



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 301 OF 2014

BHARAT KUMAR RAOJIGHAI PATEL.....1ST PLAINTIFF/APPLICANT

LIWAZA LIMITED.....2ND PLAINTIFF/APPLICANT

=VERSUS=

CHRISTOPHER OTIENO OUGO.....1ST DEFENDANT/RESPONDENT

RAPHAEL G. OTIENO KOPIYO.....2ND DEFENDANT/RESPONDENT

KENNEDY OTIENO ABONYO.....3RD DEFENDANT/RESPONDENT

ROBERT M. NYAKUNDI T/A ONYANCHA NYAKUNDI

& CO. ADVOCATES.....4TH DEFENDANT/RESPONDENT

RULING

1. This is the Notice Motion dated 23rd January 2019 brought under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 and Order 12 Rule 7 of the Civil Procedure Rules of the Civil Procedure Rules and Article 159 of the Constitution of Kenya, 2010 and all other enabling provisions of law.

2. It seeks orders:-

1. Spent.

2. That the honourable court be pleased to set aside its order of 24th September 2018 dismissing the plaintiffs/applicants plaint dated 13th march 2014 with costs and do reinstate the said suit.

3. That this honourable court be pleased to issue any further orders as it deems fit.

4. That the cost of the application be provided for.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (j).

4. The application is supported by the affidavit of Justus Obuya Advocate for the plaintiffs/applicants sworn on the 23rd January 2019.

5. The application is opposed. There are grounds of opposition filed by the 1st plaintiff/respondent dated 8th April 2019.

6. On the 15th October 2019, the court with the consent of the parties directed that the application be canvassed by way of written submissions. The plaintiffs'/applicants' submissions are dated 15th April 2020 while the 1st defendant's/respondent's are dated 18th August 2020.

7. I have considered the notice of motion and the affidavit in support. I have also considered the grounds of opposition, the written

submissions on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

8. Order 12 rule 7 of the Civil Procedure Rules, 2010 provides that:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

It is the plaintiffs'/applicants' case that failure to attend court on 24th September 2018 constituted an inadvertent mistake that did not intend to deliberately delay the course of justice. Further that the firm has been diligent in handling this matter as is evident from the undisputed facts of paragraph 13 of the supporting affidavit.

9. In the case of **Belinda Murai & Others vs Amos Wainaina [1978] KLR 278 per Madan JA** where it was stated thus:-

“A mistake is a mistake. It is no less a mistake because it is an 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 mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it out certainly to do whatever is necessary to rectify it if the interests of justice so dictate”.

10. Similarly, in the case of **D. T. Dobie & Co. Ltd vs Joseph Mbaria Muchina (CA 37 of 1978).**

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to acting darkness without the full facts of a case before it.....”

11. I am satisfied with the reasons given in the supporting affidavit of Justus Obuya Advocate, sworn on the 23rd January 2019. I find that no prejudice will be occasioned to the defendants if this suit is reinstated.

12. I hereby exercise this court's discretion in favour of the plaintiffs/applicants. I find merit in this application and the same is allowed in terms of prayer (3) of the Notice of Motion. The costs of this application be borne by the plaintiffs/applicants.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF MARCH 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Njuguna for Munyao for the Plaintiffs

No appearance for the Defendants

Phyllis - Court Assistant