



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC NO. 39 OF 2020**

**JOHNSON NDUYA MUTHAMA HOLDINGS LTD.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**FRANCIS MULWA KAVOI MUSOMBA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPH NZYOKA MUSOMBA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MUTHOKA MATAKA SOO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ALBANUS MUASA KAVOI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MBITHI NGULUKYO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DANIEL MUTISO MATAKA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. This Ruling is in relation to the Notice of Motion Application dated 2<sup>nd</sup> November 2020, brought under Articles 25, 48 & 159 of the Constitution of Kenya, Order 12 Rule 7, Order 51, Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act wherein the Applicant is seeking the following orders:

a) Spent.

b) That the Honourable court be pleased to review and or set aside the ex parte orders issued on 21<sup>st</sup> October, 2020 and proceedings thereto and in its place be pleased to reinstate the Defendants' applications dated 30<sup>th</sup> July, 2020 and 2<sup>nd</sup> July, 2020 and further order the same be heard on merit.

c) That the Honourable court be pleased to deem the Replying Affidavit dated 28<sup>th</sup> October, 2020 to the Defendants Application of the 30<sup>th</sup> July, 2020 as duly filed.

d) That the application herein be set down for hearing interpartes as a matter of urgency.

e) That costs be in the cause.

f) Any other order or relief that this Honourable court is pleased to issue in the circumstances.

2. The application is supported by the Affidavit of Mr. Mogaka Omayio Wycliff, counsel for the Applicant, who deposed that this matter came up on the 29<sup>th</sup> September, 2020 virtually, when he held brief and appeared alongside Mr. Omari when the honorable court issued the hearing date for the Defendant's Application dated 30<sup>th</sup> July, 2020; that counsel inadvertently misdiarized the matter to be coming up on 30<sup>th</sup> October, 2020 and the matter came up on 21<sup>st</sup> October, 2020 when the court allowed the application dated 30<sup>th</sup> July, 2020 in the absence of the Plaintiff/Respondent's advocates; that not knowing the directions of the court, the Plaintiff/Applicant lodged the replying affidavit to the Defendants' Application dated 30<sup>th</sup> July 2020 via email with the hope of having the matter proceed on 30<sup>th</sup> October, 2020; that on 30<sup>th</sup>

October at around 9:00am and upon noticing that the matter had not been listed, he called Machakos ELC Registry whereof a clerk identified as Simon Okara informed him that the matter was not scheduled to come up on the 30<sup>th</sup> of October but rather came up on the 21<sup>st</sup> October, 2020; that the Machakos ELC registry replied with an email giving the status of the matter and conveyed to him that indeed the matter had proceeded ex parte on 21<sup>st</sup> October, 2020 and the Defendants' Application dated 2<sup>nd</sup> July, 2020 and 30<sup>th</sup> July, 2020 allowed.

3. Counsel deposed further that the Defendants' advocate took advantage of the Plaintiff/Respondents' absence to mislead the court to proceed even when the application dated 2<sup>nd</sup> July, 2020 was not meant to proceed since directions had not been issued; that unless this matter is heard and orders granted, the Plaintiff stood to suffer substantive loss.

4. In response, the Defendants filed a Replying Affidavit dated 18<sup>th</sup> November 2020 sworn by the 1<sup>st</sup> Defendant herein who stated that on 29<sup>th</sup> September, 2020 when the matter came up virtually he was in Mr. Were's office and heard Mr. Omari and Mr. Omaiyo introducing themselves as advocates for the plaintiff; that therefore it could not be true that the two Advocates missed the date issued by court hence the explanation they are trying to put across were mere excuses as they were in different locations and both of them could not purport to have heard a wrong date at the same time; that if at all the Plaintiff could not file its Replying Affidavit in time they would have contacted their advocates on record for indulgence which they did not do; that Mr. Omaiyo called to find out what transpired on 21<sup>st</sup> October, 2020 hence knew about the date.

5. He deposed further that from the proceedings, it was apparent that even if the orders were to be set aside then still it will be an exercise in futility since the Affidavit will still remain Defective and an affidavit cannot be amended.

6. He deposed that the orders which the Plaintiff was enjoying were issued ex-parte for more than the required period hence had to be vacated on their application and as such the Plaintiff's application dated 2<sup>nd</sup> November, 2020 could not serve any meaningful purpose; that a party seeking to set aside any order of the court must annex the order to the application which the applicants have failed; that there is no way a response could be done to an email which had not been received since the email was purported to have been sent at 11:33am yet the response was sent at 6:30 am of the same day; that paragraph 11 of annexure 1 had confirmed that Kangundo ELC Suit No. 35 of 2020 was withdrawn on 15<sup>th</sup> June, 2020 hence the Verifying Affidavit to the Plaintiff contained falsehood and as such even if the orders issued herein on 21<sup>st</sup> October, 2020 were to be set aside, the court will still dismiss the verifying affidavit and he prayed that the application be dismissed with costs.

7. The application was canvassed by way of written submissions and on record are both the Plaintiff's submissions filed on 4<sup>th</sup> May 2021 and the Defendant's submissions filed on 9<sup>th</sup> November 2021.

#### **PLAINTIFF/APPLICANT'S SUBMISSIONS**

8. The Plaintiff's Counsel submitted that the Defendant's advocate misled the court that the application dated 2<sup>nd</sup> July 2021 was coming up alongside that of 30<sup>th</sup> July 2020 depriving the Plaintiff his inalienable right to be heard. Counsel submitted that the Plaintiff had set out the background of events which led to his non-attendance in court on the 21<sup>st</sup> October, 2020 and referred to the case of ***Giro Commercial Bank Limited v Jasvinder Singh Dhadialla [2005] eKLR*** which I have considered.

9. Counsel finally submitted that the Plaintiff had a plausible response to the application dated 30<sup>th</sup> July 2020 and he ought to be given an opportunity to be heard so that the matter is determined on merit.

#### **DEFENDANTS/RESPONDENTS' SUBMISSIONS**

10. Counsel for the Defendants submitted that it was apparent that timelines issued by this court were never complied with as at 21<sup>st</sup> October, 2020 and hence the Defendant's application was unopposed. Counsel submitted that the Defendants had stated clearly that they had never tried to breach any peace and had never done anything that could bring them into confrontation with the Plaintiff hence no danger is imposed on the suit property hence the matter can proceed for hearing of the main suit.

11. Counsel further submitted that the Plaintiff/Applicant had not furnished this court with sufficient grounds for setting aside of orders as prayed for this court to exercise its discretion in favour of the applicant. Counsel submitted that the Plaintiff had not demonstrated prejudice if this application is not allowed. Counsel further contended that the issue of swearing false information amounted to perjury since an affidavit in evidence is given under oath; Counsel stated that the record can prove that there was a case existing at the time of the filing of these proceedings; Counsel relied on the case of ***Edward Karanja Ragui v Barclays Bank of Kenya Ltd (2002) eKLR 647***.

12. Counsel cited Order 40 Rule 7 of the Civil Procedure Rules for the proposition that any order of injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order. Counsel concluded that the application was not merited and should be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

13. I have considered the application, the submissions and authorities cited. In my considered opinion the only issue that arise for determination is whether the court should review and/or set aside the orders issued on 21<sup>st</sup> October, 2020.

14. Article 50 of the Constitution guarantees fair hearing and sub article (1) provides;

**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public**

hearing before a court or, if appropriate, another independent and impartial tribunal or body.

15. The jurisdiction of the Court for review of orders is provided for in Order 45 Rule 1 (1) of the Civil Procedure Rules provides:

“1. Application for review of decree or order

(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 other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

16. It is now settled that for courts to review their decision they must do so in compliance with Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. In the case of Nasibwa *Wakenya Moses v University of Nairobi & Another* [2019] eKLR the court observed that;

“Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds;

(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

(b) on account of some mistake or error apparent on the face of the record, or;

(c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

17. In *Richard Ncharpi Leiyagu vs IEBC & 2 Others CA 18/2013* the Court of Appeal was categorical that the court's discretion to set aside an ex parte judgment or order for that matter is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately obstructs or delays justice.

18. In the instant case, the Applicant's counsel has stated that he misdiarized the matter and indicated 30<sup>th</sup> October 2020 instead of 21<sup>st</sup> October 2020. He has presented a copy of a leaf of his diary to that effect. Counsel has also shown the court the conversation between him and the court assistant of 30<sup>th</sup> October 2020. Having filed the application herein on 2<sup>nd</sup> November 2020, it is clear that having realized his mistake, the applicant moved the court with prompt to rectify his mistake. In the circumstances I am satisfied with the explanation given by the applicant for his failure to attend court when this matter came up for hearing of the application dated 30<sup>th</sup> July 2020 on 21<sup>st</sup> November 2020 and that the same was an inadvertent mistake not meant to obstruct or delay justice.

19. In the premises, I find and hold that the Applicant's explanation as to his non-attendance of court on 21<sup>st</sup> October 2020 is excusable and I allow the application dated 2<sup>nd</sup> November 2020 in the following terms;

a) That the Exparte orders issued on 21<sup>st</sup> October 2020 be and are hereby set aside.

b) That the Plaintiff is granted leave to file and serve hard copies of his replying affidavits to the applications dated 30<sup>th</sup> July 2020 and 2<sup>nd</sup> July 2020 in 7 days of today.

c) That parties to file and exchange submissions in respect of the two aforesaid applications in 21 days of today.

d) That this matter be listed for mention on 28<sup>th</sup> April 2022.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9<sup>TH</sup> DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Were for the Respondents

No appearance for the Applicants

Josephine Misigo – Court Assistant