REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC NO. 295 OF 2017

JASON NJURU MWANGI .....1ST PLAINTIFF/RESPONDENT

JANE WANJIKU NJUGUNA.....2ND PLAINTIFF/RESPONDENT

VERSUS

NYAMBURA MWANGI.....1ST DEFENDANT/APPLICANT

KARIUKI MWANGI .....2ND DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **14th of June 2021**, brought under Sections 1A,1B, and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1, of the Civil Procedure Rules, the 1st and 2nd Defendants /Applicants sought for orders that;

1. **That this Honourable Court be pleased to set aside Orders made on 31st May 2021, dismissing the Applicants' Notice of Motion dated 23rd March 2021.**

2. **That this Honourable Court be pleased to reinstate the Application dated 23rd March 2021.**

3. **That the cost of this Application be in the cause**.

The Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit of **Wanjiru Macharia, Advocate,** who averred; that the Application dated **23rd March 2021,** was dismissed on **31st May 2021**, for non-attendance by Counsel for the Applicant therein. That the non- attendance was occasioned by an administrative mix up at the office of counsel for the Defendants/Applicants herein which caused the matter not to be diarized and the oversight was only discovered when the Client called to inquire if his attendance in Court was required. Further that Counsel's erroneous mistake ought not to be visited on the client. That it will only be fair, expedient, and in the best interest of justice to reinstate the application and that the application for reinstatement had been made without delay.

The Application is opposed through the Replying Affidavit sworn by **Jason Njuru Mwangi, the 1st Plaintiff/Respondent, on 29th June 2021.** He averred that the Applicants' entire application and supporting affidavit are incompetent and bad in law, a gross abuse of the Court process, brought in bad faith and unmeritorious. He averred that the application was filed in Court within a period of two weeks after the order for dismissal was issued on **31st May 2021**, and no plausible reason had been given for the delay. The 1st Plaintiff/ Respondent also averred that the Defendants/ Applicants were well aware of the hearing date set for **31st May 2021**, having fixed the date at the registry in the absence of the Plaintiffs/Respondents and therefore the allegation of an administrative mix up does not hold water.

He further averred that the request to reinstate the dismissed application dated **23rd March 2021**, cannot be granted in law and in fact as so doing is tantamount to an abuse of the Court process and that the overriding objectives militate against the Defendants/Applicants application. Further that the orders sought are discretionary and the Applicants have not come to Court with clean hands in view of the unexplained delay.

The instant Application was canvassed by way of written submissions. The Defendants/Applicants filed their written submissions dated **26th July 2021,** through the **Law Firm of Kimwere Josphat & Co. Advocates,** and the Plaintiffs/Respondents filed their written submissions dated **23rd July 2021**, through the **Law Firm of Mbue Ndegwa & Co. Advocates.**

The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is; -

Whether the Orders of the Court issued on 31/5/2021 dismissing the Notice of Motion dated 23rd March 2021, ought to be set aside.

The power to set aside ex parte Orders or Judgement 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 feter the wide discretion given it by the Rules.''***

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 or order upon such terms as may be just***."

Further, **Section 3A of the Civil Procedure Act** provides for the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the Court process. It provides as follows:

> ***Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.'***

As stated above, the Court has discretion to set aside a judgment or Order. The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In **Shah vs Mbogo & Another (1967) EA 116**, it was held that:

> ***"The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".***

The Court in **Haji Ahmed Sheikh t/a Hasa Hauliers vs. Highway Carriers Ltd (1982 – 88) 1 KAR 1184**, stated as follows:

> ***"The powers of the Court in dealing with application under Order IX rule 10 is to do justice to the parties. In Pithon Waweru Maina vs Thuku Mugiria, Civil Appeal No. 27 of 1982 (unreported) (ibid) (Porter, Kneller, JJ.A. and Chesoni, Ag. J.A.) Potter, J.A. in quoting Duffus, P., in Patel vs E.A. Cargo Handling Services Ltd., (1974) E.A. 75 stated at page 1 of his judgment*** **this:**
>
> > **'There are no limits or restrictions on the judge's discretion 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 to it by the rules'**.

In the present case, the Defendants/Applicants seek an Order of setting aside the Orders made by this Court on **31st May 2021**, dismissing their Notice of Motion Application dated **23rd March 2021**. The application in question had been brought under Certificate of Urgency, and on **6th April 2021**, when the Court found that no urgency had been disclosed and directed that the Applicants serve the Application and consequently take convenient hearing date at the registry. On **17th May 2021,** the Applicants attended the Registry through their advocates and fixed the Notice of Motion dated **23rd March 2021**, for hearing on **31st May 2021.** On the said **31st May 2021**, both the Applicants and the Respondents failed to attend Court and consequently, the Court dismissed the Notice of Motion for non-attendance.

It is notable that the excuse or reasons advanced on oath by the **Wanjiru Macharia, Advocate** for the Applicants, is that on the material date, the Notice of Motion was dismissed, the matter was not indicated in her diary due to an administrative error in her office and she only realized the error when her client called her to make an inquiry on the same. That she attempted to arrest the situation by rushing to Court, but on her arrival the Notice of Motion dated **23rd March 2021**, had already been dismissed.

The Court has no reason to doubt the reasons advanced by Counsel for the Applicants and no evidence has been tabled before it to the contrary. The consideration this Court has to make however is whether the reasons advanced by the Defendants/Applicants amount to 'sufficient reason' to justify the exercise of the Court's discretion in favour of the Applicants. "In **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur)** Musinga, JA saw sufficient cause to be:

> ***"Sufficient cause" or "good cause" in law means:***
>
> > ***"….the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW DICTIONARY, 9th Edition, page 251.***
> >
> > ***Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."***

It was Applicants' submission through their Advocate that the non- attendance was as a result of an administrative error that caused the

matter to be wrongly diarized and that she took immediate steps to rectify the mistake by filing the instant application. As stated above, the Court has no reason to doubt the candid and forthright manner in which that explanation was given. The question before the Court is whether the reason given amounts to an excusable mistake. The Court finds that it did amount to an excusable mistake. In the case of **Belinda Murai & Others vs Amos Wainaina, [1979] eKLR,** ***Madan, J.A***., (as he then was) stated:

> ***"A mistake is a mistake. It is no less a mistake because it is 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 person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistakes, which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule..."***

In the present case, it is clear that failure to attend Court was a mistake of the Applicant's counsel, who swore an affidavit averring the circumstances surrounding his failure to attend Court. Although counsel for the Applicants has not annexed a copy of the Court's cause list proving that **CC No 48/ 2018,** was listed before any Court on **31st May 2021**, the Court notes that the instant application was lodged within **14 days** from the date the Court dismissed the Notice of Motion dated **23rd March 2021.**

In the case of **Philip Chemwolo & Another vs Augustine Kubende, [1986] eKLR the Court** stated 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 determined on its 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 for the purpose of imposing discipline".***

The upshot of the foregoing is that this Court finds and holds that there is sufficient reason to **set aside the orders of the *Court issued on 31st May, 2021, dismissing the Notice of Motion Application dated 23rd March 2021.***

Consequently, the Court finds and holds that the Notice of Motion Application dated **14th June 2021**, by Defendants/Applicants is merited and the said application is **allowed** entirely with costs, being in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MURANG'A THIS 30TH DAY OF NOVEMBER 2021.

L. GACHERU

JUDGE

IN THE PRESENCE OF;

ALEX MUGO - COURT ASSISTANT

N/A FOR THE PLAINTIFFS/RESPONDENTS

MS MACHARIA HB KIMWERE FOR THE DEFENDANTS/APPLICANTS

L. GACHERU

JUDGE