REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 23 OF 2009

THOMAS K SAMBU.....PLAINTIFF/APPLICANT

VERSUS

PAUL CHEPKWONY KOSKEI.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated **11th July, 2011** filed under **Orders 12 Rule 7** of the **Civil Procedure Rules** and **Section 3 A** of the **Civil Procedure Act**, the Plaintiff, **Thomas K Sambu** brought this application seeking, among other orders, that this court be pleased to set aside or vary its order of dismissal of this suit made on **29th June, 2011** upon such terms as be just as well as costs.

2. The application is supported by the affidavit of the applicant sworn on **11th July, 2011** and is premised on the grounds that the Applicant and his counsel did not attend court due to inadvertence of counsel and this being a land matter raises weighty issues.

3. In the supporting affidavit, the Applicant depones that his counsel's inadvertence in not attending the hearing arose as the counsel had been involved in another matter together with the respondent's Counsel and has attached a copy of the proceedings, marked "TAS 1".

4. The respondent filed a Notice of Preliminary Objection dated **4th October, 2011** on the following grounds:

i. That a decree had been issued on **15th July, 2011** determining the rights of the parties

ii. The Application is incompetent and ought to be dismissed as it does not seek to set aside the decree

iii. The only option for the Applicant would be to appeal as the decree has been issued

iv. A copy of the order the Applicant seeks to set aside has not been annexed to the Application.

5. On 5th October, 2012 directions were taken that the application would be disposed of by way of written submissions. Counsel for the applicant in his written submissions referred to Order **12 Rule 7** of the **Civil Procedure Rules 2010.** He also relied on the case of ***Patel v Cargo Handling Services Ltd*** **[1974] EA 75** where the court held it was just and reasonable to vary or set aside the judgment. He further submitted that the court had discretion to do so, highlighting the case of ***Waweru v Ndigah*** **[1983]** KLR 236**.**

6. ln addition, counsel for the applicant submitted that the preliminary objection was not sustainable as it did not raise pure points of law but was based on facts that were yet to be ascertained. He relied on the case of ***Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd*** **[1969]** EA 696**.**

7. The respondent's Counsel equally filed written submissions. He submitted that the framing of **Order 12 Rule 3** of the **Civil Procedure Rules** is mandatory, and that **Order 12 Rule 7** can only be invoked where a decree has not yet been issued. He further submitted that **Article 159 (2) (d)** of **the Constitution, sections 1A, 1B, 3A** and **3B** of the **Civil Procedure Act** could not come to the aid of the applicant, as he had been indolent; that the Applicant had not been denied a chance to be heard, but rather squandered it. Furthermore, if the applicant blamed his advocate for the dismissal, then his remedy lay in damages if negligence is proven.

Analysis

8. I will start by considering the Preliminary Objection first. This is because should the same succeed there would be no need for further consideration of the matter. The Preliminary Objection was filed in court on **4th October, 2011.** It was filed solely on the ground that the application was incompetent as there was no prayer to set aside the decree issued. In my view, the absence of a prayer to set aside a decree does not make the application incompetent on that ground alone. The decree resulted from the order by the judge. If that order is set aside then everything that follows collapses. I find the Preliminary objection without merit and l now move to consider the application.

9. A party seeking to have a suit reinstated must demonstrate good faith, bring the application for reinstatement without unreasonable delay and the reasons advanced by the applicant in failing to prosecute his matter should be more weighty compared to the prejudice that the defendant will suffer.

In **Simion Waitim Kimani & Three others vs Equity Building Society (2010)** eKLR, Koome J in Paragraphs 4 and 5 held;

4. "**The courts have discretion generally to reinstate a suit which is dismissed for non attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay. This suit was filed on 12th March 2002 and since 29th November 2004 no steps were taken to prosecute it. It is the court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the year 2004. The Plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years."**

5. Even if this court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the court dismissed the suit for want of prosecution. According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation……......"

10. Also see the case of Alice **Mumbi Nganga vs Danson Chege Nganga & Another (2006)** eKLR by **Kimaru J** where he states;

"This court has unfettered discretion to set aside any order which was entered *exparte.* This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. ……In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court

and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, *per se*, make this court to exercise its discretion in favour of an aggrieved litigant."

11. In the case of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR)** (*unreported)* **Waki J.A**, held at page 3 that;

" **With respect, l think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and deligence that entails such matters. Instead the applicant and his advises exhibited undesirable nonchalance, which l am not inclined to countenance''**

12. In the present case, it is clear that there was negligence on the part of counsel in not attending court. The reason given by the applicant that his counsel failed to diarize this matter is unsatisfactory. What is even more interesting is what the applicant depones in paragraph 6 of his supporting affidavit; **''that I have further been informed by my said advocate herein which information I verily believe to be true that on 29th June, 2011 at 2.30 P.M my said advocate was in the same court on a different matter which he had diarized and which involved the respondent's counsel and my said advocate.''**

13. The applicant has gone ahead to annex a copy of the proceedings for that day showing that his counsel was present in court on the very day, before the same court that dismissed his matter. In the year 2011, only one Judge was sitting in Kericho. Only one cause list was prepared for each day. For the plaintiff's counsel to attend court on that same date this suit was dismissed meant that he must have gone through the cause list for that day to ensure that the matter he attended was listed. How he could have missed the listing of this suit makes no sense. I find his attitude very casual and this being a land matter, he should have handled it with more sensitivity and diligence. I am well aware that this court has unfettered discretion to set aside any order which was entered *exparte* but this discretion has to be exercised judicially. This is one matter where the counsel's conduct precludes me from exercising my discretion in favour of his client.

14. For the reasons stated above, I find the Notice of Motion dated 11th July, 2011 without merit . It is hereby dismissed with costs.

Dated and signed at Kericho this 29th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Orina holding brief for Mr Migiro for plaintiff

Mr Siele for the Defendants

CC:

L N WAITHAKA

JUDGE