REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 271 OF 2014

ZEBEDEE MMATA INJERA.....PLAINTIFF/APPLICANT

VERSUS

BENSON ANUBI LUHONGO.....DEFENDANT/RESPONDENT

JOANNE C.K. LUHONGO.....INTERESTED PARTY

RULING

[NOTICE OF MOTION DATED THE 31ST OF JULY, 2018]

1. The applicant herein, **Zebedee Mmata Injera**, filed a Notice of Motion dated the 31st July, 2018 and brought pursuant to **Sections 1A, 1B & 3A of the Civil Procedure Act** and **Order 10 & Order 51 Rule 1 of the Civil procedure Rules 2010**, seeking for the reinstatement of suit by varying and or setting aside of the orders made on the 31st May, 2018 dismissing the suit for non-attendance by the plaintiff/applicant. The application is based on the seven **(7)** grounds on the application and is supported by the affidavit of the applicant sworn on the 31st July, 2018. That the applicant contends that though the suit was dismissed for his non-attendance, he was unaware that his case was coming up for hearing on the 31st May, 2018 as his counsel had failed to notify him. In any event, the plaintiff/applicant contends that the affidavit of service by the defendant/respondent dated the 21st May, 2018 is laced with falsehoods and his then Counsel was not properly served. He therefore avers that he has been condemned unheard, and further that no prejudice will be occasioned to the respondent/defendant if the court grants the order sought.

2. The defendant/respondent has to date not filed any reply and or submissions despite being served and being given the opportunity to do so.

3. The application was canvassed by way of written submissions, dated the 15th February, 2021 filed by the learned counsel for the plaintiff/applicant. The counsel submitted that the explanation given by the applicant in his affidavit dated the 31st July, 2018 is satisfactory to warrant allowing the instant application as prayed. That the applicant's counsel submitted that the respondent will suffer no prejudice if the application is allowed since the respondent will have an opportunity to defend the suit on merit. That the learned counsel for the applicant relied on the decision made in the case of ***Joseph Kinyua v GO Ombachi [2019] eKLR***, and urged court to consider the instant application meritorious and allow the same as prayed.

4. That the issues for the court's determinations are as follows;

(a) Whether the applicant has tendered a reasonable explanation for his failure to attend court on the date his suit was dismissed.

(b) Whether there is a basis for the court to exercise its discretionary power to set aside the order of 31st May 2018 and reinstate this suit.

(c) Who pays the costs of the application?

5. The court has carefully considered the grounds on the application, the applicant's affidavit evidence, his learned counsel's submissions, the superior court's decision cited, the record and come to the following findings;

(a) That ***Order 12 Rule 3 of the Civil Procedure Rules*** sets out the consequences of non-attendance to court by a party to a suit. In particular, ***Rule 3(1)*** is specific that where only the defendant attends, and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court. That under **Rule 3(2)**, where the defendant is the only one who attends and admits any part of the claim, the court is obligated to enter judgement against such a defendant upon such admission, and dismiss the

remainder of the suit that has not been admitted, unless for good cause to be recorded by the court. That **Rule 3(3)** provides for situations where a defendant who had counterclaimed, is the only one who attends court. That such a defendant may be allowed to prosecute their claim after the plaintiff's case has been dismissed, so far as the burden of proof lies with him. That further, **Rule 6(1) & (2)** provides that where a suit is dismissed under **Rule 3,** the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. However, **Rule 7** provides a saving clause, that the plaintiff may make an application before court for an order to set aside the dismissal of the suit, and the court may exercise its discretion in their favour, upon the plaintiff presenting sufficient cause or explanation for his/her non-appearance, at such terms as may be just in the case.

(b) That ***Section 3A of the Civil Procedure Act*** gives the court inherent power to make such orders as may be necessary for the ends of justice to be met, while ***Order 51 Rule 15 of the Civil Procedure Rules*** gives the court power to set aside any order made ex parte. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. That the court's discretion to set aside an exparte ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court's favor or discretion to adduce sufficient and plausible reasons that are demonstratable, and persuasive to the court. It is therefore necessary for party seeking reinstatement to show that there were sufficient reasons preventing them from appearing in court.

(c) That in the case of ***Shah vs Mbogo & Another [1967] 6A U7*** the Eastern Africa Court of Appeal laid down the guiding principle in the exercise of this judicial discretion. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. That conversely, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice. That in the instant application, the applicant contends that he was not notified by his counsel that the matter was coming up for hearing on the 31st of May, 2018. The applicant further stated and deponed that his then Counsel was not properly served and disputed the affidavit of service filed in court by the respondent that is dated the 21st May, 2018. He contends that the change of advocates could have affected his case with the previous advocates not informing him on the progress of the case. That it is only after the appointment of the new advocates that he was informed that his case had been dismissed.

(d) That from the record, I note that the affidavit of service of the hearing notice for the 31st May, 2018 dated the 21st May, 2018 was served upon the then counsel for the plaintiff on the 21st May, 2018. That the plaintiff's current counsel filed the Notice of Change of Advocate on the 18th June, 2018 which is 18 days after the hearing date of 31st May 2018, and 28 days after the hearing notice had been served upon the previous counsel. That as the plaintiff's contention that his then counsel had not informed him of the hearing date has not been challenged or rebutted, I find that it is probable that the applicant is telling the truth that his previous counsel on record did not notify him of the hearing date of his case on the 31st May, 2018. That furthermore, the applicant has disputed the alleged service of hearing notice upon his then counsel, and the contents of the affidavit of service, for failing to bear any rubberstamp or signature of his then advocates. The again that has not been disputed as the respondent has not filed their reply and or submissions. That if it is true that the applicant was not notified by his then advocate of the hearing date of 31st may 2018, and noting that it was therefore a mistake of his advocate, and taking into account that the suit relates to ownership of land, which is an emotive issue, it is my opinion that it is in the interest of justice, the plaintiff deserves another chance to have his suit heard and determined on merit. That as such, I find that the applicant has provided sufficient cause or explanation for his non-appearance to court on 31st May, 2018 on account of a mistake on the part of his previous advocate and in the interest of justice.

(e) That further to the finding in **(d)** above, a bonafide mistake that is not unreasonable is a sufficient excuse within the meaning of **Order 12 Rule 3(1) of the Civil Procedure Rules,** and the mistakes of counsel ought not be visited upon the client. I am further guided by the decision of court in the case of ***Belinda Muras & 6 Others vs Amos Wainaina [1978] KLR*** wherein *Madan JA* defined what constitutes a mistake as follows:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel 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 of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

That similarly, in the case of ***Phillip Chemwolo & Another vs Augustine Kubede [1982-88] KLR 103*** the court 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 his case heard on merit".

That moreover, in the case of ***Martha Wangari Karua vs IEBC Nyeri Civil Appeal No.1 of 2017 the Court of Appeal*** held that: -

"The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be."

That further to the foregoing, I am of the considered view that the overriding objective of **Articles 50 & 159 (2) of Constitution 2010, sections 1A & 1B of the Civil Procedure Act** is to achieve substantive justice to the litigants. This court is obligated by the constitution and statutes to ensure fair hearing to all parties that approach it or come before it. That in light of this, I am of the view that the inconvenience to be suffered by the respondent as a result of reinstatement of this suit can be adequately remedied through an award of thrown away costs.

6. That flowing from the foregoing, I find merit in the applicant's Notice of Motion dated the 31st July, 2018 and the same is hereby allowed in the following terms;

(a) That the dismissal order of 31st May, 2018 is hereby reviewed and set aside.

(b) That the plaintiff's suit, commenced through the plaint dated the 19th August, 2014, is reinstated for hearing and determination on merit.

(c) That the applicant pays the Respondent thrown away costs assessed at Kshs.20,000/- **(twenty thousand only)** to be paid before the next court appearance.

It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JUNE, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFF/APPLICANT: ABSENT

DEFENDANT/RESPONDENT: ABSENT

COUNSEL: ABSENT

COURT ASSISTANT: CHRISTINE