



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 166 OF 2018**

**ELIZABETH NJUGUNA.....1<sup>ST</sup> PLAINTIFF**

**JULIAN NJUGUNA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**STEPHEN NJUGUNA KAMAU.....DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiffs Notice of Motion application dated the 5<sup>th</sup> October, 2020 brought pursuant to Article 48, 53 and 159 (2) (d) of the Constitution, Section 3A of the Civil Procedure Act and Order 12 Rule 2, 3 & 7 as well as Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiffs seek to have the Orders granted on 22<sup>nd</sup> October, 2019 dismissing this suit for non-attendance reviewed, varied and or set aside. The application is premised on the grounds on the face of it and the supporting affidavit of SHEILA CHERONO an advocate in conduct of this matter on behalf of the Plaintiffs' where she confirms that on the 22<sup>nd</sup> October, 2019 when this matter was scheduled for hearing, the Plaintiffs failed to attend court. She explains that non-attendance was neither deliberate nor intentional as the advocate who had personal conduct of the matter failed to properly diarize the hearing date. Further, that the advocate had diarized the hearing to be on 16<sup>th</sup> December, 2019 instead of 22<sup>nd</sup> October, 2019. She claims on 16<sup>th</sup> December, 2019, their advocate attended court but the file could not be traced at the registry. She contends that they only learnt the matter had proceeded ex parte on 22<sup>nd</sup> October, 2019 when they received a taxation notice dated 23<sup>rd</sup> January, 2020 from the counsel for the Defendant. She avers that the Counsel who had personal conduct of this matter left the Plaintiffs' Advocates Offices. Further, that they were also affected by the COVID pandemic. She reiterates that the Plaintiffs stand to suffer great injustice if the matter is not reinstated and heard on merit.

The Defendant opposed the instant application and filed a replying affidavit where he deposes that the Plaintiffs have not been keen to prosecute this matter. He explains the proceedings that transpired on 2<sup>nd</sup> May, 2019 and 22<sup>nd</sup> October, 2019. He contends that 22<sup>nd</sup> October, 2019 was not the first time the Plaintiffs and their counsel had failed to attend court as they failed to do so when the matter was still in Nairobi. He proceeded to highlighted instances when the Plaintiffs failed to attend court and delayed in filing their submissions. He referred to the Ruling dated the 18<sup>th</sup> October, 2018 and reiterated that the said Ruling settled the issues in this suit and reinstating it, will needlessly consume this court's time. Further, there has been inordinate delay in bringing this application.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 5<sup>th</sup> October, 2020 including the rivalling affidavits and submissions, the only issue for determination is whether the Orders granted on 22<sup>nd</sup> October, 2019 should be set aside and this suit reinstated for hearing on its merits.

The Plaintiffs in their submissions reiterated their claim above. They insisted mistake of an advocate should not be visited on the client. Further, that they have a right to fair hearing. To buttress their averments, they relied on the following decisions: **Price & Another V Hilder (1984) eKLR; Pithon Waweru Maina V Thuka Mugiria (1983) eKLR; Philip Chemwolo & Another V Augustine Kubede (1986) eKLR; Esther Wamaitha Njihia & 2 Others V Safaricom Limited (2014) eKLR; Ceneast Airlines Limited V Habib Bank A G Zurich (2010) eKLR; Harrison Wanyoki Wambugu Vs Felista Wairimu Chege & Another; James Mwangi Gathara & Another V Officer Commanding Station Loitoktok & 2 Others (2018) eKLR; Savings and Loan Kenya Ltd V Odongo (1987) KLR 294 and Richard Nchapi Leiyagu Vs IEBC & 2 Others - Civil Appeal No. 18 of 2013.** The Defendant in his submissions contends that the Plaintiffs hands are tainted with indolence. He reiterates that the Court has discretion to dismiss the application to protect the integrity of the court process from abuse. To support his arguments, he relied on Articles 47 and 159 (2) of the Constitution and Sections 1A as well as 1 B of the Civil Procedure Act. He further relied on the following decisions: **Tana and Athi Rivers Development Authority V Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR; J G Builders V Plan International (2015) eKLR; Wendano Matuu Company Limited V Stephen Ndambuki Muli & 2 Others (2018) eKLR and Bilha Ngunyo Isaac V Kembu Farm Limited & Another (2018) eKLR to**

buttress his averments.

Order 10 Rule 11 of the Civil Procedure Rules provides that; **‘where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.’**

In the case of **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA75** at page 76 C and E the court held as follows: -

***‘There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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 fetter the wide discretion given it by the rules.’***

The court further held as follows: -

***‘That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication’***

Further, in the case of **Richard Ncharpi Leiyagu V Independent Electoral Boundaries Commission & Another (2013) eKLR** the court held that: ***‘The right to hearing has always been well protected right in our constitution and is also the cornerstone of the rule of law. That is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.’***

While in the case of **CMC HOLDINGS LTD VS JAMES MUMO NZIOKA (2004) KLR 173** the Court of Appeal held that:

***“[T]he discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us 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 in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”***

In the current scenario, the fulcrum of the dispute herein revolves around a claim to occupy land. The Plaintiffs’ admit failing to attend court for hearing but explain that their counsel made a mistake by wrongly diarizing the hearing date. Further, that on 16<sup>th</sup> December, 2019 they looked for the file but could not find the same. They further explain that their counsel left employment of the Advocates firm and the COVID Pandemic also affected them. The Defendant insists the Plaintiffs have been indolent and not keen on prosecuting their matter.

Based on my analysis above while relying on the cited legal provisions as well as associating myself with the quoted decisions, I find the Plaintiffs’ explanations plausible. Further, I opine that mistake to counsel should not be visited upon the Client. To my mind, the Defendant has not explained what prejudice it stands to suffer if the matter herein was heard on merit. Further, that the Plaintiffs have a right to be heard as enshrined under Article 50 of the Constitution. It is my considered view that the Defendant can be compensated with costs.

In the circumstance, I find the application dated the 5<sup>th</sup> October, 2020 merited and will proceed to allow it. I direct that the Plaintiffs proceed to set this suit down for hearing on its merits within sixty (60) days from the date hereof, failure of which it stands dismissed.

I will award the Defendant the costs of this application.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 7<sup>TH</sup> DAY OF APRIL, 2021.**

**CHRISTINE OCHIENG**

**JUDGE**