REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND AT THIKA

ELC NO. 189 OF 2017

SIMON CHOGI GATUMA.....RESPONDENT / PLAINTIFF

VS

PETER KAGUNYU KIRAGU.....APPLICANT / DEFENDANT

RULING

1. The Defendant/Applicant filed the instant application dated 15/12/2020 seeking Orders THAT;

> **i. This Court be pleased to set aside orders issued on 16th November 2020 closing the suit herein without hearing the Defendant.**
>
> **ii. The costs of this application be in the cause.**

2. The application is premised on the grounds that the Applicant's advocate mis-diarized the defence hearing date of 16/11/2020 mistakenly as 16/12/2020. The application is further supported by the Affidavit of **Damaris Nyambura Munyua Advocate,** who conceded the alleged mistake. She annexed copies of her diary for the impugned dates as ***DNM1 a & b*** and averred that on 8/12/2020 she learnt of the error when preparing for the defence hearing. She then wrote to this Court's Deputy Registrar with a view to peruse the Court file and acquaint herself with the orders of 16/11/2020. Further that the Plaintiff's advocate did forward their final written submissions ahead of the Judgment hence the application.

3. The Plaintiff/Respondent opposed the application vide his Grounds of Opposition dated **15/1/2021**. He contended that there is no cogent evidence that the Defendant's advocate failed to inform the Defendant to attend the hearing. That it is not conceivable that the Defendant's advocate's assistant failed to diarize the hearing date of 16/11/2020. He urged the Court to dismiss the application with costs.

4. The application was prosecuted by way of written submissions.

5. The Applicant filed his submissions dated 29/11/2021 through the firm of **Nyambura Munyu & Co. Advocates**. It was submitted that **Order 12 Rule 7** of the CPR empowers this Court to set aside ex-parte orders entered against a party for non-attendance. Reliance was also placed on the case of **Shah vs Mbogo [1967] E.A 116** that a Court's discretion to set aside ex-parte judgment is intended to avoid injustice or excusable mistake but not to assist a person who deliberately obstructs justice. Accordingly, that the closure of the Defendant's case without considering his evidence will cause him injustice.

6. Furthermore, that the Applicant has always been vigilant and intent to conclude the case. The Applicant reiterated the constitutional right to a fair trial pointing out that the Respondent will not suffer any prejudice that cannot be compensated by way of damages. He implored the Court to exercise its discretionary powers in his favor and allow the application.

7. In opposition, the firm of **Masore Nyang'au & Co. Advocates** filed submissions dated 9/11/2021 on behalf of the Respondent. The Respondent maintained that the Applicant has not sufficiently explained why she failed to attend Court on 16/11/2020. That the explanation how she instructed her assistant to notify the Respondent's advocate of the hearing date for 16/11/2020 yet her diary showed the erroneous date of 16/12/2020 is not plausible.

8. That Order 12 rule 7 of the CPR was not applicable herein since no judgment has been entered yet on the issue of suffering prejudice, the Respondent was emphatic that the Applicant continued occupation of the suit land denies the Respondent use of the same. Further that the Applicant's defence has not raised any triable issues that impeaches the Respondent's title.

9. Lastly the Respondent termed the Applicant's supporting affidavit as incompetent for want of jurat as required under Section 5 of the Oaths and Statutory Declarations Act. He urged the Court to dismiss the application with costs.

10. The germane issue for consideration is whether the application is merited.

11. The consequences of a Defendant's failure to attend a hearing are contained in **Order 12 rule 2 of Civil Procedure Rules** that;

> **"12. When only Plaintiff attends [Order 12, rule 2.]**
>
> **If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the Plaintiff attends, if the Court is satisfied—**
>
> **(a) that notice of hearing was duly served, it may proceed ex parte;**
>
> **(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or**
>
> **(c) that notice was not served in sufficient time for the Defendant to attend or that for other sufficient cause the Defendant was unable to attend, it shall postpone the hearing."**

12. In essence the prayer sought by the Applicant calls for exercise of this Court's discretion in determining the same.

13. It is common ground that prior to the hearing date, only the Applicant appeared before Court on 13/7/2020 and took the defence hearing date for the 16/11/2020. Counsel was directed to serve a hearing notice upon the Respondent which was done hence their attendance on 16/12/2020. The Applicant has explained that failure to attend was as a result of mis-diarizing of her diary. Extracts of the diary were annexed to the application.

14. In the case of **Belinda Muras & 6 Others vs Amos Wainaina [1978] KLR** in which Hon Madan JA (as) he then was defined what constitutes a mistake as follows:

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel 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 of a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."**

15. In line with above decision that has been reiterated in numerous decisions by our Courts and having regard to Article 159(2) (a) of Constitution of Kenya that provides for administration of justice to all, the failure of counsel to attend Court is excusable. The Court has not found any evidence to support an act on the part of Applicant intended to cause delay or pervert justice.

16. Having read and considered the application, the written submissions of the parties the Court is satisfied that the application is merited. It is allowed subject to payment of throw away costs in favour of the Respondent in the sum of Kshs 10,000/- payable before the next hearing date.

17. The orders of the Court of the 16/11/2020 deeming the defence case closed be and are hereby vacated.

18. The Applicant to take expedient steps to fix the matter for hearing of the defence case.

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Masore Nyangau for the Plaintiff/Respondent

Mrs. Kerio for Defendant/Applicant

Ms. Phyllis – Court Assistant