



**Patani v Patani (Environment & Land Case 135 of 2018)
[2023] KEELC 18441 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 18441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 135 OF 2018**

**JO MBOYA, J
MAY 18, 2023**

BETWEEN

SHOBHANABEN PANKAJ KUMANR PATANI PLAINTIFF

AND

PREDEEP HARAKACHAND PATANI DEFENDANT

RULING

1. The Plaintiff/Applicant herein filed and or commenced the suit way back in the year 2009 and wherein same sought for various reliefs. Nevertheless, the suit which was filed by and on behalf of the Plaintiff was ultimately heard and disposed of vide Judgment rendered on the 31st October 2022.
2. However, even though the Plaintiff's counsel was present and in attendance during the delivery of the Judgment herein, the Learned Counsel for the Plaintiff failed and/or neglected to file and/or lodge a Notice of appeal and/or take such other appropriate steps, if any, against the Judgment in question.
3. As a result of the failure and/or neglect to file the requisite Notice of appeal, the Plaintiff/Applicant herein thereafter filed and/or mounted an Application dated the 6th December 2022; and in respect of which same sought, inter-alia, extension of time within which to file an appeal to the Honorable Court of Appeal.
4. Instructively, the said Application was scheduled for hearing on the 22nd March 2023. Invariably, the hearing date was fixed in the presence of the Learned Counsel for the respective Parties.
5. Be that as it may, come the 22nd March 2023, Learned counsel for the Plaintiff/Applicant failed and/or neglected to attend court and in this regard, the Application dated 6th December 2022 was dismissed for want of prosecution.



6. Following the dismissal of the Application dated the 6th December 2022, the Plaintiff/Applicant has now filed and lodged the current Application. For clarity, the Application beforehand is dated the 24th March 2023, and same seeks the following reliefs;
 - i.Spent.
 - ii. This Honourable court do make an order setting aside and/or varying this Honourable court's orders issued on 22nd March 2023 and reinstate the said Application.
 - iii. Cost of the Application be in the cause.
7. Upon being served with the instant Application, Learned counsel for the Defendant/Respondent filed Grounds of opposition dated the 17th April 2023; and wherein same has contended, inter-alia, that the subject Application is frivolous and vexatious.
8. Subsequently, the Application came up for hearing and same was canvassed and ventilated by way of oral submissions. For good measure, the submissions by and on behalf of the respective Parties form part of the record.

Submissions By The Parties

a. Applicant's Submissions

9. Learned counsel for the Plaintiff/Applicant adopted the grounds at the foot of the Application and reiterated the depositions contained at the foot of the supporting affidavit and thereafter same highlighted two issues for consideration and eventual determination by the court.
10. Firstly, Learned counsel for the Applicant submitted that even though same was present when the hearing date pertaining to and concerning the Application was given, same inadvertently failed and neglected to diarize the subject matter in his diary for the 22nd March 2023.
11. In addition, Learned counsel submitted that the failure to make entry and up date his diary, with the instant matter, was neither intentional nor deliberate. Instructively, Learned counsel has contended that the failure and or inadvertence was a mistake that could occur to anyone, let alone an experienced counsel.
12. Be that as it may, Learned counsel has submitted that the fact that an innocent error and or inadvertence has occurred does not mean that such an error or mistake must be punished by depriving the client of a right/opportunity to be heard.
13. Secondly, Learned counsel submitted that the right to be heard is so central and significant that it behooved every court; the court herein not excepted, to facilitate and afford every litigant, including the Applicant herein an opportunity to be heard. In this respect, Learned counsel pointed out that if the Application is not allowed, then the Applicant would be condemned unheard and thus contravening the import and tenor of the principle relating to Fair Hearing; as well as the Doctrine of Natural Justice.
14. Furthermore, Learned counsel submitted that the Honourable court is seized and possessed of the requisite discretion to entertain and adjudicate upon the subject Application, whose import is to facilitate a right of audience to and in favor of the Plaintiff.
15. Consequently and in this regard, it has been stated and contended that the Interest of Justice dictates that the subject Application be allowed/granted.



16. In any event, Learned counsel has added that the grant of the subject Application, shall not prejudice and/or interfere with the Defendant's/Respondent's accrued right, if any. Contrarily, the grant of the subject application shall enhance the cause and process of Justice.
17. In view of the foregoing, Learned counsel for the Applicant has thus implored the Honourable court to find and hold that the instant Application deserves being granted. Furthermore, Learned Counsel relied and cited the provisions of Article 159(2) (d) of *The Constitution* 2010.
 - b. Respondent's Submissions
18. The Respondent herein adopted and relied on the Grounds of opposition dated the 12th April 2023; and thereafter highlighted three pertinent issues for consideration.
19. Firstly, Learned counsel has submitted that it is incorrect and erroneous for the counsel for the Applicant to contend that the application dated the 6th March 2022, which was dismissed for want of prosecution, had not been opposed and or controverted by the Respondent. In this regard, Learned counsel invited the Honourable court to take cognizance of the Grounds of opposition dated the 9th March 2023 and the replying affidavit sworn on even date. Both of which are submitted to have been served upon the Plaintiff's/Applicant's advocate on the 10th of March 2023.
20. Owing to the fact that the Respondent had filed both the Grounds of opposition and the Replying affidavit, respectively, Learned counsel has thus contended that same was therefore within his right to oppose the Application dated the 6th December 2022; and even to ask for the dismissal thereof.
21. Secondly, Learned counsel submitted that the Plaintiff/Applicant herein has neither tendered nor availed any credible or cogent explanation to underscore why the appeal which is sought to be filed, was neither filed nor lodged timeously and with due promptitude, following the delivery of the impugned Judgment.
22. Insofar as no evidence has been tendered and/or delivered, to explain why no steps were taken, Learned counsel has impressed upon the Honourable court to find and hold that the Applicant herein has therefore not justified his inaction and/or lethargy, in commencing and undertaking the requisite steps.
23. Thirdly, Learned counsel submitted that even though the counsel is keen and desirous to file an appeal out of time, it is instructive to note that the Plaintiff/Applicant herein has expressed her strong position against the filing of any appeal.
24. Based on the foregoing, Learned counsel for the Defendant/Respondent has wondered for and on whose behalf is the Application for extension of time is being sought. In the premises, Learned counsel has opined that the application seeking for Leave to appeal is therefore a nullity ab initio; insofar as the Applicant has not given instructions to pursue Leave to appeal either as sought or at all.
25. Finally, Learned counsel has submitted that the allegations being made and mounted by counsel for the Applicant, to found and anchor the request of extension of time, are not only concocted, but tailored made so as to mislead the Honourable court that indeed Learned counsel failed to up date and/or diarize the hearing of the subject application.
26. Furthermore, Learned counsel has submitted that it was incumbent upon Learned counsel for the Applicant to exercise due diligence and to act expeditiously, to facilitate compliance with or adherence to the provisions of the law.
27. As a result of the foregoing, Learned counsel has therefore implored the court that the Applicant herein ought not to be granted the extension, either in the manner sought or at all. In any event,



Learned counsel added that the failure to update the Plaintiff's advocates diary was informed by sheer recklessness and gross negligence, which ought not to be condoned.

Issues For Determination:

28. Having reviewed the Application beforehand and upon taking into account the oral submissions that were ventilated on behalf of the Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether the Applicant herein has supplied and/or availed cogent and credible reasons why the impugned order ought to be varied and vacated.
 - ii. Whether the Defendant/Respondent shall suffer any prejudice and/or detriment, if the Application is granted.

Analysis And Determination

Issue Number 1

Whether the Applicant herein has supplied and/or availed cogent and credible reasons why the impugned order ought to be varied and vacated.

29. It is common ground that the Application dated the 6th December 2022, was indeed set down and fixed for hearing in the presence and with the concurrence of the advocates for the respective Parties. In this regard, one would have expected the senior advocates and especially, the Advocate for the Plaintiff/Applicant; who took the hearing date to ensure that the date was duly diarized and duly captured as against the file.
30. However, despite the necessity to up date and or endorse the scheduled hearing date in his diary, Learned counsel for the Plaintiff/Applicant failed to undertake the necessary and/or requisite measures and as a result, the hearing of the subject matter came up and was indeed heard and disposed of on the 22nd of March 2023.
31. Subsequently, Learned counsel has now filed the current Application and same is now seeking that the orders of the Honourable court which were issued on the 22nd March 2023; and which essentially dismissed the suit for want of prosecution to be vacated and or discharged and in lieu thereof, liberty be granted to enable the Applicant to prosecute the subject Application.
32. Towards and on account of explaining his failure and/or lapse to attend court on the scheduled hearing date, Learned counsel for the Applicant has contended that the failure was informed by his inadvertence and neglect to make the requisite entry/endorsement in his diary, shortly after taking of the hearing date.
33. On his part, Learned counsel for the Defendant/Respondent has vehemently opposed the subject Application and same contends, inter-alia, that the failure and/or neglect to make the requisite entry and or endorsement in the diary of the counsel was informed by gross carelessness and negligence on the part of the counsel for the Plaintiff/Applicant.
34. Invariably, Learned counsel for the Defendant/Respondent has therefore submitted that such a gross carelessness and negligence, ought not to be excused and pardoned by the court. To the contrary, Learned counsel added that such carelessness should be left to fall on the head of the concerned advocate.



35. Having considered the rival submissions, it is imperative to state that Learned counsel for the Plaintiff/Applicant has owned up and conceded that the lapse and/or default, which culminated into the dismissal of the Application dated the 6th December 2022, was of his own making. In any event, counsel has thereafter tendered profound apology to both the court and the opposing counsel.
36. Additionally, Learned counsel for the Plaintiff/Applicant has averred that the mistake and or default, like the one that befell him, are not peculiar. Instructively, Learned counsel stated that such mistakes and/or inadvertence, can occur to or befall any counsel, irrespective of his/her standing in the profession.
37. Inevitably, it is common knowledge that mistake is to human. Consequently, every human being, irrespective of status, age and/or learning, are prone to make mistakes, some of which are clearly innocent and honest.
38. However, the fact that a mistake has been made, should not by itself deny and/or deprive a Party of a right and/or opportunity to be heard. For good measure, it would be incumbent upon the Honorable court to interrogate the explanation tendered by the person to whom the mistake is attributed to and thereafter ascertain whether, the mistake was innocent or deliberate.
39. Notwithstanding the foregoing, where the Party to whom the mistake is attributed to has tendered and/or offered some credible and cogent explanation or account, then it behooves the Honourable court to give the benefit of doubt to the Applicant and to thereafter afford the Applicant an opportunity to partake of the cake of justice.
40. Notably and for good measure, it has variously been stated that the fact that a blunder has been made by a Party should not ipso facto deprive the party of a right to have his/her case heard and determined on merits. In any event, it is trite and established that courts of law have not been constituted for purposes of meting out punishment or discipline to defaulting Parties.
41. Contrarily, the obtaining Jurisprudence expounds the position that where a blunder has been made and that same can be remedied, either by payment of costs or such other order that the court may deem expedient, it behooves the court to excuse and pardon the mistake of the defaulting Party, provided that sufficient reason and explanation has been tendered and/or availed.
42. In the case of *Belinda Murai & others versus Amos Wainaina* (1978) LLR 2784, the honorable court stated and held as hereunder;

“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.....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...” (our emphasis)
43. Moreover, the position that a court of law does not exist to mete out punishment or better still discipline to the defaulting party, was succinctly highlighted by the Court of Appeal in the case of *Philip Keipto Chemwollo versus Kubende* (1986)eKLR, (per Apaloo J A), where the court stated as hereunder

“I think a distinguished equity judge has said:



“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree.”

44. Taking into account the foregoing exposition of the law and coupled with the explanation that has been tendered by Learned Counsel for the Plaintiff/Applicant, I come to the conclusion that it will be inequitable, unjust and punitive on the part of the court to decline to set aside and/or vacate the dismissal orders, which clearly arose because of the mistake attributed to the advocate and not otherwise.

Issue Number 2

Whether the Defendant/Respondent shall suffer any prejudice and/or detriment, if the Application is granted.

45. The Application dated the 6th December 2022, which was dismissed vide the orders made on the 22nd March 2023, sought for Leave to file an appeal against the Judgment and decree issued by this Honorable court on the 31st October 2022.
46. From the foregoing, there is no gainsaying that what the Applicant herein is endeavoring to achieve is to be afforded an opportunity, subject to proof of sufficient cause/basis to pursue an appeal against the decision of the court. In this respect, it is not lost on this court that where a party is keen to pursue and or exercise a right of appeal (whether with leave or otherwise), it behooves the court to afford the Appellant or the intended Appellant a reasonable opportunity to escalate the dispute to a higher court for review and/or reconsideration.
47. To this end, the ratio decidendi in the case of Butt versus The Rent Restriction Tribunal (1979)eKLR is relevant and apt. For coherence, the Court of Appeal (Per Madan JA) stated and held as hereunder;
- “I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
48. Furthermore, the Application which was dismissed is also indicative of a desire by the Plaintiff/Applicant to explore it her constitutional rights of access to Justice, as espoused and entrenched in Article 48 of *The Constitution*, 2010.
49. For good measure, the provisions of Article 48 (supra) stipulates thus;
48. Access to justice
- The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
50. Having enumerated the foregoing position, it now behooves me to consider whether the Defendant/Respondent herein shall be exposed to suffer any prejudice and/or detriment, if the Application dated the 6th December 2022 and in respect of which the Applicant is seeking for Leave to appeal, is restored and reinstated for hearing and determination on merits.



51. Instructively, it is appropriate and worthy to state and underscore that Learned Counsel for the Defendant/Respondent shall still have the requisite opportunity to ventilate his position and canvass the various issues, which were alluded to at the foot of the Replying affidavit sworn on the 9th March 2023 and filed on behalf of the Defendant/Respondent.
52. To my mind, the Defendant/Respondent shall still have his rightful bite on the cherry and his position would be duly considered and appraised before the court, prior to and before a decision is made as to whether sufficient basis or cause has been tendered by the Applicant to account for, inter-alia, the failure to take appropriate steps to appeal within the statutory timeline.
53. Furthermore and for good measure, it is important to remind the Defendant/Respondent that the mere fact that the named Application shall have been reinstated and restored for hearing and determination on merits, does not mean that the impugned Application shall succeed.
54. In short, I do not discern any prejudice or detriment that the Defendant/Respondent will suffer if the impugned Application is restored for hearing and determination. Indeed, the restoration of the named Application, shall afford both Parties the opportunity to play on a level playing field, as espoused in terms of Article 50(1) of *The Constitution*, 2010.
55. Finally, it is not lost on the court that the only inconvenience that the Defendant/Respondent shall be disposed to suffer relates to getting up yet again and preparing to canvass the Application, which same had previously gotten up for. Further and in addition, the counsel shall be called upon to attend court for a second time, in respect of the same matter.
56. However, the inconvenience espoused and articulated in the preceding paragraph are capable of indemnity and atonement by way of payment of thrown away costs, assessed and certified in accordance with the Advocate Remuneration Order 2014. Certainly and to my mind, the Learned Counsel for the Defendant/Respondent can be suitably rewarded by an order of costs, to be borne and paid by counsel for the Plaintiff, who is the author of the mistake/inadvertence.

Final Disposition:

57. In my humble view, the circumstances underlining the dismissal of the Plaintiff's/Applicant's Application dated the 6th December 2022, warrants exercise of discretion in favor of the Plaintiff. In any event, it suffices to underscore that the court's discretion is wide and unfettered and is intended to achieve justice.
58. Consequently and in the premises, the Application dated the 24th March 2023, be and is hereby allowed. Invariably, the Application dated the 6th December 2022, be and is hereby reinstated and restored for hearing and determination on merits.
59. Nevertheless, Learned Counsel for the Plaintiff/Applicant shall pay to and in favor of the Defendant/Respondent costs assessed and certified in the sum of Kes.25, 000/= only payable within 7 days from the date hereof and in default, the Plaintiff shall have no audience on the return date.
60. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:



Benson – court assistant

Mr. Ochieng h/b for Mr. Oyatta for the Plaintiff/Applicant

Mr. A Rebelo for the Defendant/Respondent

