REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 278 OF 2017

SAFARICOM LIMITED ..... PLAINTIFF/RESPONDENT

VERSUS

JOSENGA COMPANY LIMITED..... 1ST DEFENDANT/RESPONDENT

SABINA GITHINA ..... 2ND DEFENDANT/APPLICANT

PUNDA MILIA FARMERS CO-OPERATIVE

SOCIETY LIMITED ..... 3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR MURANG'A.....4TH DEFENDANT/RESPONDENT

ROBERT KIMANI NDUNG'U.....5TH DEFENDANT/RESPONDENT

RULING

By a **Notice of Motion Application** dated **31st of August 2021,** brought under Articles 48, 50, 159(2) (d), of the **Constitution** Section 3A and 63 (e)of the **Civil Procedure Act** and Order 18 Rule 10, Order 51 Rule 1 of the **Civil Procedure Rules (2010**), the 2nd Defendant/Applicant sought for orders that;

1. ***Spent.***

2. ***Spent.***

3. ***That this Honorable Court be pleased to reopen the 1st 3rd and 4th Defendants' cases for cross examination by the 2nd Defendant/Applicant, the witnesses who testified on the 25th of May 2021, and 16th of June 2021, respectively.***

4. ***That this Honorable Court be pleased to reopen the 2nd Defendant's/Applicant's case and allow the applicant to testify, tender her evidence and call her witnesses.***

5. ***That this Honorable Court be pleased to grant an order to set aside the proceedings of 26th May, 2021 and 16th of June 2021.***

6. ***That the cost of this Application be provided for.***

The Application is premised on the grounds set out on the face of the Application and on the Supporting Affidavit of **Sabina Githina**, the 2nd Defendant herein who averred; that sometime in **September 2020,** she had a disagreement with her advocate on record **Mukele Ngacho & Co. Advocates**, forcing her to change advocates and instruct the Law Firm of **A.A Mudanya & Co Advocates**. That she promptly deposited half the legal fees to enable the new advocates to take up the matter. That on **19th May 2021**, she received a letter from **A.A Mudanya and Co. Advocates,** informing her that they will not continue to represent her in this matter. That the said **A.A. Mudanya & Co. Advocates** did not appraise her about the hearing and the current status of the matter.

That when the above happened, she contacted her previous advocates **Mukele Ngacho & Co Advocates** for assistance. That the Law Firm of **Mukele Ngacho Advocates,** perused the relevant Court records and they informed her that the witnesses for the **1st, 3rd and 4th Defendants**,

had testified in the absence of the 2nd Defendant/Applicant or her advocates at the time. That she was neither aware on the hearing of **25th May 2021**, nor was she informed of the same by her advocates. That she was informed of the hearing of **16th June 2021,** and she was present in Court though she was unable to cross examine the witnesses in the absence of her advocates on record. That there is a high likelihood that the Court is going to deliver its judgment without taking into account her case, contrary to the rules of natural justice. That failure to attend Court was not as a result of her fault, but that of her advocates on record. That she should not be punished because of the faults of her advocates on record. That she has always been ready, willing and desirous to prosecute her defense and that the instant application was filed without inordinate delay.

The Application is opposed by the Plaintiff through a Replying Affidavit sworn on **7th October 2020** by **Dennis Etemere, Advocate** for the Plaintiff/Respondent. The Application is further opposed by the 1st Defendant through a Replying Affidavit sworn on **7th October 2021,** by **Isabel Wanjiru Ngugi**, a Director of the 1st Defendant. In response to the Replying Affidavit, the Applicant filed a Supplementary Affidavit sworn by the Applicant on **29th October 2021.**

The Application was canvassed by way of written submissions. The 2nd Defendant/Applicant filed her written submissions dated **4th November 2021,** through the **Law Firm of LKips & Company. Advocates.** The Applicant submitted that she has approached this Court without delay in an attempt to ensure her right to fair hearing is not infringed. She relied on **Articles 25** and **50** of the **Constitution 2010**. That the right to fair hearing cannot be derogated or limited, and the Court should jealously protect it. It was the Applicant's further submissions that the Court should exercise its discretion in her favour as her nonattendance was occasioned by fault of her advocate on record. She relied on the case of **Tom Oyieyo Oduor vs. Swan Industries Limited (2018) eKLR and Tana & Arthi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 others**, among other cases.

Consequently**,** the Plaintiff/Respondent filed its written submissions dated **23rd November 2021,** through the **Law Firm of Mahmoud & Gitau Advocates** filed in Court on **25th November 2021**. The Plaintiff/Respondent submitted that the Applicant had failed to establish a case to warrant setting aside of the proceedings. That the Applicant was aware of the hearing dates and the nonattendance of the advocate was no reason why she did not proceed with the case or attend Court. That the hearing date of **25th May 2021,** was issued in the presence of all the advocates appearing in the matter and the 2nd Defendant/Applicant was served with a **hearing notice** for the hearing of **16th June 2021**, which allegation has not been controverted. The Plaintiff/Respondent also submitted that it will suffer irreparable harm if the Applicant's application is allowed.

The Court has considered the Applicant's Application, the Court records, the rival written submissions, the cited authorities and the relevant provisions of law and finds the main issue for determination is; -

I. <u>Whether the application dated 26th August 2021 is merited.</u>

There is no dispute that the 2nd Defendant's/Applicant's counsel was served with a **hearing notice,** but failed to attend Court with his client for hearing on **25th May 2021**. There is also no doubt that the Applicant was also served with the Hearing notice for hearing of **16th June 2021,** when her advocate failed to attend, but the 2nd Defendant/Applicant who was in attendance failed to notify the Court of her presence. The main issue for determination is whether the Defendant/Applicant has established sufficient cause to warrant a grant of the orders sought.

The jurisdiction of the Court to review and set aside its decisions is wide and unfettered. **In Shah v Mbogo and Another [1967] EA 116,** the Court of Appeal of East Africa held that:

> **"This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."**

The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In ***Wachira Karani v Bildad Wachira [2016] eKLR, the Court*** held that:

> ***"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending Court by a sufficient cause..."***

In the case of **BML v WM [2020] eKLR**, the Court of Appeal cited with approval the he Supreme Court of India in **Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011),** where sufficient cause was defined as follows:

> ***"Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently …"***

Further, in the case of **<u>The Hon Attorney General v the Law Society of Kenya & Another</u>,Civil Appeal (Application) No. 133 of 2011** sufficient cause was defined as:-

> ***"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 <u>rational, plausible, logical,</u> <u>convincing, reasonable and truthful. It should not be an</u>***

explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

It is trite that this Court in conducting its proceedings and functions is guided by **Article 159 of the Constitution**, Section 3A of the Civil Procedure Act and the principles of Natural Justice. Having stated the above this Court will proceed to determine if the reasons advanced by the 2nd Defendant/Applicant fit the description of sufficient cause stated above.

In the case of **Patriotic Guards Ltd. V. James Kipchirchir Sambu, NAIROBI CA NO. 20 OF 2016, (2018) KLR,** the Court stated:

> ***"It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously... judicious because the discretion to be exercised is judicial power derived from the law and as opposed to judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in the suit."***

In the instant application, the Applicant has maintained that she failed to appear in Court on **25th May 2021,** because her advocate on record at the time failed to notify her of the hearing and did not even attend Court himself. The Applicant has also alleged that she had paid the said advocate some monies being a deposit for his legal fees and therefore he had proper instructions to attend Court. Further, the Applicant has admitted being present in Court on **16th June 2021**, but failed to notify the Court of her presence on account of fear and on account that she lacked **locus**, as she had already instructed an advocate who was absent in Court on that day.

A case belongs to a litigant and it is upon the litigant to follow up his case, and show the steps taken to do so. However, there is also the obligation on the Advocate to inform his client of the date fixed, as most times when Advocate fixes dates for hearing, it is upon their own availability as per their diary and not necessarily that of their client. The possibility that a date could be fixed and the litigant not be informed due to inadvertence on the part of counsel is not farfetched, and is excusable to a certain extent. In ***Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR***, the Court observed as follows;

> ***"From past decisions of this Court, it is without doubt that Courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the Court in which he practices and even to the other side."***

The Court has considered the above cited cases and the submissions of the parties and finds that the 2nd Defendant/Applicant has established sufficient cause for this Court to exercise its discretion in her favour.

On the issue of fair hearing, the Court notes that the right to fair hearing is a principle of **Natural Justice** and the same cannot be limited and or derogated as per the provisions of **Article 25** of the **Constitution** of Kenya 2010**.** The Constitution, at Article 50(1), provides for fair hearing with regard to any dispute that has to be resolved in accordance with the law. It states as follows:

> ***"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."***

The Court, ***in Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR,*** had the following to say on Article 50, with respect to fair trial principles in civil cases:

> ***"While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of access to a Court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time."***

The Court went on to say:

> ***"… it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system***.

This Court in the interest of justice will therefore shy away from condemning the Applicant unheard.

The Court now moves on to consider the issue of inordinate delay. The question to be answered is whether the applicant approached this Court with the instant application at the earliest bearing in mind her specific scenario. In the case of **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS VS. NIC BANK LIMITED & ANOTHER [2014] eKLR** held thus;

> ***"Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court's mind on the delay, caution is advised for Courts not to take the word***

'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

In computation of time to ascertain whether there was inordinate delay, Courts should not construe inordinate and take the ordinary dictionary meaning of inordinate as was held in the **UTALII** case above. The Court should look at the circumstances of the case, the explanation given and the bigger picture of administering justice. One day can be termed as inordinate delay and one year can be construed not to be inordinate delay.

In the case of **Burhani Decorators & Contractors V Morning Foods Ltd & Another [2014] eKLR** the Court held that:

> ***"I have also asked myself whether failure to attend Court on 23rd May 2012 by both the appellant and their advocates constituted an inadvertent excusable mistake, an error of judgment regarding failure by the advocates law firm to diarize the hearing dates as required 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 the dismissal order, 3 months after the said order was made constituted inordinate delay."***

The Court notes in the instant application that the matter was in Court for hearing on **6th June 2021** and the instant application **31st August 2021**. The period between **6th June 2021** and **31st August 2021**, is approximately **three** months. The Court notes the reason advance by the Applicant for bringing the instant application, the reason being that her advocate regardless of having full instructions failed to attend Court on two occasions and in effect jeopardizing her case. The Court therefore holds that the three months was **not inordinate delay** as the 2nd Defendant/Applicant had to again begin the process of looking for a suitable advocate, instruct the said advocate and it was only after he had sufficiently perused the matter that he could the advice the Applicant and obtain instructions to file the instant Application.

The Court appreciates the loss that will be occasioned on the Respondents herein especially by way of delay in concluding the main suit. However, the Court having held and found that the Applicant approached this Court with the instant application without inordinate delay, any loss suffered can be compensated by way of damages.

The upshot of the foregoing is that the Court finds the Notice of Motion Application dated **26th August, 2021,** is **merited** and the same is allowed entirely in terms of prayers No **(3) (4) & (6).**

The 2nd Defendant/Applicant is further condemned to pay a throw away costs of **20,000/=** to the Plaintiff/Respondent herein before the next hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF DECEMBER, 2021.

L. GACHERU

JUDGE

Delivered online

In the presence of;

Kuiyaki - Court Assistant

Mr Etemere for the Plaintiff/Respondent

M/s Mungai for the 1st, 3rd and 5th Defendants/Respondents.

Mr Ngome for the 2nd Defendant/Applicant

N/A for the 4th Defendant.

L. GACHERU

JUDGE