REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.148 OF 2011

JULIANA CHEPNGENO ..... PLAINTIFF/APPLICANT

VERSUS

ROBERT MUTURI THIONGO..... DEFENDANT/ RESPONDENT

RULING

The notice of motion dated 9th November, 2011 seeks, among other prayers, the setting aside of this courts order, made on 8th November, 2011, dismissing the applicant's notice of motion dated 20th June, 2011; and an order for reinstatement of that application.

The application is supported by the affidavit of the applicant's advocate and is premised on the grounds that the application was dismissed owing to the advocate's failure to appear in court at the time the application was called for hearing (at 9.00 a.m); that the advocate's delay of five minutes was caused by circumstances beyond his control (he was attending to another matter listed before Court 1); and that the advocate's failure to appear in court was inadvertent and excusable. Further that the mistake of the applicant's advocate should not be visited on the applicant who is innocent.

Maintaining that the applicant is ready to prosecute the application expeditiously and that unless the prayers sought are granted the applicant will suffer greater injustice and prejudice, the applicant's advocate has contended that it is just and fair to grant the orders sought.

In reply, the defendant/respondent filed the grounds of opposition dated 4th December, 2011. In those grounds, it is contended that no good reason has been given for failure to attend court; that there was an unexplained delay of 18 days before filing of the instant application; and that the application sought to be reinstated is lacking in merits, hopeless and unworthy of judicial time.

From the pleadings filed herein and submissions filed in support thereof, the issues for determination are:-

1. What factors and/or principles does a court consider in determining an application for setting aside and/or varying an order dismissing a suit or application for none attendant?

2. Has the applicant made a case for setting aside the orders hereto?

3. What is the order as to costs?

Principles and/or factors to consider when determining an application for setting aside an ex parte order or judgment:

The principles and/or factors that a court should consider when determining an application for setting aside an *ex parte* judgment or order were set down by the Court of Appeal for East Africa in **Shah** v. **Mbogo & Another (1967) E.A 116** thus:-

> **"...the court's discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice."**

Therefore, a party desirous of setting aside an *ex parte* judgment and/or order must satisfy the court that:-

a. The judgment or order sought to be set aside was made owing to accident, inadvertence or excusable mistake or error on the part of the applicant and/or his advocate.

b. that the ommision or action that led to the issuance of the order sought to be set aside was not meant to assist the applicant to evade or otherwise delay the cause of justice.

Has the applicant made up a case for setting aside the orders herein?

In the instant application, the advocate's failure to appear in court is described as inadvertent and excusable. It is also contended that the application was dismissed owing to a mistake on the part of the applicant's advocate. Referring to **Charles M. Kaharuka** v. **Wilson Mugo Mwangi (2013) e KLR** where J.M. Mutungi J. Stated-

> **"There is ample judicial authority to the effect that unless a party is shown to have contributed to the mistake, a party ought not to be punished for the mistake of counsel."**

The advocate for the applicant has urged the court not to visit the advocate's mistake on the applicant who is innocent and ready to prosecute the application expeditiously.

The respondent argues that, no good reason has been given for failure to attend court; there being an unexplained delay of 18 days before filing of the application.

It is noteworthy that in the submissions filed on behalf of the respondent, the issue of the advocate's mistake, which allegedly led to dismissal of the application, is not addressed. Instead, the respondent has devoted alot of time and energy on the dismissed application.

In accordance with the test propounded herein before, for the applicant to obtain the orders sought, he need not prove that the dismissed application has merits. All what he should prove, to discharge the burden imposed on him by law, is that the error that led to the dismissal of the application was inadvertent and/or excusable. He must also prove that the application was lodged without undue delay. See **Macauley** v. **De Boer & Another (2002) 2 KLR 260** where Onyancha J., observed:-

> **"The court in deciding whether to set a side a judgment will take into consideration the following factors:**

a. **.....**

b. **whether or not the applicant's application was filed without delay**
c. **.....**

d. **whether or not the applicant has generally acted diligently;**

e. **whether or not the granting of the prayer to set aside would easily be compensated in costs and that it would, considering all circumstances of the case, be to the ends of justice to exercise the court's discretion in favour of the applicant."**

The instant application was prepared a day after the order sought to be set aside was made and filed in court 18 days thereafter. No explanation has been offered for the 18 days delay in filing the application. Besides no evidence has been adduced to show that the applicant's advocate was in court as alleged. To prove engagement elsewhere, the advocate ought to have revealed the identity of the suit he was handling in the other court and/or annexed an extract of the court proceedings in the other court to prove his said commitment. Be that as it may, I take note of the observation of Madan J.A (as he then was) in **Belinda Murai & others vs Amoi Wainaina, [1978] LLR 2782**, quoted with approval by the Court of Appeal, in **Richard Ncharpi Leiyagu** v **Independent Electoral Boundaries Commission & 2 others [2013] eKLR** thus:

> **"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. . . ."**

I also take note of the observation of Apaloo J.A (as he then was) in **Philip Chemwolo & Another v Augustine Kubede [1982-88] KAR 103** where he posited:-

> **"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."**

And finally, upon taking note of the observation of the Court of Appeal in **Richard Ncharpi Leiyagu** v **Independent Electoral Boundaries Commission & 2 others** *(supra)* where it was observed:-

> **"...The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

In the spirit of these observation in the cited cases and to give a fair chance to the applicant, I set aside the order dismissing the application hereto; and order the applicant to fix the application for hearing within 30 days from the date of this ruling, failing which the application will stand automatically dismissed.

What is the order as to costs?

Owing to the mistake of the applicant's advocate hereto the respondent incurred costs in defending this application. Having found that the reason given for the advocate's failure to attend court was not convincing, I award the costs of defending the application to the respondent, the same be personally borne by the applicant's counsel who failed to attend court on time.

The upshot of the foregoing is that the application is allowed with costs to the respondent.

Dated, signed and delivered this 16th day of May, 2014 at Nakuru.

H.A OMONDI

JUDGE