REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 30 OF 2016

JANEFER CHEBII KIMETO (suing as the personal representative of the estate of

JONAH KIPKOSKE ARAP CHUMO.....PLAINTIFF/APPLICANT

VERSUS

BOARD OF GOVERNORS

CHEBWAGAN YOUTH POLYTECHNIC.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 4th November 2020 filed **pursuant to the provisions of Order 12 Rule 7, Order 22 Rule 25 (sic) and Section 3A of the Civil Procedure Act, and all enabling provisions of the law,** the Applicant herein seeks the following orders:

i. **Spent**

ii. That the orders issued herein and all the consequential orders thereto entered on the 28th January 2019 and the ruling delivered on the 28th October 2020 be reviewed, varied and /or set aside.

iii. That the honorable court find it mete and just to reinstate the suit herein and the Plaintiff/Applicant be allowed to prosecute the same ex debito justiciae.

iv. That the cost of the application be in the cause.

2. The Application was premised on the grounds on the face of it as well as on the supporting affidavit sworn on the 4th November 2020 by the Applicant's Counsel M/s Julius Mong'are Motanya.

3. The said application was opposed by the Respondent in their replying affidavit dated the 29th January 2021 to the effect that it was frivolous, mischievous, lacking in merit, incompetent, and was based on falsehoods and had been brought in bad faith and ought to be dismissed.

4. By consent, directions had been issued to the effect that the application be disposed of by way of written submissions. The Plaintiff/Applicant's submission was to the effect that their application was not frivolous, mischievous, lacking in merit, or incompetent. That on the 28th January 2019, when the matter had come up for hearing of the main suit, the Applicant's Counsel was not in court as he had inadvertently failed to diarize the matter when he took the date.

5. That although the Respondent had contended that the application ought to be struck out, it was their submissions that striking out any suit or pleading was draconian and that the parameters by which the court ought to strike out pleadings was set out under Order 2 Rule 15 of the Civil Procedure Rules.

6. That the Applicant had bought a substantive suit worthy of trial and therefore it was only just and fair that she gets an opportunity in the seat of justice to advance her cause.

7. That the subject matter in issue related to a suit property No. LR Kericho/Leiten/330 which property the Respondent had trespassed upon on allegations that he was a bonafide purchaser. The Applicant had therefore put forth evidence to show that the suit property did not form part of the free property as alleged by the Respondent. The Applicant also submitted that the application was procedurally right before the court to which she sought audience so as to demonstrate her claim over the suit property.

8. The Applicant further submitted that the mistakes of Counsel should not be visited upon an innocent litigant by condemning such a party unheard. That the court needed to appreciate that the door to justice was not closed on account of an advocate's mistake and was bound to rectify the same in the interest of justice. That misapprehending the reasons given for non-attendance which arose as a result of a mistake should not make the Applicant suffer the penalty of not having her case heard on merit. That the inconvenience caused by the Applicant's Counsel's failure to attend court on the material date could be compensated by way of costs.

9. That the overriding objectives as provided for in sections of the Civil Procedure Act enjoined the court to ensure that there was a just determination of proceedings in a timely and efficient manner at a cost affordable to the respective parties. That the Applicant had adduced sufficient reason persuading the court to exercise its jurisdiction in her favour and reinstate the suit.

10. The Applicant relied on the decided case in **DT Dobie Kenya Limited vs. Muchina [1982] eKLR, Trust Bank Limited vs. Amin Company Limited & Another [2000] KLR** and **Lucy Bosire vs Kehancha Division Land Disputes Tribunal & 2 Others [2013] eKLR.**

11. In opposition to the Applicant's application, the Respondent submitted that that the provisions under Order 12 Rule 7 of the Civil Procedure Rules gave the court discretion to reinstate a suit that had been dismissed for non-attendance of the Plaintiff. That the power to reinstate such a suit was discretionary and the Applicant was obligated to demonstrate that she was deserving such orders for which the court should exercise discretion in her favour. The Applicant failed to discharge this burden.

12. That the hearing date for the suit had been taken by consent on the 25th October 2018 in the presence of the Applicant's Counsel whereby it had been dismissed on 28th January 2019 after the court had granted the Plaintiff sufficient time to appear before it. The current application had then been lodged at the registry on 5th November 2020 which was a whopping 647 days later. There had been no explanation given by the Applicant of the inordinate delay and as was held by the Court of Appeal in **Reliance Bank Limited (in liquidation) vs. Grandways Ventures Limited & 2 Others [2007] eKLR**, a delay even for a day must be explained.

13. That the Court of Appeal in its recent decision in the case of **Henry Chepwony Langat vs Elizabeth Akinyi Mutai [2021] eKLR** while declining to extend time had held that the delay of 272 days was such a long period of time and had not been sufficiently explained.

14. That the Applicant despite being served with a Bill of Costs and submissions as well as directions by the court to participate in the hearing of the Bill of Costs by filing her submissions, did not comply with the directions and was only awakened after the Defendant taxed his Bill which was the reason she had rushed to court with the present application.

15. That although it was trite law that mistakes of Counsel should not be visited upon an innocent Applicant, yet like many other rules, this rule had an exception to wit that a litigant would be bound by the errors and omissions of Counsel if the litigant participated or remained indifferent over the errors and omissions of his Counsel. Reference was made to the case in **Rukenya Buuri vs M'arimi Minyora & 2 Others [2018] eKLR.** That a case belonged to a litigant and if an Advocate was in breach of his or her professional duties, there were avenues to seek remedy.

16. That the Applicant did not disclose the steps she had taken to follow up on her case and neither had she explained why she did not instruct her Counsel to peruse the file, take a date or any steps whatsoever that could have led to the discovery that the suit had been dismissed. That even after the Bill of Costs had been served on 27th February 2020, the Applicant did not move the court immediately upon service. The conduct of the Applicant therefore led to an inescapable conclusion that she was never interested in this matter. That the delay in filing the present application was inordinate and she had not demonstrated any special circumstances therein.

17. That the Respondent was a Board of a Vocational Training Institution that served the public and the more the suit remained un-prosecuted, the more it hurt the institution and the students studying therein. That in case the court was persuaded by the Applicant's application, the Applicant should be ordered to pay the Respondent the cost of the application assessed at Kshs 50,000/= as compensation. That should the suit be reinstated, the Applicant be ordered to deposit in court and the taxed sum of Kshs 794,557/= within 14 days from the date of ruling. Reliance was placed on the decided case of **Barnabas Maritim vs. Manywele Korgoren & Another [2016] eKLR**. The Respondent sought for the application to be dismissed.

Determination.

18. I have carefully perused and considered the pleadings, and the written submissions filed. I find the issue for determination herein as being whether the Plaintiff/ Applicant's suit should be reinstated.

19. It is not in dispute that this matter was instituted vide a Plaint dated the 26th May 2016 alongside an application of an equal date seeking interim orders of injunction against the Respondent to which a ruling had been delivered on 29th July 2016 allowing the said application and an order dated 2nd August 2016 extracted. It is also not in dispute that pursuant to the parties having complied with the provisions of order 11 of the Civil Procedure Rules, a date for hearing of the matter had been fixed for the 26th September 2018 but whilst pending the hearing date, the Respondents herein filed an application dated the 22nd June 2018 in which they had sought to have the Applicant held in contempt of the court orders of 2nd August 2016. The said application was heard and dismissed vide a ruling dated the 25th October 2018 wherein the case had been fixed for hearing for the 28th January 2019 on which day the same was dismissed for non-attendance, the hearing date having been taken by consent and there having been no explanation as to the absence of both the Plaintiff and his Counsel. Thereafter, the Respondent's Bill of Costs was taxed at Kshs 794,557/= via a ruling of 28th October 2020 wherein the present application was filed on the 4th November 2020.

20. The Court of Appeal in the case of **Peter Ngome vs Plantex Company Limited [1983] eKLR** held that the dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution amounted to a judgment in that suit. A court's discretion to set aside an exparte judgment or order, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not

to assist a person who deliberately seeks to obstruct or delay the course of justice.

21. I have considered the reasons presented before me by the Applicant's Counsel regarding his failure to attend court to prosecute their matter. I have also considered the affidavits filed in support of the application and considered whether the failure to attend court on 28th January 2019 by both the Plaintiff and his Counsel constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the application for setting aside orders made on the 28th January 2019, almost one year after the said order was made, constituted inordinate delay.

22. In the case of **Belinda Murai & Others – Vs – Amos Wainaina [1978] KLR 278** per **Madan JA** (as he then), cited with approval in the case of **Richard Ncharpi Leiyagu – vs – IEBC and 2 Others, Nyeri CA 18 of 2013**, where he described what constitutes a mistake in the following terms:

> *"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior Counsel. Though in the case of junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."*

23. His Lordship went further to state that:

> *"It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule…"*

24. In the case of **Phillip Chemwolo & Another vs Augustine Kubede [1982-88] KAR 103 AT 1040, Apalloo J** (as he then was) and cited with approval in the **Nyeri CA 18 of 2013** (supra), as follows:

> *"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 his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."*

25. In this case, although the Plaintiff did not act with alacrity upon discovery of the mistake in seeking to correct the mistake when she filed the present application almost one year later, however the right to a hearing, in my view has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. I also find that the overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases. In the matter before me it was not demonstrated that the Plaintiff and his advocate had developed a habit of absconding from court, rather the matter was dismissed on the very first time it had come up for hearing.

26. I find the Applicant Counsel's explanation for his failure to attend court reasonable and proceed to allow the application herein dated 4th November 2020 and set aside the orders issued on the 28th January 2019 thereby reinstating the Plaintiff/Applicant's suit for hearing subject to the following conditions.

i. The Applicant shall deposit in court the taxed costs of Kshs 794,557/= within 21 days of this ruling.

ii. The Plaintiff/Applicant shall also pay throw away costs of Kshs. 25,000/= within 15 days from the date of this ruling.

iii. Failure to comply, the order of dismissal of the suit shall automatically stand and the defendant/Respondent shall be at liberty to execute for both taxed costs and the Kshs. 25,000/= awarded to him as costs. **Dated and delivered via Microsoft Teams this 6th day of May 2021.**

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE