REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 51 OF 2012

EMILY NASIMIYU BUCHUNJU ..... PLAINTIFF

VERSUS

ALEX WECHULI ..... 1ST DEFENDANT

JOHN NJUNULI ..... 2ND DEFENDANT

DESTERIO S. ODUOR ..... 3RD DEFENDANT

R U L I N G

1. This ruling is in respect to the plaintiff's Notice of Motion dated 8th December 2019 which is premised under the provisions of **Sections 1A**, **1B, 3** and **3A** of the **Civil Procedure Act** and **Order 12** of the **Civil Procedure Rules**. The plaintiff seeks the following order: -

(a) This Honourable Court be pleased to set aside the order dismissing the plaintiff's suit.

(b) Consequently, the plaintiff's suit be reinstated to hearing on merit.

(c) Costs be provided for.

The application is predicated on the grounds set out therein and is also supported by the affidavit of **EMILY NASIMIYU BUCHUNJU** the plaintiff herein.

2. The gravamen of the application is that although her suit was dismissed on 10th October 2017, she has always wanted to have it heard and determined and at no time did she inform her previous Counsel that she wanted to have it compromised as was intimated to the Court on 6th April 2017.

3. That on 10th October 2017, her then Counsel **MR MURUNGA** called her at 11 a.m to inform her that the case was coming up for trial. She registered her disappointment as to why Counsel had not called her earlier. She enquired whether she should travel to the Court but Counsel informed her that it would be too late but he did not disclose to her that the suit had already been dismissed. That she was never served with the letter dated 29th September 2017 and when she went to the office of her then Counsel, she was informed that the Court had removed him from the record. It was then that she learnt that her suit had been dismissed. That she would not have undertaken to refund any money in respect to the transactions subject of this suit and which had been done by her brother who was and has been at all material times of unsound mind. That it is fair and just that this application be allowed and the orders dismissing her suit be set aside and/or be reviewed so that she can prosecute it. Annexed to her affidavit are the following documents:

1. Letter dated 20th March 2018 from her new advocates OCHARO KEBIRA & CO ADVOCATES addressed to her previous advocates J. O. MAKALI & CO ADVOCATES requesting for her file.

2. Receipt dated 6th November 2015 issued to her in respect of filing fees being Kshs. 10,000/=.

3. Letter dated 19th June 2012 from the Medical Superintendent Bungoma District Hospital in respect of PATRICK WANYAMA BUCHUNJU.

This application had previously been filed out of time but by a ruling dated 30th November 2021, I reinstated it and directed that it be canvassed by way of written submissions. The defendants were to be served within 7 days and they would have 14 days within which to file and serve submissions. Mention date was set for 22nd December 2021 before the Deputy Registrar to confirm compliance.

4. On 22nd December 2021, only **MS RATEMO** Counsel for the plaintiff was present. There was no appearance by **MR KITUYI** Counsel for the 2nd defendant or the 1st and 3rd defendants who are in person and no responses had been filed in respect to that application. As there was no evidence of service, the Deputy Registrar gave **MS RATEMO** upto 12th January 2022 to serve the defendants.

5. On 12th January 2022, there was no response filed by any of the defendants in response to the application dated 9th December 2019. And neither did **MR KITUYI** Counsel for the 2nd defendant nor the 1st and 3rd defendants attend Court. However, there are submissions dated 12th December 2021 filed by **MR KITUYI** although they relate to an application dated 24th June 2019. Only Counsel for the plaintiff filed submissions on 6th December 2021.

6. I have considered the application which is un – contested since neither of the defendants filed any responses nor attended the Court on 22nd December 2021 or 12th January 2022. I have also considered the submissions by **MS RATEMO** instructed by the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** for the plaintiff.

7. Although no replying affidavits were filed in response to the application, this Court must nonetheless consider if the ***"probative value"*** of the un – rebutted affidavit is ***"sufficient to prove the plaintiff's claims"*** – **DAVID KIBET MUTAI & OTHERS .V. A – G 22019 eKLR**.

8. What comes out the application, the supporting affidavit and the submissions by the plaintiff's Counsel is that she was not made aware about the orders dismissing her case as her Counsel did not inform her. Further, that she did not give her previous Counsel consent to compromise the suit on 6th April 2017 and she has an arguable case with high chances of success. That although the plaintiff has taken long, she should be allowed her day in Court. That the defendant will not suffer any prejudice and the overriding objective should be to do substantive justice to the parties.

9. There is no doubt that this Court has the power to set aside and/or review the orders dismissing a suit. **Order 12 Rule 7** of the **Civil Procedure Rules** which has been cited in this application reads: -

> ***"Where under this order Judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the Judgment or order upon such terms as may be just."***

And although the plaintiff has not cited **Order 45 Rule 1** of the **Civil Procedure Rules**, she nonetheless seeks, in the alternative, an order to review the order dismissing her suit. That provision provides as follows: -

> ***1(1) "Any person considering himself aggrieved –***
>
> ***(a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or***
>
> ***(b) by a decree or order from which no appeal is hereby allowed,***
>
> ***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any sufficient reason desires to obtain a review of the decree or order, may apply for a review of the Judgment to the Court which passed the decree or made the order without unreasonable delay."*** Emphasis added.

The threshold for setting aside an ex – parte order was set way back in the case of **SHAH .V. MBOGO & ANOTHER 1967 E.A 116** where **HARRIS J** held that such discretion: -

> ***"…… is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."***

This was affirmed in **MBOGO .V. SHAH 1968 EA**. It is of course the law that every person has a right to a fair trial as guaranteed by **Article 50** of the **Constitution**. I am also reminded of the words by **AINLEY J** in the case of **JAMNADAS SUDHA .V. GORDANDAS HEMRAJ 1952 7 ULR 11**

> ***"…… that to deny a subject a hearing should be the last resort of a Court"***

10. However, when an opportunity to be heard is availed, it should not be squandered. In **UNION INSURANCE COMPANY OF KENYA LTD .V. RAMAZAN ABDUL DHANJI C.A CIVIL APPLICATION No 179 of 1998**, the Court of Appeal had this to say: -

> ***"The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."*** Emphasis added.

With regard to the remedy of review, it is clear from the provisions of **Order 45 Rule 1** of the **Civil Procedure Rules** cited above that the power can only be exercised by the Court if the following conditions ae met: -

1. Where there is discovery of new and important matter or evidence which, even after due diligence was not within the knowledge of the Applicant nor could it be produced at the time when the order was made.

2. On account of some mistake or error apparent on the face of the record.

3. For any other sufficient reason.

4. The application must be filed without unreasonable delay.

The above were reiterated by the Court of Appeal in the case of **FRANCIS ORIGO & ANOTHER .V. JACOB KUMALI MUNGALA C.A CIVIL APPEAL No 149 of 2001** when it said: -

> ***"In an application for review, an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the applicant must make the application for review without unreasonable delay."*** Emphasis mine.

11. Guided by the above provisions and precedents among others, and notwithstanding the fact that the defendants did not file any response to the application dated 9th December 2019, I have perused the record herein. The plaintiff was previously represented by the firm of **J.O MAKALI ADVOCATES** and when the matter came up for mention on 6th April 2017, **MR MURUNGA** from that firm was present and so too was **MR KITUYI** Counsel for the 2nd defendant while the 1st and 3rd defendant were also present in person. **MR MURUNGA** addressed the Court as follows: -

> ***"We wish to refund the money to the 2nd defendant as per the Judgment in ELC 169 of 2014. We request for time to do so. We shall pay by June 2017."***

MR KITUYI had no objection while the 1st and 3rd defendants appear not to have said anything in response to that request.

12. By the time the matter next came up on 25th September 2017, **MR MURUNGA**'s relationship with his client had already hit serious turbulence, perhaps similar to that on the London to New York route which is reputed to experience the most turbulence. Counsel informed the Court that although the plaintiff had agreed to pay the money by 6th April 2017, she had changed her mind and wished to engage another Counsel. **MR MURUNGA** therefore sought leave to cease acting for the plaintiff.

13. MUKUNYA J was not amused with the turn of events. He reminded the parties that the case was then five (5) years old (it is now ten (10) years old). The Judge added that it was the plaintiff who had initiated the settlement but had now changed her mind causing further delays. He fixed a hearing date for 10th October 2017 ***"without any option of adjournment"*** and allowed **MR MURUNGA** to withdraw from acting for the plaintiff but directed him to serve his erstwhile client with a notice for the hearing. **MR MURUNGA** was undoubtedly relieved to have gone over the turbulence. It was now time to safely land and disembark. He promptly wrote a letter dated 29th September 2017 informing the plaintiff that he had withdrawn from acting for her and advised her to instruct another Counsel. Most significantly, he informed the plaintiff as follows in paragraph 4: -

> ***"The matter will be heard on 10.10.2017 and no application for adjournment will be entertained."***

Notwithstanding the fact that he had been allowed to cease acting, **MR MURUNGA** attended the Court on 10th October 2017, confirmed that he had acted as directed by the Judge and sought to be discharged for the proceedings. Both **MR KITUYI** for the 2nd defendant as well as the 1st and 3rd defendants who were acting in person were present and did not object to that application. The Judge promptly discharged **MR MURUNGA**. As the plaintiff was not present, both **MR KITUYI** and the 1st and 3rd defendants sought the dismissal of her case which application was allowed.

14. The plaintiff then took a long siesta and by a Notice of Change of Advocate dated 24th June 2019 and filed on 2nd September 2019, the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** came on record for her. They first filed an application dated 24th June 2019 culminating in the application which is the subject of this ruling.

15. It is in the background of the above that this application must be considered.

16. The plaintiff has in paragraph 7 of her supporting affidavit started by faulting the manner in which **MR MURUNGA** ceased acting for her. She has deponed thus: -

> ***7: "That I am informed by my Counsel on record that any Counsel who is on record for a party and who desires to cease acting for such a party is enjoined by law to file, serve and prosecute an application to cease acting."***

The plaintiff probably had in mind the provisions of **Order 9 Rule 13** of the **Civil Procedure Rules** on the withdrawal of a Counsel who has ceased to act. As is already clear form the record however, **MR MURUNGA** was discharged from these proceedings by the Court firstly on 25th September 2017 and then on 10th October 2017 when the Judge stated: -

"COURT - MR MURUNGA is discharged from the case. He now ceases from acting for the plaintiff."

The above order was made in the presence of both **MR KITUYI** Counsel for the 2nd defendant and the 1st and 3rd defendants who are acting in person. They had no objection. The Court had earlier directed **MR MURUNGA** to serve a notice to the plaintiff. There is a letter filed in Court on 10th October 2017 and addressed to the Deputy Registrar notifying him that the plaintiff was personally served with the letter dated 29th September 2017 informing her that the firm of **J. O. MAKALI AND COMPANY ADVOCATES** were no longer acting for her. The broad principle that **Order 9** of the **Civil Procedure Rules** seeks to address is that where there is a change of Counsel or a party intends to act in person, then the other parties must be informed about the changes. Nothing really turns on that. The plaintiff cannot now be heard to complain, as she has done in paragraph 12 of her affidavit, that she was never served yet her former Counsel has stated that she was served with the letter but refused to sign. The plaintiff cannot also allege that she was only called on 10th October 2017 and informed about the hearing date yet the letter dated 29th September 2017 was addressed to her. Clearly, the plaintiff has not come to Court with clean hands yet she is seeking an equitable remedy that is only available to her at the discretion of the Court. She has not demonstrated any inadvertence, accident or excusable mistake or error to warrant the orders sought. If anything, she is intent on deliberately obstructing or delaying the cause of justice.

17. She is also guilty of laches. In paragraphs 13 and 14 of her supporting affidavit, she says: -

13: "That I know of my own knowledge that after the matter was dealt with on 10th October 2017, I after 3 days of the day went to my Counsel then on record who told me that the Court had "removed him from record." He never disclosed that the matter had been dismissed."

14: "That Counsel urged me to look for another Counsel to continue with the matter for and on behalf of me."

There is already evidence by way of a letter addressed to her on 29th September 2017 advising her that the firm of **J. O. MAKALI ADVOCATES** were no longer acting for her and advising her that the case was coming up for hearing on 10th October 2017 which was served on her in Counsel's office and she refused to sign it. But even assuming that the first time she knew about the dismissal of her suit was there (3) days after the event, she has not explained why it took her upto 24th June 2019 (a period of twenty (20) months) to instruct the firm of **OCHARO KEBIRA & COMPANY ADVOCATES** to act for her on 24th June 2019 when she filed the first application seeking to set aside the dismissal order. This Court is however satisfied that as early as 4th October 2017, the letter dated 29th September 2017 advising her about the hearing date of 10th October 2017 had already been served upon the plaintiff. This is because, in the letter dated 10th October 2017 and addressed to the Deputy Registrar by the firm of **J. O. MAKALI & COMPANY ADVOCATES**, it is stated as follows: -

"Dear Sir

RE: BUNGOMA ELC CASE No 51 of 2012

EMILY NASIMIYU BUCHUNJU .V. ALEX WECHULI & 2 OTHERS

We refer to the above matter and the directions of the Court issued on 25.9.17.

Enclosed herewith please find a copy of a letter dated 29.9.2017 which was duly served on the plaintiff herein in our chambers on 4.10.17 but she declined to sign on our copy (copy enclosed).

We write to confirm that the plaintiff herein is aware of the contents of the letter enclosed herein.

Yours faithfully

J. O. MAKALI & COMPANY

ADVOCATES

CC: Client."

As I have already stated above, the message which was being convened to the plaintiff through the letter dated 29th September 2017 was that the Counsel had been allowed to withdraw from acting for her and that her case was scheduled for hearing on 10th October 2017 and no application for adjournment would be entertained. And as is now clear, the plaintiff was a no – show on the hearing date. It is therefore not borne out by the evidence herein for her new Counsel to submit, as she has done in paragraphs 9 and 10 of the submissions, that: -

9: "From the above series of events, we submit that it is quite clear that although the plaintiff had a Counsel to represent her, the Counsel neither informed her of the date the matter was coming up for hearing (no evidence thereof was provided that the letter dated 29th September 2017 ever reached the plaintiff) nor of the orders of the Court to dismiss her suit."

10: "We therefore submit that the Applicant was totally unaware of the orders to dismiss her suit nor was she given a chance to make representation to avoid her case from being dismissed."

The letter addressed to her on 29th September 2017 was served to her in the office of her former Counsel on 4th October 2017 but she declined to sign as indicated in the letter dated 10th October 2017 and addressed to the Deputy Registrar. This forms part of the record herein. It was not posted to her. So she knew about the hearing date almost a week earlier. All she needed to do was attend the Court in person and make representations including seeking for time to engage another Counsel.

18. The plaintiff's Counsel has also submitted that she was not given an opportunity to be heard and therefore the rules of Natural Justice was violated. The totality of the evidence before this Court is that the opportunity to be heard was given because she was informed about the hearing date in good time. She however chose not to attend Court. The rules of Natural Justice do not demand that a party be dragged to the Court to prosecute his case. All that they demand is that a party be given an opportunity for a fair hearing. That was availed to the plaintiff.

19. Her Counsel has also submitted in paragraph 14 of the submissions that:-

> ***14: "My Lord, while indeed the matter has taken a period of time, the plaintiff applicant has at all material times been ready and eager to have her day in Court as can be seen through her affidavit evidence."***

Surely a party who, having known that her case was dismissed in 2017, approaches the Court in 2019 seeking to have the dismissal order set aside or reviewed cannot be described as ***"eager to have her day in Court."*** The remedy for setting aside is granted on the basis of sound reasons. Not on the whims of the Court. In the circumstances of this case, the plaintiff does not merit those orders.

20. With regard to the remedy of review, a major consideration is that a party seeking it must approach the Court ***"without unreasonable delay."*** By her own admission, the plaintiff knew about the dismissal of her suit some three (3) days after the event. That is as per paragraph 13 of her affidavit although there is evidence that she was notified in writing and the letter was served upon her on 4th October 2017. Either way, the filing of this application in 2019 amounts to an ***"unreasonable delay"*** which has not been explained at all and which therefore disentitles her to the remedy of review.

21. There is also no discovery of any new and important matter or evidence that was not within her knowledge or any mistake or error apparent on the face of the record or any other sufficient reason to justify the order sought. The plaintiff has annexed to her supporting affidavit a letter from the Bungoma District Hospital dated 19th June 2012 showing that one **PATRICK WANYAMA BUCHUNJU** whom she describes in paragraph 8 of the affidavit as her brother, is ***"suffering from a major mental illness."*** The relevance of that letter is not clear as the said **PATRICK WANYAMA BUCHUNJU** is neither a party in these proceedings and neither is he her witness. He is listed as the 1st defendant's witness and it is not clear how his illness could have prevented her from attending the Court on 10th October 2017 to prosecute her case.

22. The up – shot of all the above is that the Notice of Motion dated 9th December 2017 is without merit. It is accordingly dismissed with no orders as to costs.

BOAZ N. OLAO.

J U D G E

23RD FEBRUARY 2022.

Ruling dated, signed and delivered on this 23rd day of February 2022 by way of electronic mail in keeping with the **COVID – 19** protocols and as was advised to the parties on 12th January 2022.

BOAZ N. OLAO.

J U D G E

23rd February 2022.