



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 86 OF 2018**

**MARGARET GACIGI GECAGA.....PLAINTIFF**

**VERSUS**

**GATEWAY INSURANCE CO. LIMITED.....1ST DEFENDANT**

**UDI MAREKA GECAGA.....2ND DEFENDANT**

**QUINVEST LIMITED.....3RD DEFENDANT**

**RULING**

1. On **3rd May, 2018** the plaintiff filed, under certificate of urgency, a notice of motion dated **30th April 2018**. By that application the plaintiff sought to stay orders issued by this court's ruling dated **16th April 2018**. By that ruling, this court struck out the plaintiff's suit with costs to the defendants.
2. The application dated **30th April 2018**, was placed before me on **2nd May 2018**. The matter was filed under certificate of urgency and I considered it exparte.
3. On **2nd May 2018**, I made an order that the application be served upon the defendants for hearing inter partes on **8th May 2018**.
4. On **8th May 2018**, the plaintiff was not present in court and the 2nd and 3rd defendant's counsel, who was present, applied for the notice of motion to be dismissed for non attendance. The court acceded to that prayer and the notice of motion was dismissed.
5. The plaintiff by a notice of motion dated **10th May 2018**, which is the subject of this ruling, and which shall hence forth be referred to as the subject application, seeks for reinstatement of the notice of motion dated **8th May 2018**.
6. The affidavit in support of the subject application was sworn by **Jeremy Njenga** the learned counsel for the plaintiff. He deponed as follows:

*(2) That on **30th April 2018**, we filed a notice of motion application of even date under certificate of urgency and upon filing, our court clerk one **KENNEDY LUSENO** was advised that the same would be forwarded to the duty Judge for directions and that we should check position on directions issued on the following working day i.e on **2nd May 2018** as **1st May 2018** was a public holiday.*

*(3) That I am aware that on **2nd May 2018**, our said court clerk followed the matter and later advised me and which advise I verily believe to be true that the application had been certified as urgent and fixed for interpartes hearing on **10th May 2018**. This was per information given to him by a then unnamed court's registry clerk who deals with certificates of urgency. He duly indicated the date in our diaries as per the attached copies annexed and marked "**J1**".*

*(4) That on **4th May 2018**, I consequently instructed our process server to serve the same and I am aware that the same was served on the Advocates acting for 1st, 2nd and 3rd defendants respectively (copy affidavit of service annexed and marked "**J2**"). If my memory serves me right, the hearing dated indicated in the copies served was **10th May, 2018**. I would challenge the defendants/respondents counsel to confirm date indicated on copies served on them.*

*(5) That we then waited for the hearing date and on **10th May 2018**, I attended court and was in the court precincts before 9am only to find that the matter was not listed just as I had confirmed from the same internet early same morning. On further enquiry from the court's registry, it was then when I noted from the court file that the date given by the court was 8/5/18 and not 10/5/18 and that the matter did in fact come up on 8/5/18 when the application dated 30th April 2018 was dismissed for want of prosecution at the request*

of the 2nd and 3rd defendant's counsel. We however had not been served with any grounds of opposition or replying affidavits by any of the defendant/respondents.

(6) *That the failure to be in court on 8th May 2018 was therefore not deliberate but was as a result of inadvertent miscommunication between our court clerk and the court's registry personnel which led to subsequent mis-diarization by our court clerk. The mistake is regretted but nevertheless excusable.*"

7. The plaintiff's learned counsel annexed a photocopy of his firm's diary for the **10th May 2018** which reflects an entry of the hearing of this matter.

8. The application was opposed by the 2nd and 3rd defendants through grounds of opposition which are as follows:

*"1. The application is misconceived, frivolous and abuse of the court process.*

*2. There is no useful purpose to be served by reinstating the dismissed application which in any event is fatally defective and untenable in law.*

*3. The plaintiff has a remedy against her advocates for their inexcusable mistake and lack of diligence in failing to attend court as scheduled in the daily cause list.*

*4. There are no sufficient reasons demonstrated by the plaintiff to warrant the exercise of the court's discretion in her favour.*

*5. Justice must look both ways as the rules of procedure are meant to expeditiously regulate administration of justice and not meant to assist the indolent. See **Mariara and Others v Matundura [2004]2 E.A 163.***

9. The plaintiff in giving the reason why there was no attendance by his counsel on **8th May 2018**, alleged that there was misinformation given by the court registry staff that the matter was due for hearing of the notice of motion dated **30th April 2018** on **10th May 2018**. The matter in fact was fixed for hearing interpartes on **8th May 2018**.

10. The 2nd and 3rd defendants chose to rely on the grounds of opposition in opposing the subject application. Having made that choice, and having not relied on an affidavit, the said defendants cannot refer to factual matters. It follows that the court cannot consider whether or not the application was or was not dated when it was served on the defendants; and the court cannot consider how the defendants got information that the application was fixed for hearing interpartes on **8th May 2018**.

11. In my view, the plaintiff has shown reasonable excuse why her learned counsel failed to attend court on **8th May 2018**. This court in reaching that conclusion, relies on two decisions of the court of appeal. **Belinda Murai & Others Vs Amoi Wainaina, [1978] LLR 2782 (CALL)**, the court stated 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. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."*

In **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040**, the court stated:

*"Blunder 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 heard on merit. 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 the purpose of imposing discipline."*

12. The plaintiff's counsel blundered and it does not follow that because he blundered the plaintiff must suffer the consequence of that blunder.

13. Accordingly, the plaintiff's notice of motion dated **10th May 2018** succeeds and I order as follows:

*a. The orders issued on **8th May 2018** dismissing the plaintiff's application dated **30th April 2018** is hereby set aside and the same is reinstated.*

*b. The defendants are awarded costs of the notice of motion dated **10th May 2018**.*

*c. At the reading of this ruling, the court shall fix for hearing the reinstated application dated **30 April 2018**.*

**DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2018.**

**MARY KASANGO**

**JUDGE**

***Ruling read and delivered in open court in the presence of***

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

**MARY KASANGO**

**JUDGE**