



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. 46 OF 2019**

**FRANCIS MURANGU *alias***

**MURANGU KAMAU.....APPELLANT/APPLICANT**

**VERSUS**

**MWANGI KAMUTHU RUHIU**

**TERESIAH NYAMBURA NDUNGU**

**JOSE NGARUIYA KINITHI (*Suing for and on behalf of***

***African Foundation Akorino Community Church*).....RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion Application dated **8<sup>th</sup> November 2019** by the Appellant/ Applicant seeking for orders that;

- 1. This Honourable court be pleased to set aside its orders of dismissal made on the 31<sup>st</sup> July 2019 and the suit be restored.**
- 2. Costs be in the cause.**

The Application is premised on the grounds that the suit came up for hearing on several times, but could not proceed as the counsel for the Appellant was held up in another Court. That the Appellant has shown interest in prosecuting his case and thus should not be punished because of the mistake of the Counsel. That it is only fair and in the interest of Justice that the matter be restored and be set down for hearing as the ownership of the land is the subject matter of this suit.

In his Supporting Affidavit, **Francis Murangu alias Murangu Kamau** averred that the Application dated **24<sup>th</sup> June 2019** was dismissed in **July 2019** for non attendance. That his Advocate on record was held up in another Court in **Machakos** when the matter came and thus could not attend when the matter was called out. Further that he should not be punished because of the mistake committed by the Advocate. That he will suffer great injustice if the matter is not reinstated as he was keen to prosecute the matter. That he stands to lose a great deal if the matter does not proceed. That it is in the interest of Justice that the matter proceeds.

The Application is opposed and **Mwangi Kamuthu Ruhii**, the Respondent swore a Replying Affidavit on **13<sup>th</sup> January 2020**, and averred that the Application is misconceived, vexatious frivolous and an abuse of the Court process. That no proof has been advanced that the Applicant's Advocate was indeed in Machakos on **24<sup>th</sup> June 2019**. Further that the Applicant has not demonstrated that he was in Court himself to pursue the prosecution of the said Application. That despite taking a date for hearing of the Application, it is evident that the Applicant was not keen on pursuing the same.

It was his contention that there was no new evidence neither any sufficient reason that has been advanced by the Applicant to warrant the review of the order made in **July 2019**, thus failing to meet the threshold for a review. Further that despite the Application being dismissed in **July 2019**, the Applicant has brought the Application in **November 2019**, which delay is unreasonable and incurable. That the setting aside/ reviewing of an order of the Court is a Judicial discretion and that the Applicant does not deserve it as he and his Advocate have shown a laxity in prosecuting this matter. He urged the Court to dismiss the Application.

The Application was canvassed by way of written submissions which the Court has carefully read and considered and finds that the issue for determination is whether the Appellant/ Applicant is entitled to the orders sought.

The Appellant/ Applicant has sought for orders to set aside the Ex parte orders made on **31<sup>st</sup> July 2019**, dismissing the Application dated **24<sup>th</sup> June 2019** for non attendance. It is not in doubt that the said Application which was seeking leave to appeal out of time was filed by the Appellant/ Applicant under Certificate of Urgency on **11<sup>th</sup> July 2019**, to which the Court gave the hearing date of **31<sup>st</sup> July 2019**. The Appellant/ Applicant and/or his Advocate did not attend Court on the said date and the allegation that the Appellant/ Applicant's Advocate was attending Court on the said date in Machakos is not supported by an evidence.

Further the Appellant/ Applicant has not given any reason why the said Advocate did not send a representative to his hold brief nor has the delay of **4 months** that saw the filing of the instant Application been explained. Though the Appellant/ Applicant might put the Defense of Counsel, he has not indicated to the Court that he did not know of the said date nor has he indicate that he made any follow up to his case to cure the inordinate delay .

Setting aside of an ex parte judgment is the discretion of the court and in so doing, such discretion is unfettered, but the same should be exercised judiciously and not capriciously – see the case of **Shah Vs Mbogo (1967) E.A. 166** the court held that:

*“This discretion to set aside as ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. “29”. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.*

It is the Court’s considered view that no sufficient reason has been tendered by the Appellant/ Applicant as to why there was non attendance in Court on that particular day and why there was inadvertent delay in bringing the instant Application, while the previous Application had been brought under Certificate of Urgency.

The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion, while also ensuring that Justice has been done. The Court in *Patel....Vs....E.A Cargo Handling Services Ltd (1974) EA 75*, held that:-

*“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”*

The Upshot of the foregoing is that the Appellant / Applicant has not met the threshold for warranting this the Court to exercise its discretion in his favour and consequently the applicant is not entitled to the setting aside of the Ex parte Orders.

Having now carefully read and considered the instant Application, the affidavits and annexures thereto together with the written submissions, the Court finds that the Notice of Motion Application dated **8<sup>th</sup> November 2019**, is **not** merited and the same is dismissed entirely with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 25TH DAY OF MARCH 2021**

**L. GACHERU**

**JUDGE**

**25/3/2021**

**Court Assistant - Dominic**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Muriuki holding brief for Njiru for the Appellant/Applicant**

**Mr. Kanyi for the Respondent**

**L. GACHERU**

**JUDGE**

**25/3/2021**