REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 116 OF 2016

GEORFREY OMARIBA BOSIRE.....PLAINTIFF/ 1ST RESPONDENT

VERSUS

MARY NYABOKE MAINA.....1ST DEFENDANT/ APPLICANT

NABOTH SAGWE OGETO.....2nd DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This Ruling in respect of the 1st Defendant's Notice of Motion dated 8th February, 2021 seeking the following orders:-

i. That this Honourable Court be pleased to set aside the ex-parte proceedings of 25th November 2020 closing the 1st Defendant's case;

ii. That upon grant of the above prayer, the Honourable Court be pleased to accord the 1st Defendant an opportunity of giving her Defense; and

iii. The costs of this application be provided for.

2. The application was brought pursuant to the provision of Order 12 Rule 7 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act. The application was supported by an Affidavit sworn by the 1st Defendant/Applicant. The 1st Defendant/Applicant's contention was that the Plaintiff filed his suit in April 2016 to which the Defendant responded by filing a Statement of Defence in June 2016. The 1st Defendant/Applicant contended that the Plaintiff thereafter prosecuted his case and closed his case on 25th November, 2020. She lamented that as a result of her non-attendance on the date scheduled for Defence hearing, her case was closed without her being heard. She averred that she was not able to attend the Defence hearing because she had lost a relative who is also a relative of the Plaintiff. It was her further averment that her Advocate had mistakenly thought Mr. Magara, Advocate whom he had requested to hold his brief was in court when the date was set for Defence hearing.

3. Further, it was her averment that her Advocate was not aware of the proceedings of 25th November, 2020 as he was under the impression that Mr. Magara had proceeded with the case. The Applicant contended that her Advocate only became aware of the proceedings on 25th November, 2020 when her advocate on record was served with a Mention Notice on 2nd December 2020. She contended that there was a miscommunication between the two advocates and this led the court to close her case without her being heard. She contended that she has a good Defence which raises triable issues and if given an opportunity she will demonstrate so in Court.

4. In response to the application, the 1st Respondent/Plaintiff filed a Replying Affidavit dated 9th March, 2021. In his Replying Affidavit the Plaintiff averred that on 25th November 2020, when the matter came up for the Defence hearing, neither the Applicant nor his Advocate were present in court. He also averred that Mr. Magara, Advocate who took the date for Defence hearing did not swear any Affidavit to explain why he did not appear in court for Defence hearing. It was his contention that the Applicant did not inform the court of the name of the person who died and that none of his relatives died in November, 2020 and thus the Applicant was lying. The 1st Respondent finally deponed that the Applicant's defence did not raise triable issues and thus the application is baseless and should be dismissed with costs.

5. On 20th April, 2021 this court directed that the application be canvassed by way of written submissions. The 1st Defendant/Applicant filed her submissions on 14th July, 2021 while the Plaintiff filed his submissions on 24th September, 2021. The 2nd Respondent did not oppose the

application and neither did he file any responses or submissions to it.

ISSUES FOR DETERMINATION

6. From my analysis of the application, the response thereto and the submissions filed by both Parties, I deduce that the sole issue for determination is:

Whether the ex-parte proceedings of 25th November 2020 closing the 1st Defendant's case should be set aside.

ANALYSIS AND DETERMINATION

7. The power to set aside **ex-parte proceedings** is discretionary and the Court must exercise its discretion judiciously while ensuring that justice is done. This was reiterated in the case of Patel ***-Vs- E.A Cargo Handling Services Ltd (1974) EA 75,*** where it 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 feter the wide discretion given to it by the Rules.''**

8. Further, in deciding whether or not to grant the orders sought, the Court is guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed.

9. In the instant case, the 1stDefendant/Applicant alleges that she failed to attend the defence hearing for two reasons. First she alleges that she had lost a relative on the date set for defence hearing. Secondly, she alleges that Mr. Anyona Mbunde Advocate whom she had instructed to act for her appointed Mr. Magara Advocate, to handle the matter on his behalf given that he had personally been disqualified by this court from handling the matter. Mr. Magara did represent her during the hearing of the Plaintiff's case. However, Mr. Magara failed to communicate the date set for defence hearing with the result that her advocate equally failed to attend court on the said date. As a consequence of the miscommunication between the two Advocates, her case was closed without her being heard.

10. From the above reasons and even though the explanation given by the Applicant that she was bereaved during the hearing date is not supported by sufficient evidence, her explanation that there was a miscommunication between the two advocates, Mr. Anyona Mbunde and Mr. Magara is in my considered view excusable.

11. It would therefore be harsh for this court to deny her a chance to be heard based on a blunder committed by her Advocates. Further, it is my considered view that such a blunder by the 1st Defendant's Advocate should not deny her the right of having her case heard on merit. On this, I am guided by the case ***Augustine Kubende (1986) eKLR***, where 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.''

12. Therefore, in applying the above principles, the Court finds that there are sufficient reasons for it to exercise its discretion to set aside the ex-parte proceedings of 25th November 2020.

13. The Plaintiff/Respondent has not demonstrated that he will suffer any prejudice that would not be compensated by costs for any delay of the trial occasioned. The Court further finds that justice would be sufficiently served if the 1st Defendant/Applicant is given an opportunity to have her day in Court.

14. The upshot is that the 1st Defendant/Applicant's *Notice of Motion* dated 8th February 2021**,** has merit and it is hereby granted. The Defendant shall pay Kshs. 10,000 thrown away costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021

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J.M ONYANGO

JUDGE