



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 11 OF 2016

ANNA KAMORINJITHI.....PLAINTIFF

VERSUS

DAVID MUNENE.....DEFENDANT

AND

PAULINE WANGITHI

SUSAN WAIRIMU MWANIKIAPPLICANTS/INTENDED

LUCY WANGECI MWANIKI INTERESTED PARTIES

ROSE WANJIRA NJITHI

CHARITY WANJA CHOMBA

RULING

The applicant filed the Notice of Motion dated 11th February 2020 under *Order 10 Rule 11 Civil Procedure Rules* seeking the following orders:-

- 1. That the Honourable Court be pleased to set aside the orders of dismissal dated the 6th February 2020 for want of prosecution.**
- 2. That costs be in the cause.**

Grounds Upon Which the Application is Premised:

- (a) There was an inadvertent confusion on the date and the applicant's advocate only realized on the particular date while dealing with other matters.
- (b) That the applicant has at all times been keen to proceed save for the unfortunate hitch.

Applicants Statements of Facts

The applicant filed an affidavit in support of the application and deponed as follows:-

- (1) That this matter was dismissed on the 6th February 2020 for want of prosecution.
- (2) That she has been keen on proceeding with this matter since it was filed.
- (3) That they have always attended Court as and when required save for the unfortunate hitch.
- (4) That during the last attendance, they misunderstood the date and their advocate's office realized of the error while attending to other Court matters.

(5) That they apologize and pray that the orders be granted to enable them be heard on merit.

(6) That they are ready to comply to any conditions set by this Honourable Court.

Respondents Statements of Facts

The application is opposed by the respondent who filed grounds of opposition and averred as follows:-

1. That the application is bad in law.
2. That this application has no merit.
3. That the application is frivolous, vexatious and an abuse of the Court process.
4. That the application is incurably defective and offends mandatory provisions of law.
5. That there is no basis for this application.
6. That the application should be dismissed for lack of merits.

Submissions by counsel for the Plaintiff

The firm of Ikahu Nganga & Co. Advocates for the plaintiff submitted that the present state of affairs was regrettably caused by non-attendance of her counsel of the hearing slated for 6th February 2020 which was occasioned by an unfortunate mistake and error made by counsel. He submitted that the said mistake and error was not deliberate but was because of mis-diarization of the hearing date by the applicant's counsel. The learned counsel also averred that upon realizing the mistake, he took steps to rectify the error by the present application which was filed expeditiously.

He also submitted that despite the pandemic striking, the applicant exercised vigilance by filing the present application via the on-line e-filing system despite it being new and largely complex. Counsel further submitted that the mistake was not deliberate and should not be visited upon his client. He stated that they have given sufficient explanation for failing to attend

Court on the material date and to find the reasons excusable, reasonable, plausible, logical, convincing and truthful. He cited the case of *Muwanga Estates and Another Vs N. Pazt C.A 49/2001*. The learned counsel submitted that the plaintiff/applicant stands to suffer irreparable harm in case the orders sought are not granted since the issue in dispute is land which is highly emotive and that it would be in the interest of justice to accord the applicant an opportunity to be heard. He urged this Honourable Court to exercise its discretion by allowing the application. He cited *Article 159 of the Constitution 2010, Articles 10 and 50 of the Constitution* and the following decided cases:-

- (1) *Wanjiku Kamau V Tabitha Kamau & 3 others (2014) e K.L.R.*
- (2) *Lochab Bros Ltd Vs Peter Kamau T/A Lumumba, Lumumba Advocates (2003) e K.L.R.*
- (3) *Philip & Another Vs Augustine Kibede (1982 – 88) K.L.R 103.*
- (4) *Wilson Cheboi Yego Vs Samuel Kipsang Cheboi (2019) e K.L.R.*
- (5) *Joseph Kinyua Vs G.O. Ombachi (2019) e K.L.R.*

Submissions by counsel for the Respondent

The firm of Bwononga & Co. Advocates for the respondent also submitted that no valid reason has been explained why the application was drawn on 11th February but filed in Court on 28th July 2020. He stated that the delay is inexcusable as no explanation has been given for the inordinate delay. The learned counsel also stated that the applicant has not fully demonstrated the reasons for failing to attend Court during the hearing date which was taken by consent. He stated that the applicant is not entitled to the grant of the discretionary order for failure to give sufficient explanation for failure to attend Court. The learned counsel cited the following cases in opposition to the application:-

- (1) *Bilha Ngonyo Isaac Vs Kembu Farm Ltd & Another (2018) e K.L.R*
- (2) *Ferrua Omar Mohendan & Others Vs Ahmed Mohamed Honey (2016) e K.L.R*
- (3) *Tana Teachers Co-operative & Credit Society Vs Andriano Muchiri (2018) e K.L.R.*

Legal Analysis

I have considered the Notice of Motion application and the factual statements in support of the same. I have equally considered the grounds of opposition by the counsel for the respondent and the written submissions by both counsels. It is trite law that an application for setting

aside a dismissal of a suit for want of prosecution under **Order 12 Rule 7** is a discretionary power of the Court. The Court can only exercise such discretion upon sufficient reasons or explanation why the applicant was not able to attend Court during the hearing of the suit. In this case, the hearing date was taken by consent of the parties. When the matter was called out in the morning, one Maina Kagio who was holding brief for Mr. Ikahu Nganga for the plaintiff indicated that the advocate was ready to proceed and that the matter be confirmed for hearing. The matter was then confirmed for hearing at 12.45 p.m. but neither the plaintiff nor his advocate was present. The plaintiff in his written submissions alluded to mis-diarization of the hearing date as the reason for failing to attend Court. Those averments were not stated in the supporting affidavit. The learned counsel appearing for the plaintiff did not even file a supplementary affidavit to explain the reasons for his failure to attend Court. The reasons given in the advocates written submissions that he mis-diarized the hearing date cannot hold as he had sent Mr. Maina Kagio that morning to confirm his readiness to proceed. He cannot later change and state that he was not aware that the case was coming up for hearing. In any case, the learned counsel did not even annex a copy of an extract from his office diary showing when he had mistakenly fixed this suit for hearing if not on the 6/2/2020. These are necessary materials in which the applicant can assist this Honourable Court to exercise its discretion in her favour. I am alive to the fact the orders being sought are discretionary in nature. That discretion can only be exercised judicially and not whimsically. It must be exercised based on some material showing that the error or mistake in failing to attend Court was an excusable one. No such sufficient material has been placed before me. The applicant also appear to shift the blame to her advocate and arguing that the mistake of her advocate should not be visited on her. I have heard these arguments more often but my view is that lawyers like all professional consultants must be held liable for acts of omission and commission in the course of their professional duties.

The overriding objective under **Section 1A of the Civil Procedure Act Chapter 21 Laws of Kenya** is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes in our Courts. That objective cannot be achieved if application where excusable or sufficient explanation is not given where a client and his advocate fail to attend Court during the hearing date. In my view, where no excusable grounds for a mistake or sufficient reasons given, the consequence of the negligent act must be allowed to fall on the negligent counsel. That was the decision in the case of **Omwoyo Vs African Highlands & Produce Co. Ltd (2002) K.L.R** where **Ringera J.** (as he then was) held as follows:-

“Time has come for legal practitioners to shoulders the consequences of their negligent act or omissions like other professionals do in their fields of endeavor. The plaintiff should not be made to shoulder the consequence of the negligence of the defendant’s advocate. This is a proper case where the defendant’s remedy is against its erstwhile advocate for professional negligence and not setting aside the judgment”.

Conclusion and Decision

For the above stated reasons, I find no merit in the Notice of Motion dated 11th February 2020. Consequently, the application is hereby dismissed. I make no order as to costs.

READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 5TH DAY OF MARCH, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Otuke for the Plaintiff/Applicant
2. Mrs Magara for the Defendant
3. Kabuta, Court clerk.