REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 312 OF 2016

KARIMA MWANGOMBE.....PLAINTIFF

VERSUS

1. JUHUDI WOMEN GROUP

2. MARY MBEGA

3. MBODZE MBURA

4. CHITSAKA MWADZOVA

5. KINGSFORD ROCHIER.....DEFENDANTS

RULING

1. By the Notice of Motion dated and filed herein on 22nd October, 2020, Karima Mwang'ombe (the Plaintiff) prays for orders: -

> ***2. That the Honourable Court be pleased to reinstate the Plaintiff's plaint dated 16th November, 2016 and order a fresh hearing for both Plaintiff's case and Defendant Counterclaim.***
>
> ***3. Cost be in the cause.***

2. The application which is supported by an affidavit sworn by the Applicant's Advocate, Robinson Malombo is based on the grounds:

> **a)** ***That the Plaintiff's Plaint dated 16th November, 2016 was dismissed on 21/10/2020 for want of prosecution;***
>
> **b)** ***That the Plaintiff was and is still desirous to proceed with the case but due to unavoidable circumstances he was unable to proceed;***
>
> **c)** ***That the Plaintiff's Counsel was in isolation due to Covid-19 and this fact was brought to the court's attention through the Advocate holding brief but the same was declined on the ground that there was no medical report supporting the same;***
>
> **d)** ***That the Plaintiff's Counsel has now obtained medical evidence confirming his indisposition hence the need to reinstate the application;***
>
> **e)** ***That the Defendant proceeded with the Counter-claim unopposed and the Plaintiff was condemned unheard;***
>
> **f)** ***That it is in the interest of justice that the application be allowed.***

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 6th November, 2020, Mary Mbega the Defendant herein on her own behalf and on behalf of the 1st to 5th Defendants avers that the Application herein is misconceived and an abuse of the court process. The Defendant asserts that the Plaintiff has been unwilling to prosecute the suit since the filing of the suit herein in 2016.

4. The Defendants deny that the adjournment of 21st October, 2020 was declined on account that there was no medical report in support of the Applicant being struck by COVID-19 as the Court's reason for the denial was that the matter had been given a last adjournment and the

Plaintiff did not have witnesses to proceed.

5. The Defendant further avers if at all the Plaintiff's Advocate had been struck by COVID-19 on 19th October, 2020 they were not called and informed at the earliest opportune time and on the hearing date his representative did not provide the Court with the details of his sickness or make alternative arrangements for the hearing.

6. The Defendants urge the Court to reject the application on account that for four (4) years they have continued to suffer financial, mental and emotional frustrations due to the Plaintiff's habitual failure to proceed and finalize his case against them in time and raise issues with the medical report annexed to the Plaintiff's application stating it lacks authenticity.

7. I have considered the application and the respective response thereto. I have equally perused and considered the rival written submissions and authorities placed before me by the Learned Advocates for the parties.

8. I think it is now settled that it is within the discretion of the Court to set aside any order issued ex-parte by itself so long as sufficient cause has been shown for the exercise of such discretion. As was stated in ***CMC Holdings Ltd –vs- Nzioki (2004) 1KLR 173: -***

> ***"In law, the discretion that a Court of law has in deciding whether or not to set aside an ex-parte order… was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be a proper use of such discretion if the Court turns its back on a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error…"***

9. That being the case, in circumstances such as this, the primary concern of the Court would be to interrogate the reasons given by the Plaintiff for his failure to attend Court and whether any prejudice would be suffered by either the Plaintiff or the Defendant should the ex-parte orders be set aside and the suit be reinstated to hearing and disposal on merits.

10. In this respect, and from the record herein, when this matter came up for hearing on 21st October 2020, the Advocate holding brief for the Plaintiff's Counsel informed the Court that Mr. Malombo Advocate for the Plaintiff had been taken ill with the now common Covid- 19 disease. The request for adjournment was rejected largely on account of the Plaintiff's past record which appeared to suggest that he had been less than enthusiastic in prosecuting this case and the fact that there were no supporting documents to the claim of sickness.

11. In the Supporting Affidavit to the application herein, Mr. Robinson Malombo Advocate now avers that he was diagonised with the said Covid-19 on 19th October 2020 and was per the Covid- 19 Health Protocols advised to proceed to self-isolation. He further avers that out abundance of caution he closed his Law Firm and sent all employees on compulsory leave.

12. Counsel further avers that it is only a day to the hearing that he received a call from the Plaintiff who informed him that the matter was due for hearing the following day. On that account, Counsel asserts that he called Mr. Obaga Advocate to hold brief after advising the client that he needed not to attend Court as the matter was most likely going to be adjourned.

13. While the Plaintiff's Counsel was certainly in error in advising his client not to attend Court, I did not find any reason to doubt the claim that he was unwell and in isolation. Given those circumstances, it would not have been possible for the Advocate to provide concrete evidence of his ailment in Court the following day.

14. The orders issued herein in the absence of the Plaintiff and his Advocate have the effect of locking out the Plaintiff from the hearing of his case. While the Plaintiff has not been very keen in prosecuting his claim, I find the reasons given for their absence in Court on the hearing date plausible. As Madan J (as he then was) stated in ***Belinda Murai & Others –vs- Amos Wainaina (1978) KLR: -***

> ***"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 certainty 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……"***

15. In the circumstances herein, I find merit in the Plaintiff's motion dated 22nd October 2020. I will allow it on condition that they pay unto the Defendants thrown away costs in the sum of Kshs 30,000/- within 30 days from today failure to which the application shall stand dismissed.

16. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF MARCH, 2021.

J.O. OLOLA

JUDGE