



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

JUDICIAL REVIEW CAUSE NO. 9 OF 2019

IN THE MATTER OF: AN APPLICATION BY BEJA NGOJA MWERU FOR JUDICIAL REVIEW

AND

**IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012 SECTION 108,
THE REGISTERED LAND ACT CHAPTER 300 (REPEALED) OF THE LAWS OF KENYA**

AND

IN THE MATTER OF: THE SURVEY CAP 299 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: REGISTERED TITLE NO. KINANGO 'A' 1070, 1114A AND 1116

BETWEEN

BEJA NGOJA MWERO.....APPLICANT

VERSUS

LAND REGISTRAR KWALE.....1ST RESPONDENT

DISTRICT LAND ADJUDICATION

AND SETTLEMENT KWALE.....2ND RESPONDENT

THE DISTRICT SURVEYOR KWALE.....3RD RESPONDENT

AND

- 1. GENGA JEFFA**
- 2. LUGHO JEFFA**
- 3. NGOME JEFFA**
- 4. MZENGI MWERU**
- 5. MWERU NGOJA**
- 6. MRISA CHIBUNDA**
- 7. NYAWA NYALE NYAWA**

8. CHITI MUMBO JEFFA

9. MWANGO JEFFA

10. CHITI JEFFA

11. MWALEWA JEFFA

12. KOMBO JEFFA

13. JUMA NYAWA

14. MUMBO NYALE

15. SAMUEL JEFFA

16. GHORIFU GHOMBO.....INTERESTED PARTIES

RULING

1. Before me for consideration is the Applicant's Notice of Motion filed on 27th October 2020 and brought under Section 1A, 1B, and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules. The applicant seeks to set aside the orders issued by this court on 22nd October 2019 that dismissed the applicant's suit for non-attendance and have the suit reinstated for hearing. The application is premised on the grounds on the face of the application that inter alia the failure of the applicant's counsel to attend court on 22nd October 2019 should not be visited on the applicant. Shimaka Leonard, the advocate on record for the applicant and George Otieno a legal assistant at Mr. Shimaka's law firm swore affidavits in support of the application.

2. Mr. Shimaka averred that his mistake of not attending court when the matter came up for hearing on 22nd October 2019 was occasioned by failure by his clerk to diarize the matter. He averred that his mistake should not be borne by his client and further averred that his clerk fixed the matter for hearing on 26th February 2020 but the matter was not listed as it was already dismissed by court. He prayed to the court to reinstate the suit that he contended raised crucial issues that ought to be heard on merit for the interest of justice.

3. Mr. Otieno averred that on or about 28th May 2019, he fixed the matter for hearing on 22nd October 2019 but inadvertently forgot to note the date in the firm's master diary. He averred that he proceeded for his annual leave in October 2019 and was not present when the matter was coming up for hearing on 22nd October 2019. He further averred when he came back from leave, on 15th November 2019 he fixed the matter for mention on 22nd February 2020 but was informed by the court registry that the matter was taken out of the court's diary since it was already dismissed for non-attendance. He prayed that the court reinstates the suit for it to be heard on merit in the interest of justice.

4. The 7th interested party, Nyawa Nyale Nyawa filed a replying affidavit on 8th December 2020. He opposed the application and averred inter alia that the petitioner is abusing the court process by filing numerous suits. He averred that the court should not entertain the petitioner who instituted ELC 543 of 2015 and ELC Appeal No. 13 of 2015 against the 9th interested party but has failed. He asked court to dismiss the application with costs since the application has no substantial grounds.

5. The court directed the application to be dispensed with by way of written submissions.

6. The 7th interested party filed written submissions on 21st December 2020 in person. He argued that the applicant's counsel has not given court a satisfactory reason why he did not attend court on 22nd October 2019 despite having taken the date ex-parte and effecting service on other parties. He submitted inter alia that the applicant's advocate has not given an explanation why he moved to fix a mention date on 26th February 2020 while the matter had already been dismissed and later filing this application on 27th October 2020 a year later. He relied on the case of **Mugo V Njogu (2010) eKLR** where it was held that "*it is no longer in my view for the court to automatically excuse the mistakes and lapses of counsel. Counsel has a role and duty to assist the court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective*" to ask court to dismiss the application with costs.

7. The petitioner filed his submissions on 26th February 2021 in support of the application. Counsel for the petitioner/applicant submitted that the failure to attend court was not deliberate or intentional to delay the matter but rather human error that should be overlooked by court. Counsel submitted that his mistake should not be visited upon his client who is a layman and asked court to understand that error is to human nature that can be rectified.

8. Counsel submitted that the covid-19 impact is to blame for his late filing of this application and asked court to allow the application. He pleaded that the operations of court were suspended for a long time and after resumption there was a backlog that caused them to delay in making the application. Counsel submitted that neither the respondents nor the interested parties will be prejudiced if the application is reinstated and heard on merit. He concluded by asking court to reinstate the suit in the interest of justice.

9. I have considered the application, the response to it and the submissions filed and the issue before me for determination is whether I should set aside the orders issued on 22nd October 2019 that dismissed this suit for non-attendance.

10. The suit herein was dismissed by this court on 22nd October 2019 when it came up for hearing of the application dated 22nd May 2019. The counsel for petitioner/applicant failed to attend court despite having fixed the date on 28th May 2019 and serving the other parties herein. The applicant averred that failure to attend court was occasioned by the mistake of his clerk who did not diarize on his master diary which he uses to attend court. Counsel pleaded with court to overlook the mistake and reinstate the suit for the sake of justice. The 7th interested party on the other hand averred that the applicant's reason for failing to attend court is not substantial enough to reinstate the suit and asked court to dismiss the application.

11. On perusing the court record, I do note that on 28th May 2019, George from Marende Necheza & Company advocates fixed a hearing date for the application dated 22nd May 2019 on the 22nd October 2019 ex parte and was instructed by the Deputy Registrar to issue a Hearing Notice to the other parties herein. On 22nd October 2019, when the matter came up for hearing no one appeared for the petitioner/applicant, but Mr Makuto was present for the respondents. The applicant averred that his advocate failed to attend court since the court clerk, one George Otieno failed to diarize the matter in the firm's master diary. The time that lapsed between the fixing of the hearing date at the court registry and the actual hearing date of the application is four months and 24 days which is a period of almost five months. In my view, four months is more than enough time for a firm to have perused all its diaries and confirmed that all matters have been correctly diarized for court. I do not understand how a law firm that takes litigation seriously can take more than four months without updating its diaries. It goes to show the laxity that the advocate has in dealing with this matter.

12. It is also clear to the court that this application was filed on 27th October 2020 a year after the suit was dismissed on 22nd October 2019. Counsel for the applicant has submitted that the delay in filing the application was occasioned by the covid19 restrictions which forced the court to suspend its operations. Despite the counsel's sentiments, I do note that, in the supporting affidavit dated 26th October 2020 of George Otieno stated that he had previously fixed the matter for hearing on 22nd February 2020. However he was later informed by the court registry that the suit was dismissed for non-attendance. This information would have prompted the petitioner to file this application at the earliest opportunity which would have been February 2020 before covid19 restrictions were enforced by court. This court will not allow advocates to hide behind the shadows of the covid19 pandemic and use it as a reason to avoid responsibility as officers of court as well as to the litigants who are their clients.

13. Order 12, Rule 7 of the Civil Procedure Rules empowers the court with discretion to set aside or vary an order given upon such terms as it may see as just. I am however not persuaded by the reasons fronted by the applicant to set aside the orders that I made on 22nd October 2019. In view of my above findings, I dismiss the Notice of Motion dated 26th October 2020 with costs to the 7th interested party.

It is so Ordered.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 29th day of July 2021

C.K. YANO

JUDGE