REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 87 OF 2018

JULIUS KIBIWOTT TUWEI.....PLAINTIFF/APPLICANT

VERSUS

REUBEN ARGUT & 7 OTHERS.....DEFENDANT/RESPONDENT

RULING

(On setting aside an order of dismissal of suit for non-attendance)

1. By a Notice of Motion dated **7/10/2021** and filed on **8/10/2021**, the Plaintiff/Applicant sought the setting aside of the orders of this court given on **23/9/2021**. By the said orders the Plaintiff's suit was dismissed for his non-attendance. He also prayed that the suit be reinstated for *inter partes* hearing. Lastly, he prayed for the costs of the application to abide the outcome of the main suit.

2. The application was brought under **Orders 17 Rule 2, Order 12 Rule 7, Order 5 Rule 17** and **51 Rule 1** of the **Civil Procedure Rules 2010** and **Section 3A** of the **Civil Procedure Act** and **"all other enabling provisions of the law."**

3. It was premised on six grounds listed on its face, and supported by two (2) affidavits. One was sworn by the Applicant on **07/10/2021** and the other by his learned counsel, one **Mr. Musungu**, the same date. The contents of the grounds were repeated in the affidavits. Therefore, I need not enumerate them separately since I will highlight on the Affidavits at length as follows:

a) The Applicants' Advocate's Supporting Affidavit

4. Learned Counsel, filed his Affidavit on **8/10/2021**. In it, he deponed that the Applicant instructed him on **10/9/2018** to act in this matter**.** He filed the suit in that behalf and made efforts to prosecute it. He was particular that on two occasions, to wit, the **9/3/2021** and **10/6/2021** the matter was fixed for hearing but did not proceed because the Court did not sit, although he and his client were in attendance. He then stated that he was "aware that the suit herein was dismissed on **23/9/2021** for want of prosecution" (*sic*).

5. He gave the reasons for his failure to attend. About them, he deponed firstly that he was unable to organize for his transport logistics on the date **22/09/2021** since the driver who was to bring him to Court in Kitale from Nairobi the following day let him down the last minute. Secondly, that due to his ill-health of an allergic condition which recurred on **22/09/2021**, he could not use public transport. Thirdly, that he had seen an online Cause List of this Court on **20/9/2021** indicating that it would not be sitting and that files would be mentioned before the Deputy Registrar. As a result, he called learned counsel for the Defence to inquire if indeed the Court would not be sitting because counsel had served him the previous week with a hearing notice contradicting the information given by the online Cause List.

6. He did not deny knowledge of the fact that this suit had been fixed for hearing on that day and that he received a hearing notice to that effect. He deponed that counsel clarified to him that the court would be sitting on the material date - the **23/9/2021**. He then made efforts to attend court but could not make it. It was then that he made plans to travel yet he was not in a good state of health. His further deposition was that he did not, during the phone call with the defendant's counsel, inform him of his state of health although the doctor had given him a **three-day** bed rest because he knew that he would struggle to be in court on **23/9/2021.** He annexed to his Affidavit and marked as **FM1** a Medical Certificate (sick-off sheet) to show that he attended hospital on **22/09/2021** and was given a sick off to **24/09/2021**.

7. Learned counsel deponed that by **3.10 pm** of the **22/09/2021**, he had not secured the services of his taxi driver because the taxi had been involved in a road accident. He deponed further that upon realizing the impossibility of attending court on **23/9/2021,** he notified the defendant's counsel, by email, of the situation and requested him to adjourn the matter. He then deponed that much as he did not disclose every reason for requesting for adjournment, some of which he termed "personal and confidential," he expected the defendant's counsel to understand his predicament. However, to his shock, the defendant's counsel objected to the application for adjournment made on his behalf. He annexed to his Affidavit and marked as **FM2** a copy of an email extract dated **22/09/2021** which he sent to the defendants' counsel. The email shows that it was sent out at **4.52** PM. He regretted that the suit was dismissed on **23/9/2021** for what he termed as miscommunication

between him, the advocate who held his brief and the defendant's counsel.

8. Learned counsel then ventured into deponing on matters of evidence in paragraphs **14**, **15** and **16** of the Affidavit, which should ordinarily be left for a party to swear on. He deponed about the prayers for cancellation of title and amendment of the register, the Plaintiff being in continuous occupation of the parcel of land since **1987** and developing it as a residential parcel, and the defendants having obtained titles by fraud but had never been in occupation thereof.

9. Finally, he deponed that his non-attendance was not intentional but for the reasons beyond his control and that it was in the interest of justice that the suit be reinstated. He also urged the Court to find that the suit had high chances of success and that the respondent would not suffer any prejudice if the application was allowed.

b) <u>The Applicants' Supporting Affidavit</u>

10. The Applicant, one **Julius Kibiwott Tuwei**, swore his affidavit on **7/10/2021** in support of the Application, and filed it on **8/10/2021**. He repeated the contents of his advocate's affidavit. However, he added that he failed to attend court on the material date because his advocate called and advised him so because the Court was not sitting. He deponed that the advocate called him later that afternoon and informed him that his case was dismissed because he (the advocate) was unable to proceed with the hearing on that date.

11. His further contention was that his non-attendance was due to reasons that were beyond his control. He swore that he was still interested to prosecute the matter. Again, he deponed that his advocate could have committed a mistake for failing to attend the hearing but stated his advocate's mistakes and omissions should not be visited on him, an innocent party. He urged the court to allow the application and reinstate the suit for hearing *inter partes*.

<u>The Response</u>

12. The Application was opposed. The **2nd** Respondent, one **Stanley Cherutich Chesang**, filed a replying affidavit sworn **01/12/2021** and filed on **15/12/2021**. His response was that the Plaintiff and his advocate were aware of the hearing date by, one, having been served with the hearing notice and, two, the Plaintiff's counsel having been informed on phone that the Court would sit on **23/9/2021**. He deponed that on the hearing date, Plaintiff's counsel deputized someone to attend court and seek an adjournment. The representative applied for adjournment on the ground that Plaintiff's Advocate was ill yet he had indicated that he could not travel to non-availability of vehicles (PSV) and that the Plaintiff's advocate issue of respiratory illness was neither here nor there as it was an afterthought.

13. His further response was that on **12/11/2020**, **10/6/2021** and **9/3/2021**, the Plaintiff and his counsel were absent and the matter was adjourned at their instance. Again, he stated that on **23/9/2021**, the Plaintiff's case was adjourned to about **3 pm** to give both he and learned counsel a chance to put their house in order but they failed to do so. He further stated that the Plaintiff had lacked interest in the case and should not be given an opportunity that he wasted. He prayed that the application be dismissed with costs.

<u>Directions</u>

14. The Court directed that the application be canvassed by way of written submissions. The parties filed their respective submissions.

<u>Analysis, Issues and Determination</u>

15. Having carefully considered the application, the rival affidavits, the submissions and authorities relied on and the law cited, it is my view that the issues for determination are:

a) Whether the Application is merited;

b) What orders to issue and who to bear cost of the Application?

16. I will analyze the issues one after the other below:

a) <u>Whether the Application is merited</u>

17. From the outset, it is worth pointing out that the instant application being made after the Court considered an application for adjournment and disallowed it is appears to raise some facts that overlap those the Court considered on **23/09/2021** when the order sought to be set aside was made. In these circumstances, this not being an application for review, it is prudent and lawful for the Court not to reconsider the merits or otherwise of the same set of facts or else this Court would be sitting on appeal on its decision. For that reason, I first separate the facts not considered from those that were considered.

18. On the **23/09/2021** learned counsel holding brief for the Plaintiff's Advocate gave one reason for the prayer for adjournment. It was that learned counsel was unwell and that he had communicated it to the defence. This was countered by learned counsel for the defence who stated that the communication he received the previous day from learned counsel for the plaintiff was to the effect that counsel had thought the matter could not proceed but would be mentioned before the Deputy Registrar. He further stated that he had communicated to him that the matter would proceed and that it was after that learned counsel, through email, wrote stating that he had failed to secure means of travel.

19. It was upon these two contending positions that the Court decided to place the suit aside and require counsel who held brief to contact Mr. Musungu Advocate to avail the medical evidence about illness, even via email or WhatsApp. Learned counsel did not avail the evidence

of that fact despite the file being placed aside and he being given chance to do so for the better part of the morning. There was no communication to Court that counsel had instructed his client not to attend Court. Thus, in absence of both the Plaintiff and his counsel the suit was dismissed for non-attendance. Therefore, the issue of illness was sufficiently addressed by Court on the material date. This Court will not be acting legally if it reconsidered the same as a basis for setting aside this order impugned herein. Also, the issue of failure to secure means of transport was considered and it was found not sufficient. Additionally, from the Cause List of the material date the matter was not listed before the Deputy Registrar. It has never been placed before the said Judicial Officer, on that date or subsequently.

20. I therefore get to the merits of the Application before me. The Applicant brought this Application under various provisions of the law. I will summarize their relevance or otherwise in this Application before analyzing it further. **Order 17 Rule 2** is about dismissal for want of prosecution where after adjournment a party does not take steps in the matter for over a year. This was not the case on **23/09/2021**. **Order 5 Rule 17** is about substituted service of summons to enter appearance. Nothing was about service of summons on the material date. **Order 51 Rule 1** is about the form of the Application while **Section 3A** of the **Civil Procedure Act** is about the inherent powers of the Court to make such order as to meet the ends of justice or prevent the abuse of its process. The phrase "all other enabling provisions of the law" is meaningless in so far as there is no enabling provision of law which is cited to clarify what it refers to.

21. This suit was dismissed for non-attendance of the Plaintiff/Applicant when it came up for hearing on **23/09/2021**. Thus, the relevant law governing setting aside judgment or dismissal is Order **12 Rule 7** of the **Civil Procedure Rules.** It provides as follows:

> ***"Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just"***

22. The decision of whether to or not to allow an application for setting aside judgment or an order for dismissal of a suit due to non-attendance of a Plaintiff is within the wide discretion of the court. This discretion has to be exercised judiciously, as was stated the case of ***Shah vs Mbogo (1979) EA 116*** quoted with approval in the case of ***John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR,*** where that court held thus:

> ***".....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."***

23. Also, the case of **Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another [2021] eKLR explains it even further.**

24. For the Court to exercise its discretion in favour of the Applicant, he or she has satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in ***Parimal vs Veena*** which was cited with approval in the case of **Wachira Karani v Bildad Wachira [2016] eKLR.** In the case, the said Supreme Court stated that:-

> ***"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"***
>
> ***The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."***

25. In the instant case the Applicant claimed that the suit was dismissed for want of prosecution for non-attendance on the date of hearing. With due respect, this is a misconception. The Rules do not provide for dismissal of a suit for want of prosecution on a date it is set down for hearing. Instead they provide for dismissal on account of non-attendance of a Plaintiff or a Defendant who has a counter-claim for that matter. Thus, to set the record straight, the way I understand the facts and the record herein is that the suit was dismissed for non-attendance of both the Plaintiff and his learned counsel on the date of hearing(of their case).

26. As indicated earlier, the merits or otherwise of the issue of illness, failure to attend Court for reason of means of travel, and the belief that the suit was listed before the Deputy Registrar were considered by the Court and found wanting. In case the Applicant was dissatisfied with the findings of the Court on them he should have appealed against the decision of this Court. Needless to state that as the Court found on the **23/09/2021**, the Plaintiff, through learned counsel gave falsehoods to the Court or shifted goal posts about the illness and on being confronted with the truth about his learned counsel's communication the previous day, about failure to secure transport means. This is the same misinformation that the Applicant still hang on in the Application.

27. Also, and strangely so, the Applicant insisted on misleading the Court or the reader of the record that there has ever been a Cause List which has indicated that this suit was to be heard before a Deputy Registrar. Despite the Court having pointed out to counsel who held brief on **23/09/2021** that that was not the position, and despite learned counsel for the defence having pointed it out to the Applicant's learned counsel that there was nothing of the sort, the Applicant persisted on repeating the falsehood as a basis for this Application. With due respect to whosever advised the Applicant to insist on that line of untruth, it is good practice to live by the truth and accept it even when it bites painfully.

28. I am now left to consider the facts that, to me were new, as raised in the Application. The Applicant argued that his failure to attend Court was that his learned counsel called him and advised him not to attend Court. I have once again perused the record of **23/09/2021**. It is clear that the suit was called out in Court, as per the rules of procedure, and in the presence of learned counsel who held brief for Mr. Musungu. The Plaintiff was not in attendance. If the Plaintiff's assertion would be taken to be true, at that point when the matter was called out in and outside the Court, learned counsel did not indicate that the counsel whose brief he held had instructed the Plaintiff not to attend Court. Again, I have carefully analyzed the Affidavit sworn by Mr. Musungu Advocate in support of the instant Application. He did not depone anywhere that he instructed he Plaintiff not to attend Court on the material date. Lastly, on this point, the Plaintiff failed to demonstrate to the Court that indeed he was called by his Advocate and advised not to attend Court. He could have done so by way of a printout of the mobile telephone communication between him and his Advocate about the issue. Having failed to do so, I find not convincing the explanation given by the Plaintiff for his failure to attend Court on the material date. This turns me to the other contention he put forth that he attended Court on other days.

29. The Plaintiff, through his learned counsel Mr. Musungu, attempted to lay blame on the Court for not handling his matter on two previous occasions. At **paragraph 2** of Mr. Musungu's Affidavit, he singled out the two dated as the **9/03/2021** and **10/06/2021**. He deponed that on the two occasions, he attended Court when the suit had been fixed for hearing but the Court did not sit. His point seemed to be that had the Court sat on the two occasions, he could have proceeded with hearing. It therefore indirectly meant that the Court was at fault. I had the occasion to refer to the Court record on the two occasions singled out. In regard to the **09/03/2021**, I noted that the date was given by the Court on **12/11/2020** when the Plaintiff did not attend Court but all the other parties were present. Before the hearing date would reach, this Court issued a written notice through the Deputy Registrar, on **01/03/2021**, to all Advocates, Litigants and Members of the Public that "all matters scheduled for hearing in the month of **March, 2021** before Hon. Justice Mwangi Njoroge will be lifted as they are …. and fixed from **2nd June**, **2021** to **2nd July, 2021**" (emphasis mine). Parties who were uncomfortable with the dates were given **7** days to make amends. Then on **17/03/2021** the Registry fixed he suit for hearing on **10/06/2021** and a hearing notice issued by way of email by the Deputy Registrar on **23/04/2021**.

30. In regard to the **10/06/2021**, the Court record shows that on **07/06/2021** the Deputy Registrar sent out another notice to all parties as contained in the earlier one. This time it indicated that on the **10/06/2021** the Honourable Judge would be engaged in other official duties elsewhere and hearings of that date would be mentioned by way of teleconference on **15/06/2021**, and this matter was listed as one of those to be mentioned. Of course, the record of **16/06/2021** shows that, as usual and I say so with tremendous due respect that even on the previous occasions prior to **09/03/2021**, only the Defendants attended the teleconference of **15/06/2021**. From the record, it is clear that on the two occasions that the Plaintiff attempted to fault the Court, the Court had sent out notices to the Advocates, litigants and the public that it would not be sitting. Thus, it is not possibly true that the Plaintiff and learned counsel would be present in Court and be surprised that the Court was not sitting. The Court cannot be faulted on that. Moreover, previous records such as **4/7/2019, 23/09/2019** and **12/11/2020** the Plaintiff did not attend Court without any explanation.

31. The last of the issue raised by the Plaintiff that I address in this ruling is the prayer that the mistake of the Plaintiff in not attending Court was of his Advocate hence it should not be visited on him. I have indicated in the **paragraph 27** above that I have not been convinced that the Plaintiff failed to attend Court on account of his Advocate. However, even assuming that his contention were to be taken to be true, would the mistake absolve him from accountability in this suit? In my view not all mistakes of Advocates pull out litigants from the mud they drag them into. Courts have held that it was the duty of the plaintiff to follow the progress of their case by constantly checking it from their advocates.

32. In my humble opinion, both the plaintiff and his advocate demonstrated inexcusable laxity in prosecuting this case, and not only on the material date but others. It is the role of the plaintiff and his counsel to ensure that the case proceeds for hearing without wasting the precious court time. In the case of **Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank** and **Another (2014) eKLR**, the court held that:

> ***"It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."***

33. *It is also the duty of the parties to assist the court to adjudicate on the matters brought before it expeditiously as was held in* ***Gideon Sitelu Konchella vs Daima Bank Limited (2013)eKLR*** where the court while citing the case of ***Mobil Kitale Service Limited vs Mobil Oil Kenya Limited,*** held that:-

> ***"It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ….the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."***

34. The Plaintiff blamed his learned counsel. But in my view, a case does not belong to his advocate. It is a litigant's. In this matter, the Plaintiff indicated in his affidavit that his advocate advised him not to attend court. I have not found as much. In the persuasive case of ***Ruga Distributors Limted vs Nairobi Bottlers Limited [2015]eKLR,*** the learned cited Kimaru J. in ***Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi HCCC397/2002,*** where he stated;

> ***"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her***

advocate. A litigant has a duty to pursue the prosecution of his or her case.

The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.

35. *The totality of the facts, the law, the analysis thereof, and the findings I have made is that the Applicant has not demonstrated that his Application has merits. Instead, he attempted to mislead the Court in some respects the second time again as he did at first on* ***23/09/2021****. This would not assist him in any way. It does not make his Application stronger. Instead it destroyed it.*

b) <u>What orders to issue and who to bears the cos of the Application</u>

36. *From the foregoing, this court finds that the applicant has not demonstrated any sufficient cause to make the Court set aside the orders of* ***23/09/2021*** *and reinstate the suit. The application dated* ***07/10/2021*** *being one that is lacking in merit is hereby disallowed in entirety. As costs follow the event, the plaintiff shall bear the costs of this Application.*

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF MARCH, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.