



Rotich v Chumo (Civil Suit 45 of 2013) [2017] KEELC 2821 (KLR) (30 May 2017) (Ruling)

James Kiplimo Rotich v Taprandich Chumo [2017] eKLR

Neutral citation: [2017] KEELC 2821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
CIVIL SUIT 45 OF 2013
JM ONYANGO, J
MAY 30, 2017**

BETWEEN

JAMES KIPLIMO ROTICH PLAINTIFF

AND

TAPRANDICH CHUMO DEFENDANT

RULING

1. By a Notice of Motion dated 8th February, 2017 the Applicant seeks orders for setting aside of the orders dismissing the suit herein and all consequential orders thereto entered on 11th November, 2016. The Application also seeks an order to reinstate the suit herein.
2. The Application is supported by the grounds set out on the face of the Application and the Affidavit of Julius Mong'are Motanya, the Applicant's advocate herein.
3. The main reasons given for the application are first, that on the date the suit was fixed for hearing, the Applicant's advocate was not aware that the matter was coming up for hearing since his clerk forgot to diarize it.
4. Secondly, the Applicant's advocate avers that he was engaged in a hearing in High Court. He therefore urges the court not to visit his mistake on his innocent client. It is also stated in one of the grounds, that the pleadings raise serious triable issues worthy of a full hearing and the suit therefore ought to be heard on the merits.
5. In response to the Application, the Respondent has through his advocate Mr. Siele Sigira, filed a Preliminary Objection raising the following points of law:
 - a) That a decree determining the rights of the parties with regard to the matters that were before the court was issued on 11th November, 2015.



- b) That the application before the court is incompetent and ought to be dismissed as it does not seek to set aside the decree.
 - c) That upon issuance of the decree pursuant to an order for dismissal of the Applicant's suit on 11th November, 2015, the only option remaining was for the applicant to appeal.
 - d) That the Applicant has not annexed a copy of the order he seeks to set aside to the Application.
6. In further opposition to the Application, the Respondent advocate filed Grounds of Opposition in which he stated as follows;
- 1) That the Applicant is guilty of laches as there has been inordinate delay in bringing the application to Court.
 - 2) That Equity will always aid the vigilant and the applicant's indolence has not been explained.
 - 3) That there is no good cause to justify why the Applicant and his advocate failed to attend Court on 11th November, 2015.
 - 4) That there is no explanation why the applicant failed to move the court since the matter was dismissed on 11th November, 2015, a period of 1 ½ years.
 - 5) That the Applicant squandered his right to be heard.
 - 6) That the Applicant has been in deep slumber and only woke when the Respondent sought the services of the County Surveyor with a view to establishing land boundary with the Applicant after the Applicant's suit was dismissed.
7. The Respondent's advocate filed written submissions citing various authorities his client's case while the Applicant chose not to file any.
8. What stands for determination is whether the order dismissing the Applicant's suit which was made on 11th November, 2015 should be set aside and whether the suit should be reinstated.
9. With regard to the Preliminary Objection raised by Mr. Siele-Sigira I wish to state as follows:-
- With respect, I find no merit in the grounds raised by the Respondent's counsel as the application seeks to set aside the order for dismissal of the suit and all consequential orders. I consider the decree issued herein as a consequential order. I also do not think that it is mandatory to attach the decree or order in respect of which the application to set aside is made. The Preliminary Objection is therefore disallowed.
- The courts have a wide discretion to set aside orders for dismissal and reinstate suits which have been dismissed for non-attendance. However, the following principles apply:-
- i. All matters involving the exercise of the courts discretion must be exercised judiciously based on the facts and law.
 - ii. The party seeking to reinstate the suit must demonstrate good faith.
 - iii. The application should be brought to court without unreasonable delay.
10. In the instant suit the Applicant's advocate has explained in his Affidavit that the reason he failed to attend court when the suit came up for hearing was that he was not aware that the matter had been fixed for hearing on that date since his clerk forgot to diarize the same. This explanation, though plausible would have been more credible if a copy of the advocates diary had been annexed to show that indeed the case was not diarized on the said date.



11. Secondly, Mr. Motanya states in his affidavit that on the date when the Applicant's suit was listed for hearing, he was engaged in another hearing in the High Court. Once again, it would have been more credible if he stated the case number of the case he was handling in the High Court on that day. Failure to do so leaves the court wondering whether he is telling the truth. In any event the Applicant had a duty to follow up on her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel for the litigant on account of such advocates failure to attend court. See *Edney Adaja Ismail Vs. Equity Bank Ltd* 2014 KLR eKLR.
12. The other important point raised by the Respondent's advocate and one which the court must consider is whether there was inordinate delay in bringing the application to set aside the dismissal. The order for dismissal for the suit was made on 11th November, 2015. The Applicant whether deliberately or through a typographical error states in his Notice of Motion that the order was made on 11th November, 2016.
13. Be that as it may, one and a half (1½) years is a long time to take before reinstating a suit that has been dismissed especially if one takes into account the sensitivity of the case being a land matter. I am inclined to believe the submissions of learned Counsel for the Respondent that the Applicant only arose from her deep slumber when the Respondent engaged the services of the County Surveyor to establish the boundary between her land and that of the Applicant after the Applicant's suit was dismissed.
14. In the case of *Peter Kinyari Kihumba Vs. Gladys Wanjiru Migwi and James Kihumba Migwi* CA No. 121 of 2005 Justice Waki held that a delay of four (4) months in seeking an extension of time within which to file a Notice of Appeal was inordinate, despite the fact that the suit in question was a land matter. I am persuaded by the holding of Justice Waki. In the instant case, the delay was well over a year which in my view is inexcusable.
15. All in all, I have considered the Application together with the grounds upon which it is based, the Supporting Affidavit as well as the Grounds of Opposition and the Respondent's written submissions and I find no merit in the Applicant's application. I therefore dismiss the same with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 30TH DAY OF MAY, 2017.

JANE M. ONYANGO

JUDGE

In the presence of:

Mr. Siele Sigira for the Respondent.

N/A for the Applicant.

Court Assistant- Rotich.

