



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 87 OF 2017

PHEOBE MUGA ASIYO.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH NYAKWA OJWANG.....1ST DEFENDANT/RESPONDENT

GORDON NYAKWA.....2ND DEFENDANT/RESPONDENT

ROSELINE KWAMBOKA.....3RD DEFENDANT/RESPONDENT

RULING

The Plaintiff is seeking orders to review and set aside orders of the court of 6th November 2019 dismissing the suit for non-attendance on the part of the Plaintiff. The application is based on the grounds that the matter was dismissed a few minutes before the Plaintiff's counsel walked into the court room, his delay being because an email was being sent from the United States explaining the Plaintiff's absence and counsel was waiting for it to be printed in order to lodge it in court. That the Defendants have now moved to begin demolishing property on the suit property on the basis that an injunction is no longer in force. That the injunction should be reinstated to ensure the status quo is maintained and preserve the suit property pending determination.

In his supporting affidavit, counsel for the Plaintiff stated that the Plaintiff was admitted in the United States for medical treatment and the doctor was to send the document verifying this by email. That due to time difference, the email arrived on 6th November 2019. That the mistake of counsel should not be visited upon the Plaintiff. Counsel attached the email and sick note from the doctor to the supporting affidavit.

The Defendants/Respondents neither filed a response nor submissions.

Applicant's Submissions

Counsel submitted that he had demonstrated the reason as to why he was late to court, and that the mistake should not be visited upon an innocent client who is willing and ready to have the matter heard and finalised on merit. That the Respondent does not even have any copy of title documents but intends to oust the Applicant from her land which she has title to. That the Applicant has demonstrated that she has a strong case against the Respondents.

Counsel submitted that the Applicant brought the application immediately the matter was dismissed, demonstrating the seriousness with which the counsel is dealing with the matter. That the right of a party to be heard was enshrined in the Constitution. Counsel relied on the case of ***Burhani Decorators & Contractors v Morning Foods Ltd & another* [2014] eKLR**.

Issues for Determination

1. Whether the order sought is merited

The legislative framework is established in Order 12 Rule 7 of the Civil Procedure Rules for setting aside and Section 80 of the Civil Procedure Act along with Order 45 of the Civil Procedure Rules for review.

Order 12 Rule 7 requires the applicant to demonstrate sufficient cause for setting aside *ex-parte* orders. The court is required to exercise this discretion in a judicious manner as set out in ***CMC Holdings Limited v Nzioki* [2004] 1 KLR 173**:

“That discretion must be exercised upon reasons and must be exercised judiciously... Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...”

The Overriding Objective in Section 1A and 1B of the Civil Procedure Act, that is ensuring the expeditious, fair, and just proportionate and economic disposal of cases, must be considered. Where an Advocate’s mistake can be remedied with costs and where the respondent stands to suffer no prejudice, the court’s orders ought to be set aside. The court’s objective is to ensure that the ultimate end of justice is achieved.

Regarding whether an Advocate’s mistake is a sufficient ground for setting aside an *ex-parte* judgment, Apaloo J. (as he then was) in Phillip Chemwolo & another v Augustine Kubede [1986] eKLR held:

“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 its merits. 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 the purpose of imposing discipline.”

The Plaintiff’s Counsel has sufficiently explained his failure to attend when the matter was called. Further, the Defendants have not opposed the motion or claimed that they would suffer any prejudice should the orders sought be granted. I DO exercise my discretion by allowing the application. Costs in the cause.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY, 2020.

In the presence of:

Mr Emukule for the Plaintiff

N/A for defendant

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE