



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 53 OF 2014

CHRISTOPHER M. MACHIMBO..... PLAINTIFF

VERSUS

GEORGE RIOGI MOCHAMA.....DEFENDANT

RULING

1. The plaintiff filed an application dated 4/11/2016 seeking to set aside the judgement of the court made on 18/4/2016 dismissing the plaintiff's suit for want of prosecution. Further the plaintiff seeks an order setting aside this court's judgement delivered on 26/9/2016 allowing the defendant's suit, and that the suits be heard on the merits.
2. The grounds on which the application is made are that at the time the suit was heard the applicant was bed-ridden. At that time also the applicant was acting in person. The plaintiff avers that there are serious triable issues involved and it is possible that the court may arrive at a different finding were the suits heard on the merits.
3. The plaintiff has exhibited copies of medical documents to support his claim of indisposition at the time the suit was heard.
4. The application is opposed. The defendant filed a replying affidavit sworn on 16/3/2017. His main response is that there is no good ground shown for the exercise of the court's discretion in his favour, that by use of due diligence, the plaintiff could have learned of the hearing date; that the plaintiff would not have been able to file the notice of intention to act in person without knowledge of the position of the case; that non attendance by the plaintiff on 18/4/2016 was as a result of negligence or lack of due diligence on the plaintiff's part. The evidence regarding the plaintiff indisposition has not been challenged.
5. The court has a very wide discretion in respect of setting aside of orders or judgements. It may not be fettered at all in the exercise of this discretion. In the case of *Pithon Waweru Maina –vs- Thuku Mugiria 1983 Eklr*, the Court cited the case of *Patel –vs- E.A Cargo Handling Services Ltd [1974] E.A. at P.76* in which the Court stated as follows:-

“There are no limits or restriction on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just..... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Secondly, an *Harris J said in Shah –vs- Mbogo, [1967] E.A 116 at 123 (B):* this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or

delay the course of justice”.

6. In the instant case there is no evidence that the plaintiff attempted to delay or obstruct the course of justice. There is evidence that the plaintiff was unwell as at the time of the hearing. It is true that the setting aside of the judgement may cause more precious judicial time to be taken up but this court is a court of justice. Where possible, after it has been established that the dismissal of a suit, or the taking of proceedings and issuance of judgement ex parte was as a result of accident, excusable mistake or error, the court may upon the application of the affected party, set aside the judgement upon such conditions as it may deem fit and just. In the current case I consider that the failure of the plaintiff to attend court is appropriately explained. I also consider or award of costs to be panacea to the ills that the defendant may have to bear upon the setting aside of the judgement and the taking of consequential proceedings. I therefore issue the following orders:-

(1) The plaintiff’s application dated 4/11/2016 is hereby granted in terms of prayers (c), (d) and (e).

(2) The costs of the said application shall be borne by the plaintiff.

(3) The defendant is hereby awarded thrown away costs assessed in the sum of Kshs.40,000/=.

(4) The suit shall be fixed for hearing within 30 days of this order failure to which the Orders No. (1), (2) and (3) hereinabove issued shall stand vacated and judgements reinstated as they were prior to the issuance of those orders.

It is so ordered.

Dated, signed and delivered at Kitale on this 19th day of September, 2017.

MWANGI NJOROGE

JUDGE

Ruling read in open court in the presence of:-

Mr. Ingosi for defendant/respondent

N/A for the plaintiff

Court Assistant – Isabellah.

MWANGI NJOROGE

JUDGE

19/09/2017.