REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 83 OF 2008

1. PACIFICA MORAA NYAMBARIGA

2. JOSEPH MOYA NYAMBARIGA……...……PLAINTIFFS

VERSUS

1. THE CLERK SUNEKA TOWN COUNCIL

2. CHARLES MOENGA GESICHO

3. ADRIANO ONGUTI MOMANYI……DEFENDANTS

RULING

1. On 25th November, 2008, the firm of C.O. Nyamwange & Co. Advocates who were previously acting for the plaintiffs herein listed this suit for hearing on 28th September, 2009 at the registry. The hearing date was taken in the absence of the advocates who were on record for the defendants. From the minutes of that day, the plaintiff's then advocates were directed to serve a hearing notice upon the advocates for the defendants. It is not clear from the record whether the advocates for the defendants were served with a hearing notice for the hearing that was scheduled for 28th September, 2009. However, when the matter came up for hearing on 28th September, 2009 before Musinga J. (as he then was), there was no appearance by all the parties. Neither the parties nor their advocates were in court when the matter was called out. In the circumstances, the court dismissed the suit for want of prosecution with no order as to costs.
2. On 7th December, 2009, the plaintiffs filed a Notice to act in person. This was followed by an application dated 16th February, 2010 which was filed on 17th February, 2010 by the plaintiffs in person seeking an order to set aside the said court order that was made on 28th September, 2009 so that this suit may be reinstated for hearing on merits. On 23rd March, 2011, the plaintiffs appointed the firm of Nyatundo & Co. Advocates to act for them in this suit. For reasons which are not clear from the record, when the plaintiff's application dated 16th February, 2010 came up for hearing on 11th April, 2011, the plaintiffs' new advocates applied to withdraw it and in the absence of any objection from the defendants, the application was marked as withdrawn with costs to the 2nd defendant. Soon after the withdrawal of that application, the plaintiffs filed a fresh application dated 17th May, 2011 seeking similar orders namely, the setting aside of the orders that were made on 28th September, 2009. This is the application which is the subject of this ruling. The plaintiffs' application that was filed on 28th May, 2011 was brought under order 12 rule 7 of the Civil Procedure Rules and sections1A, 3 and 3A of the Civil Procedure Act. The plaintiffs' application was brought on among other grounds that the plaintiffs' previous advocates

did not notify them of the hearing date of 28th September, 2009 and that the mistake on the part of their said previous advocates should not be visited upon them. In his affidavit in support of the application, the 2nd plaintiff deposed that the plaintiffs were not aware that this suit came up for hearing on 28th September, 2009 until 3rd December, 2009 when the court clerk of C. O. Nyamwange, advocate who was their previous advocate informed him that this suit came up for hearing on 28th September, 2009 and that the same was dismissed for non- attendance as neither the plaintiffs nor their previous advocate had appeared in court. The 2nd plaintiff deposed further that the plaintiffs stand to suffer irreparable loss and damage if this suit is not reinstated for hearing. The 2nd plaintiff annexed to his affidavit a copy of a surveyor's report to demonstrate that the plaintiffs have a strong case against the defendants. The 2nd plaintiff urged the court in the interest of justice and fairness to allow the application.

3. The plaintiffs' application was opposed by the 2nd and 3rd defendants. The 2nd and 3rd defendants swore replying affidavits on 14th March, 2012 and 5th April, 2012 respectively in opposition to the application. In their affidavits aforesaid, the defendants deposed that the plaintiffs' application is unmerited and amounts to an abuse of the process of the court. The defendants deposed further that the application has been brought after inordinate delay and that the plaintiffs have not been keen to have the dispute between the plaintiffs and the defendants determined once and for all. The defendantsdeposed further that the plaintiffs' application is incompetent and incurably defective. The defendants urged the court not to exercise its discretion in favour of the plaintiffs.
4. On 29th May, 2013, the advocates for the parties agreed to argue the plaintiffs' application by way of written submissions. The plaintiffs filed their written submissions on 14th June, 2013, the 3rd defendant on 18th September, 2013 and the 2nd defendant filed his written submissions on 19th September, 2013. I have considered the plaintiffs' application together with the affidavit of the 2nd plaintiff filed in support thereof. I have also considered the 2nd and 3rddefendants affidavits in opposition to the application and the parties'advocates' respective written submissions. The plaintiffs' application is brought under Order 12 Rule 7 of the Civil Procedure Rules which confers upon the court, the power to set aside an order for dismissal of a case for non-attendance by a party. Whether or not to exercise the power is a matter for the discretion of the court. Like any other judicial discretion, the discretion to set aside an order for the dismissal of a suit must be exercised judiciously on well-established principles. As was stated by Potter JA. in the case of **Pithon Waweru Maina –vs- Thuka Mugiria (1982-1988) 1KAR 171**, the discretion of the court to set aside judgment entered due to the failure of a party to attend a hearing is not limited or restricted save that the main concern of the court should be to do justice to the parties and if the court exercises its discretion to set aside the judgment, it does so on such terms as may be just. In the case of **Shah –vs- Mbogo and Another [1967] E. A 116**, it was held that the court's discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.
5. It follows from the foregoing that what I need to determine in the application before me is whether the failure by the plaintiffs to attend court on 28th September, 2009resulted from an excusable mistake or error or it was meant to deliberately delay the cause of justice.The other issue connected to that is whether it would be fair and just for all the parties herein that the said orders of 28th September, 2009 be set aside. As I have stated above, the orders sought are discretional. A party who seeks the exercise of the court's discretion in its favour must lay a basis on which that discretion should be exercised and should also demonstrate that it deserves the exercise of such discretion. The plaintiffs were therefore under a duty to demonstrate that their failure to attend court was as a result of an excusable mistake or error and that in the circumstances it would be just that the order made in their absence be set aside. The plaintiffs'case is that their previous advocates, who took the hearing date of 28th September, 2009 failed to notify them of that date and also failed to appear in court to represent them. The plaintiffs were therefore not aware that this suit was coming up for hearing on 28th September, 2009 when the same was dismissed for non-attendance. The plaintiffs have attributed their failure to attend court on 28th September, 2009

to a mistake on the part of their previous advocate which they have urged the court not to visit upon them. A mistake or error whether made by an advocate or a party to the suit may be excused. Whether a mistake or error is excusable depends on the circumstances of each case. In certain circumstances, the loss or damage occasioned by errors or mistakes made by advocates are left alone to be borne by such advocates while in some cases, the courts do intervene to ensure that justice is done to the parties particularly in cases where the party seeking the excusal of such mistake is completely not at fault and the loss or damage likely to be occasioned by the courts failure excuse such error or mistake would be irreparable.

6. When this suit came up for hearing before Musinga J. (as he then was) on 28th September, 2009, all the parties to this suit together with their advocates did not appear in court. This suit was therefore dismissed by the court on its own motion. It is not clear whether the defendants' advocates were aware that the matter was coming up on that day and if they were why they never appeared in court. For the plaintiffs, they have contended that they were not notified by their previous advocates that the matter was coming up on that day and that is why they did not attend court. The contention by the plaintiffs that they were not aware of the hearing date of 28th September, 2009 has not been controverted. Failure to notify the plaintiffs of the hearing date was a mistake committed by the plaintiffs said previous advocates. Whether or not to visit that mistake upon the plaintiff depends on what the plaintiffs did upon becoming aware that this suit came up on that day and was dismissed for non-attendance. According to the plaintiffs' affidavit in support of the present application, the plaintiffs did not know until 3rd December, 2009 that this suit was dismissed on 28th September, 2009. From the record, the first step taken by the plaintiffs was to file a Notice to Act in person. This was done on 7th December, 2009. This was followed on 17th February, 2010 by an application to set aside the said order of dismissal of this suit. This application by the plaintiffs was withdrawn on 17th November, 2011 by the plaintiffs' advocates on record which filed the present application. I am of the opinion that the plaintiffs took immediate steps once they learnt that this suit had been dismissed to have the order of dismissal set aside. This in my view was a demonstration of the plaintiffs desire to proceed with this suit. The fact that the plaintiffs' application dated 16th February, 2010 which they filed in person was later on withdrawn when they instructed an advocate does not change the fact that the plaintiffs took immediate steps when they learnt of the dismissal of this suit to have the order set a side and the suit reinstated for hearing. I have noted further from the record that when this suit was dismissed, it was the first time that it was coming up for hearing. There is no evidence on record that the suit had come up for hearing previously and that the plaintiffs had not been keen or ready to go on with the same. The defendants have not convinced me that they would suffer serious prejudice or injustice if this suit is reinstated for hearing. From the pleadings and material on record, I am of the view that a fair hearing can still take place if this suit is reinstated. I am of the opinion that in the circumstances of this case, it would not be fair to visit the mistake of the plaintiffs' previous advocates upon the plaintiffs.
7. The defendants had opposed the plaintiffs' application on various grounds. The first ground was that the application herein was brought after inordinate delay. As I have already stated above, the plaintiffs filed an application to set aside the orders of dismissal as soon as they had notice of the same. When the said application was withdrawn on 17th November, 2010, the present application was brought immediately thereafter on 26th May, 2011. When considering whether or not the plaintiffs were indolent, I think it would only be fair to take into account when the plaintiffs took the first action upon having notice of the dismissal of the suit and the conduct of the plaintiffs thereafter. I agree with the defendants that if the present application which was filed on 28th May, 2011 was the first application that had been filed by the plaintiffs to set aside orders that were made on 28th September, 2009 then the plaintiffs would be guilty laches and indolence. This however is not the case. I am not persuaded that the plaintiffs' application should be denied on account of inordinate delay. The defendants had also raised some issues touching on the competency of the application. The 2nd defendant's advocates had submitted that the plaintiffs could only have filed a notice to act in person with leave of the court and consequently, the notice to act in person that was filed by the plaintiffs without such leave and notice of appointment of advocates that was filed by the plaintiffs advocates on record were all irregular which irregularity

renders the application herein incompetent. The plaintiffs notice to act in person was filed under Order III Rule 9 of the repealed Civil Procedure Rules. Under Order III Rule 9A of the said Civil Procedure Rules such notice would have been filed only with leave of the court in the event that it was being filed after judgment had been entered in this suit. I am not in agreement with the 2nd defendant's submission that the notice to act in person that was filed herein by the plaintiffs was irregular. The dismissal of this suit for non-attendance did not amount to a judgment. It was merely an order. Judgments give rise to decrees and decrees do not arise from dismissal of suits for default. In this regard refer to the definition of a decree in section 2 of the Civil Procedure Act, Cap. 21 Laws of Kenya. It is my finding therefore that the notice of change of advocates filed herein by the plaintiffs and the notice of appointment of advocates filed by the plaintiffs advocates on record were properly filed. The present application is therefore competent.

8. In conclusion, it is my finding that the plaintiffs have laid a proper basis on which this court can exercise its powers under Order 12 Rule 7. The plaintiffs have demonstrated that their failure to attend court on 28thSeptember, 2009 was as a result of excusable mistake or error. I am not persuaded that the plaintiffs' failure to attend court on the said date was deliberate and that it was intended to delay the hearing and disposal of this case. I find the plaintiffs' application dated 17th May, 2011 well merited. The same is allowed with costs to the 2nd and 3rd defendants assessed at Ksh. 5000.00 each to be paid forthwith.

Delivered, dated and signed at Kisii this 16th of May 2014.

S. OKONG'O

JUDGE

In the presence of:

Mr. Minda h/b for Nyatundo for the plaintiffs

Mr. Soire for the defendant

Mr. Mobisa Court clerk

S. OKONG'O

JUDGE