dan Onyango Odero who stated that his application dated October 12, 2020 was scheduled for hearing on April 25, 2022 when it was dismissed for non-attendance. That his advocate joined the court online but could not address the court as the

matters were being heard physically. That his advocate on record came to know of the dismissal of the application upon inquiry at the registry. That the dismissal of the application was unfair and prejudicial and that the mistakes of counsel should not be visited on an innocent litigant. That under article 159 of the *Constitution* and section 1A and 2A of the *Civil Procedure Act*, it would be fair and in the interest of justice to reinstate the application.

4. The application came up for hearing on May 4, 2022 when the court directed that the application be served upon the respondent and another hearing date given for the 18th July 2022 when the matter was reserved for ruling.

5. Upon perusal of the court record, there is no response filed to the application and neither of the parties filed their submissions.

Analysis and Determination

6. The plaintiff herein seeks to set aside the orders dismissing the application dated October 12, 2020for non-attendance.

   Order 12 Rule 7 of the *Civil Procedure Rules* provides as follows:

   > " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

7. The orders sought by the plaintiff are discretionary. The plaintiff has explained that neither him nor his advocate were present in court on April 25, 2022 when the application came up for hearing as his counsel had thought that the matter was being mentioned virtually and yet the court was hearing the matters in court physically.

8. Since it was the mistake of counsel, the same should not be visited on an innocent litigant. The court in the case of *Belinda Murai & others v Amos Wainaina* (1978) LLR 2782 (CALL) held as follows:

   > A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

9. The Court of Appeal in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR held as follows:

   > We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.

10. This court finds the application merited hence the application dated October 12, 2020 is hereby reinstated and to be heard on merit.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 19TH DAY OF JANUARY 2023.

A. O OMBWAYO

JUDGE