REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 298 OF 2017

(FORMERLY ELC NRB 805 OF 2016)

JOSEPH NDIRANGU MUNENE.....PLAINTIFF/ APPLICANT

VERSUS

PETER MACHARIA MURIU.....1ST DEFENDANT/RESPONDENT

MICHAEL NJEHIA KIARIE.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated ***16th November 2019,*** by the Plaintiff/ Applicant seeking for orders that;

1. ***THAT the Honourable Court be pleased to set aside the Orders and Decree of Hon. Lady justice L. Mbugua (ELC Judge) made on 4th December 2018 dismissing this suit for want of prosecution and all other consequential orders thereto;***

2. ***THAT the Honourable court be pleased to reinstate this suit.***

3. ***THAT the costs of this Application be in the cause.***

The Application is premised on the grounds that the matter was coming up for **Notice to Show Cause (NTSC**) on ***4th December 2018,*** but both parties and their Counsel did not attend and the court dismissed the suit for want of prosecution. Further that failure to attend Court on the material day was not intentional as the Advocate was served with the Notice to Show Cause on ***22nd November 2018,*** and the same was received under protest as the Notice was too short and the Advocate had other matters already fixed for hearing in Nairobi and Machakos Law courts. Further that the Advocate sent a clerk to Court to ensure his brief is held and the interests of the client are well represented. That the clerk was new in the Law Firm and in town and did not understand the difference between the **Thika Environment & Land Court** and the **Thika Chief Magistrates Court**, and thought both were located at the Chief Magistrates Court's compound. That by the time he was informed of the location of the Thika Environment & Land Court and before he got to Court, the matter had already been called out and dismissed for want of prosecution. That the Plaintiff/ Applicant is keen on prosecuting his said suit and no party particularly the Defendants/ Respondents shall suffer prejudice if this instant Application is allowed as it is in the interest of Justice that the said orders be allowed.

In his Supporting Affidavit, ***John Kaingati Kamonjo*** the Plaintiff's/ Applicant's Advocate averred that as per his records, the Law Firm made a Notice of Motion Application dated ***21st June 2019,*** praying that the matter be transferred to Ruiru Law Courts as the subject matter was within Ruiru Law court's Jurisdiction. That upon filing, his clerk was given a hearing date for the Application which was scheduled for **7th *October 2019*** .That when his clerk sought to serve the Application upon ***M/S Kanyi Kiruchi & Co Advocates,*** for the Defendants/ Respondents, he was informed that the suit against their clients had already been dismissed for want of prosecution on ***4th December, 2018***.

He averred that his former clerk had not informed him that the suit had been dismissed and he only learnt of the position when his current clerk conducted service upon the Defendants/Respondents . That there were efforts to prosecute the suit but for the inadvertent failure to attend court on ***4th December 2018***. That the Plaintiff/ Applicant has always wanted to prosecute the suit and it was unfair that the same was dismissed without hearing his case. That the question of ownership of ***Plot No. 3128*** **within** land parcel No. ***Ruiru West Block 1/ Githunguri*** is contained in ballot No. **G3** which was still the subject of the Plaintiff's/ Applicant's suit is still contentious and it is only fair and just that the Application be allowed.

The Application is opposed and the 2nd Defendant/ Respondent swore a Replying Affidavit on **9th *January 2019,*** and averred that he is the

absolute owner of all that property denoted by **ballot No. G3**, share **certificate No. B309**. Further that he has been advised by hi advocate that the matter came up for dismissal on **4th December 2018** and both his Counsel and the Plaintiff's/ Applicant's Counsel were duly served with the dismissal Notice and the matter was subsequently dismissed on ***4th December 2018*** one year before bringing the current Application. Further that his Advocate has advised him that the suit was dismissed because the Plaintiff/ Applicant had not taken any steps to prosecute the matter for a period exceeding one year and the next course of action was to dismiss the suit.

That the Application is an abuse of the Court process and the Plaintiff/ Applicants is an indolent litigant as the matter was dismissed on ***4th December 2018*** and the Plaintiff's/ Applicant's Counsel admits that he had been served. That there was sufficient time between the service of the said Notice to show cause and the time it was slated for hearing on ***4th December 2018*** . Further that the Plaintiff/ Applicant through his advocate would have chosen to file a Replying Affidavit or attend Court if at all he felt there were reasons preventing him from prosecuting the matter within the said 1 year. That the Plaintiff/ Applicant was neither in Court for reasons not given and so was his advocate who chose to attend to other matters but has not elaborated or provided any proof of that. Further that no reasons were advanced by the Plaintiff/ Applicant nor his Counsel for failure to take action within one year. Going by the current Application the Plaintiff's/ Applicant's Counsel knew all along that the matter was dismissed and it has taken them one year to prepare an Application to set aside the orders of dismissal. That the Plaintiff/ Applicant have not explained what happened between dismissal and when they filed the instant Application on ***16th November 2019*** . That the inordinate delay has not been explained and therefore the suit is not one that can be resurrected.

The Plaintiff/ Applicant ***Joseph Ndirangu Munene*** swore a Supplementary Affidavit on ***6th November 2020,*** and averred that he commenced the suit on ***27th June 2016,*** by way of Certificate of Urgency, Notice of Motion and Plaint. That the Court delivered its Ruling on ***25th July 2017*** and directed that none of the parties should have any dealings with the land, that the OCS Ruiru Police Station to ensure status quo order had been maintained and Court order complied with and further that parties to comply with order 11 within the next 30 days. That the matter had not been fixed by either party hence the matter was never ready for trial. Further that Notice to show cause was served on his previous Advocate on **22nd November 2018** , who did not respond to the same and also did not attend Court . That he was aware that his previous Advocate was unware of the Order dismissing the suit. He contended that he was keen on prosecuting the matter.

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

The Plaintiff/ Applicant has sought for setting aside of the orders of the Court made on ***4th December 2018,*** for want of prosecution. It is not in doubt that the Notice to Show case was issued to both parties. It is the Plaintiff's/ Applicants contention that though his Advocate on record at the time was served with the Notice, he was unable to attend as he had attended to another matter in Machakos and therefore he sent his clerk who was unable to get to Court on time and by the time he got to Court the matter had already been dismissed.

The guiding provision of the Law with regards to setting aside of Ex parte Judgment/order is to be found in ***Order 12 Rule 7 of the Civil Procedure Rules which*** provides:-

> ***"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."***

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

> **"The court may set aside an order made ex parte"**

In the case of **Wachira Karani …Vs…Bildad Wachira (2016) eKLR** in allowing an application to set aside an *ex parte* judgment, the court held that:-

> ***"The rationale for this rule lies largely on the premise that an exparte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."***

Order 12 Rule 7 **of** the ***Civil Procedure Rules*** 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. 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 feter the wide discretion given it by the Rules.''***

There is thus no doubt that in deciding whether or not to set aside and exparte order the Court is called upon to exercise its discretion. In exercising discretion the Court is further called upon to determine whether there is sufficient reasons that has been given to warrant it exercise the said discretion.

In this instant matter, it is the Plaintiff's/ Applicants contention that his Advocate could not attend Court as he was held up in another matter. On the said issue, this Court concurs with the Defendant/ Respondent that no attempt has been made to show that the said Advocate could not appear in Court on that particular day.

Further, it has been indicated that the Plaintiff's/ Applicant's Advocate's Clerk arrived in Court and found that the matter had already been called out and that the same had been dismissed. It would therefore mean that on that particular date the said Law Firm of Advocates knew or ought to have known that the matter had been dismissed. From the said *4th December 2018* to *21st June 2019,* when the Plaintiff/ Applicant claims to have filed an Application to transfer the suit nothing had been done. The Court is thus not satisfied that the reason for nonattendance had been satisfactorily explained.

The foregoing is coupled with the fact that though the suit was dismissed on the date that it was set up for *Notice to Show* Cause why the matter had not been prosecuted for a period of over a year, this Court is yet to be given a reason why the suit had not been prosecuted.

The Plaintiff/ Applicant acknowledges that on *25th June 2017*, the Court delivered a Ruling granting an Injunction and barring either parties from dealing with the suit property. In the said Ruling the Court then gave an Order that parties to Comply with Pre Trial Directions and set the matter for pre-trial.

In his submissions the Plaintiff/ Applicant submitted that none of

the parties did so. It is imperative that the Plaintiff is the one who filed the instant suit, he is the one who is seeking to set aside the Ex parte Order dismissing the suit for want of prosecution and it was then his burden to explain to Court why the suit was not prosecuted.

It is he Court's considered view that no explanation has been given as to why the suit had not been prosecuted given that the same was what was coming. Therefore, it would not be in the interest of Justice to set aside the ex parte order as the Plaintiff/ Applicant has not given reason why the suit was not to be dismissed in the first place.

Further it is clear that there was an inordinate delay in bringing the instant Application the same having been brought on *16th November 2019* while the suit was dismissed on *4th December 2018* and the Plaintiff/ Applicant acknowledges that his Advocate through their clerk were aware of the dismissal. In the case of ***Shah….Vs…Mbogo (1967) EA 166*** **,** the Court stated that:-

> ***"this discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice.''***

In applying the above principle, the Court finds that there are no sufficient reasons to set aside the exparte orders. Consequently, the Court finds and holds that the Plaintiff/ Applicant has not satisfied it to warrant it exercise its discretion in his favour.

Therefore, the Court finds and holds the Application dated **16th November 2019,** is ***not merited*** and the same is dismissed entirely with costs to the Respondents.

It is so ordered

Dated, signed and Delivered at Thika this 18th Day of March, 2021

L. GACHERU

JUDGE

18/3/2021

……- Court Assistant

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 the Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consent. 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

Mr. Kanyi for the Defendants/Respondents

No appearance for the Plaintiff/Applicant

L. GACHERU

JUDGE