



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 360 OF 2017

TERESIA WAMBUI GICHURI ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT

JOSEPH NJUGUNA GICHURI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

-VERSUS-

ESTHER GATHONI NJUGUNA .....DEFENDANT/RESPONDENT

RULING

Through a Notice of Motion Application dated **10<sup>th</sup> July 2019**, expressed to be bought under; **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 12 Rule 7**. The Applicant sought the following orders;

- 1. That this Honorable Court be pleased to Set Aside orders made on 1<sup>st</sup> July 2019, and reinstate the Suit for hearing and determination.**
- 2. That Costs be in the cause.**

The Application is supported by the Affidavit sworn by **Murugi Anne Stacy Advocate**, who deponed that the Suit herein was duly fixed for **Formal Proof on 1<sup>st</sup> July 2019**, and on the said date, she left Nairobi very early and on her way, along Thika Road, the vehicle she was in was hit on its rear end by another vehicle.

**That she had to get alternative transport to Court, which took more time. She contended that after the call over, she sought the Court's indulgence and explained her unfortunate situation and the court advised her to make this Application. That it is in the interest of justice that the Suit be reinstated and fixed for Formal Proof.**

Despite the Respondent being duly served, she did not enter appearance nor file any Pleadings with regards to the Applicant's Application.

The Court directed that the Application be canvassed by way of written Submissions. The Applicant filed her submissions on **11<sup>th</sup> November 2020**, through the **Law Firm of Achillah T.O & Co. Advocates**.

The Court has carefully perused the Application and notes that the same was duly served upon the Respondent and notably so, it stands unopposed. It is this Court's considered view that the issue for determination is whether the Application is merited.

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

**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 fetter the wide discretion given it by the Rules.”**

The Applicant has argued that the inadvertent mistake was caused by an accident along Thika Road and her advocate opted to seek an alternative means to Thika. It is evident that the suit was dismissed on **1<sup>st</sup> July 2019**, when parties and their Advocates were required to present themselves physically in court before the outbreak of the Covid 19 Pandemic as opposed to current times when Courts are conducting matters virtually. This Court will take Judicial Notice of the fact that Thika Road is notorious for Traffic jam and transport inconveniences

This Court therefore finds that such transport inconveniences may happen to anyone and therefore excusable. In the case of ***Philip Chemwolo & Another... Vs... Augustine Kubende (1986) eKLR***, 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 there was no unreasonable delay in bringing the Application. The upshot of the foregoing is that the Applicant’s ***Notice of Motion*** dated **10<sup>th</sup> July 2019** ***is merited***. ***The same is allowed entirely without throw away costs as the Application is undefended.***

As this case was filed in the **year 2016**, Let the matter be set down for hearing expeditiously.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 1<sup>ST</sup> DAY OF JULY 2021**

**L. GACHERU**

**JUDGE**

**1/7/2021**

**Court Assistant – Lucy**

**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 **15<sup>th</sup> 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. Achilla for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Applicants**

**No appearance for the Defendant/Respondent**

**L. GACHERU**

**JUDGE**

**1/7/2021**