REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 371 OF 2017

JAMES MWANGI MURAGURI........................PLAINTIFF/APPLICANT

-VERSUS-

ASSUMPTA MURUGI GIKA......................DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **15th July 2020,** bought under order **12 Rule 7, and Section 3A** of the Civil Procedure Act, by the Plaintiff/ Applicant seeking for orders that;

1. That the Court be pleased to set aside its orders made herein on 9th March 2020, dismissing this suit for want of prosecution and reinstate the same for hearing on merit.

2. That the costs of this application be provided for.

The Application is premised on the grounds that the matter came for Pretrial directions on **17th December 2019.** That the matter was called out before the Advocate arrived and the Court gave a date of **5th February 2020**. Further that the Advocate arrived shortly and indicated that the date was not convenient and requested for mention on **12th March 2020,** but it appears the Court indicated **12th February 2020,** and thus nobody appeared on **12th February 2020.**

In his Supporting Affidavit, **G. Muthuri,** Advocate on record for the Plaintiff/ Applicant averred that a Notice to Show Cause, why the matter should not be dismissed was served and he did not diarize the same. That the matter was mentioned on **9th March 2020,** and the same was dismissed for want of prosecution. He averred that on **12th March 2020 ,** he noticed the matter was not in the day's **Cause List** and upon inquiry, he was informed that the same was dismissed on **9th March 2020,** for **want of prosecution.** That as he as preparing an Application for reinstatement of the suit, the Court were closed down on **16th March 2020,** due to the Covid 19 Pandemic. That the Plaintiff/ Applicant is desirous of prosecuting the case expeditiously and he undertakes to abide by conditions imposed by this court.

The Defendant/Respondent filed grounds of opposition dated **8th October 2020,** and objected to the Application on the grounds that the said Application is bad in law, defective and an abuse of the Court process. That the Notice of dismissal was served twice, on the Plaintiff/ Applicant and he decided not to prosecute the suit. That no reasonable grounds have been advanced as to why the suit should not be dismissed. That the suit was dismissed on reasonable grounds and the Plaintiff/ Applicant is not interested with the suit.

In her Replying Affidavit, sworn on **8th October 2020**, **Assumpta Murugi Gika,** averred that the Notice for dismissal was served twice on the Plaintiff/ Applicant and he decided not to prosecute the suit. Further that there was no error apparent on the part of the Court and if the Court is inclined to allow the Application, she would seek for costs.

The Application was canvassed by way of written submissions and the Plaintiff/ Applicant through the Law Firm of **Muia V. M. & Co. Advocates** filed his written submissions on **3rd November 2020,** and submitted that the Affidavit sworn by the Advocate in support of the Application is properly on record. That the Respondent's Advocate was not in Court when the matter was dismissed on **9th March 2020**. The Court was urged to allow the Application.

The Defendant/Respondent through the Law firm of **Kahuthu & Kahuthu Advocates,** filed her written submissions dated **6th November 2020,** and submitted that the Plaintiff/ Applicant has not made out a clear case as to which Advocate was handling the matter on **12th March 2020** or **9th March 2020,** to warrant the current orders sought . That the Application is gravely defective as it is not supported by any Affidavit and the Application cannot support it as it is based on hearsay It was further submitted that the suit was filed in **2017,** and was gravely defective as it was filed by an Advocate without a Practicing certificate.

Having carefully gone through the Notice of Motion Application , the Affidavit in support, the grounds of opposition and the written submissions, the Courts finds and holds that the issue for determination is ***whether the Plaintiff/ Applicant is entitled to the orders sought*** .

The Court must first determine whether the Application is defective. Though the Defendant/Respondent has submitted that the Application is not supported by any Affidavit, the same is not factual as the Application has been supported by the Affidavit of **G. Muthuri Advocate**. Further as to whether an Advocate can swear an Affidavit on behalf of their Client, the Court is guided by the provisions of **Order 19 Rule 3(1)** of the Civil Procedure Rules which provides;

> ***"affidavits shall be confirmed to such facts as the deponent is able of his own knowledge to prove."***

Further in the case of ***Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR*** the Court held that;-

> ***"However, where an affidavit by an advocate raises issues of law and fact which are within his knowledge having been an advocate handling the suit on behalf of the party on whose behalf the affidavit is sworn, there is absolutely no mistake or error in the affidavit that can render it defective.***
>
> ***Furthermore, there is not law expressly prohibiting an advocate from swearing an affidavit on behalf of his client in a client's cause, on matters which he as an advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause.***

There is nothing barring an Advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, from the Supporting Affidavit. Thus, the Court is satisfied that the matter deposed to by the Plaintiff's/ Applicant's Advocate are matters within his personal knowledge as the same relate to his Court attendance and therefore issues of facts and the same are not contentious issues. 'The Court therefore finds and holds that the Supporting Affidavit is properly on record.

On whether the Court should set aside the orders of **9th March 2020,** dismissing the suit for want of prosecution, the Court recognizes that the powers 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. See the Case of ***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.''***

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 or order upon such terms as may be just***."

In deciding further on whether or not to grant the orders sought and exercise discretion, the Court is also guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed.

The Application is premised on the fact that when the matter came before the Deputy Registrar to take a mention date, the Applicant's Advocate inadvertently misdiarised the matter as coming up for mention on **12th March 2020,** while the Court had set the same as **12th February 2020.**Though the Defendant/Respondent has submitted that these allegations are a form of fishing expedition, no evidence has been produced to rebut the Plaintiff's/ Applicant's contention.

The Court has gone through the Court proceedings and notes that while the Plaintiff/ Applicant made various Courts appearance, there is indeed worrying trend by the parties wherein in some instances no appearance had been made necessitating the Court to give further dates. However, the Court also recognizes that there were negotiations that had ensued between the parties, which negotiations seem to have bore no fruits. Further the Court also notes that the Plaintiff/ Applicant through his Advocates has made Court appearances while the Defendant/ Respondent has failed to appear in Court in most instances. The Plaintiff's/ Applicant's Advocate explanation of misdiarizing the matter in the Court's considered view is excusable, taking into consideration that Advocates are mostly guided by their diaries. See the case of ***Philip Chemwolo & Another …Vs… Augustine Kubende (1986) eKLR***, where the Court of Appeal held that:-

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merits.''***

Further taking into account that the Defendant/Respondent has in most cases failed to attend Court, the Court is satisfied that the Defendant/ Respondent will not suffer any prejudice if the **Ex parte** orders are set aside. See the case of ***Shah….Vs…Mbogo (1967) EA 166,*** where 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.''***

As to whether there was an inordinate delay, in bringing the Application, the Court will take **Judicial Notice** of the fact that the **Covid 19 Pandemic** had just been reported and the Courts were shut down and therefore any delay is excusable within the rims as enumerated by the

Plaintiff/ Applicant.

In applying the above principles, the Court finds that there are sufficient reasons for it to exercise its discretion to set aside its orders made on **9th March 2020,** of dismissing the suit for want of prosecution. This Court being cognizant of the fact that on the date of **12th February 2020,** when the **Notice to Show Cause** was issued for **9th March 2020,** the said matter was coming up for Pre trial Directions. The matter was last in Court on **17th December 2019,** where the Plaintiff/ Applicant Advocate appeared in Court and therefore the suit herein had not been dormant. In the interest of justice, the suit herein should be heard and determined on merit.

The Defendant/Respondent would not suffer any prejudice as they would be compensated by costs for any delay of the trial occasioned and costs herein would be sufficient to cover any prejudice occasioned. The Court further finds that Justice would be sufficiently served if the matter is heard and determined on merit and the parties given an opportunity to have their day in Court.

The upshot of the foregoing is that the Plaintiff/Applicant's ***Notice of Motion Application*** dated **15th July 2020,** ***is found merited***. The ***same is allowed entirely with throw away costs of Kshs.5,000/=*** to the Defendant/ Respondent. Let the matter be decided on merit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF APRIL 2021.

L. GACHERU

JUDGE

29/4/2021

Court Assistant – Phyllis

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 **15th 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

Mr. Muthuri for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

L. GACHERU

JUDGE

29/4/2021