



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 148 OF 2016

MARY WAMBUI GICHURUPLAINTIFF

VERSUS

JOHN B. KARUGA KINYANJUI1ST DEFENDANT

JAMES SAMUEL KINYANJUI (Sued as the Legal

Administrator of the Estate of MUSA

MUIKAMBA NGETHE (Deceased).....2ND DEFENDANT

RULING

(Application seeking to reinstate another that was dismissed for non-attendance; application allowed subject to thrown away costs).

1. The application before me is that dated 28 September 2016 filed by the plaintiff. It seeks orders to have reinstated an application dated 27 April 2016 which was dismissed for non attendance.

2. By way of background, this suit was commenced on 29 April 2016 by way of plaint. Contemporaneously with the plaint, was filed the application dated 27 April 2016 which is an application for injunction. In the suit, the plaintiff pleaded that he is the owner of the land parcel Naivasha/Maraigushu Block 11/ 148 (Karai) which land is registered in the name of Musa Muikamba Ngethe (deceased) of whom the defendant is the legal administrator. In the plaint, the plaintiff has pleaded that the registration of the deceased as the proprietor of the suit land was procured by way of mistake and fraud. In the suit, the plaintiff sought orders to have the title of the deceased to the suit land cancelled together with costs and interest.

3. In the application dated 27 April 2016, the plaintiff asked for orders to have the defendant restrained from selling, transferring, or disposing of the suit land until the case is heard and determined. When the application first came before me on 4 May 2016, I directed that status quo be maintained and further ordered that there be no dealings over the suit land pending inter partes hearing. The case came up for inter partes hearing on 21 September 2016, when only Mr. Gaita, learned counsel for the defendant/respondent, was present. The defendant had filed a Replying Affidavit opposing the application for injunction and there being no one to move it, I dismissed the said application.

4. The present application, is supported by two affidavits, one sworn by the plaintiff and the other by Mr.

Gai, learned counsel for the plaintiff. In her affidavit, the plaintiff has deposed that she mistook the date of 21 September 2016 for 27 September 2016. Owing to this mistake, she did not attend court on 21 September 2016. She has stated that her advocate was not present in court when the case was dismissed because the matter had not been cause listed and that he was overwhelmed with other work that he had in other courts. On his part, Mr. Gai had deposed that he was informed by his clerk that the case was not listed but only found out later that it was actually listed. When he rushed to court, he found that the application had been dismissed. He has deposed that on that day, he was overwhelmed by work as he had several other matters. He has averred that it was his mistake not to have attended court.

5. The defendant has not opposed this application and he and his counsel were not present at its hearing. I have noted the explanation given by the plaintiff and his counsel for not being present in court when the application dated 27 April 2016 came up for hearing inter partes. It is not unusual for mistakes to be made. However, I do not think counsel for the plaintiff was very vigilant about the matter. He merely took it from his clerk that the matter was not listed without verifying the position. But even if a matter is not listed, yet it has been given a date by the court, it behoves upon counsel to appear in court, and confirm from the court that the case will not proceed. The cause list, in my view, does not supercede the order given in the court file. Mistakes can be made in the typing out of a cause list, and my advice to litigants and counsels is always to confirm from the court that a matter that was given a date will not proceed when they do not see the same in the cause list.

6. I will nevertheless allow this application but subject to payment of throwaway costs of Kshs. 15,000/= payable within 14 days given that the respondent was ready on the date that had been fixed for its hearing. If the costs are not paid, then the application will stand dismissed. If the costs are paid, the application will be reinstated and may be given a hearing date.

7. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 29TH day of June 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Gai for the plaintiff/applicant.

Mr. Karanja Mbugua holding brief for Mr. Gaita for the defendant/respondent

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU