



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 591 OF 2001**

**1. KAMIMI COMPANY (1976) LTD**

**2. DR. MUNYUA WAIYAKI** (Suing on his own behalf and on behalf of other

Residents of Mombasa North, Mtwapa Mombasa.....**PLAINTIFFS**

**VERSUS**

**BAMBURI CEMENT LIMITED**.....**DEFENDANT**

**RULING**

1. The plaintiff has brought application by way of Notice of Motion dated 5.03.2020 seeking from the court an order that the order made on the 3.03.2020 and dismissing its application dated 18.09.2018 be set reviewed, discharged, violated and/or set aside and the dismissed application be reinstated for hearing and consideration on the merits.

2. The main reason advanced to ground the orders sought is a mistake and inadvantage by counsel in failing to diarise the matter on the date set and when it was dismissed owing to non-attendance. It was then contended that the applicant stands to suffer substantially being condemned unheard and that the application was lodge expeditiously upon the applicant learning of the dismissal order.

3. The same facts were reiterated in the Affidavit in support in which it was contended and averred that pursuant to the direction given on the 20.20.20 submission were indeed prepared and were ready by the 31/01/2020 but were never filed and that the 3.03.2020, when owing to pressure of work outside Mombasa, the file was availed to the advocate after the matter had been dismissed. The counsel, Mr. Kirui Titus contends and deponees that his mistake was not intentional and ought not be taken against the client to the counsel.

4. For the defendant/respondent, a statement of grounds of opposition was filed in which it was contended that the motion is meritless and that the matter smirks of gross indolence evidenced by glaring failure to take it seriously for the last 19 years and that litigation ought to come to an end in that a suit need not be kept in court at the whim of one of the parties. It was then added that the defendant stands to be gravely prejudiced if the order of reinstatement is made for reasons that the lapsed time will prejudice its defence.

5. On the direction by the court the matter was argued orally during which arguments counsel basically dwelt on the history with the applicant owing up to a binder and the respondent pressing which he termed dilatory and lethargic conduct by the plaintiff and counsel.

6. To this court, substantial dispensation of justice demands and dictates that before a court of law determines a dispute on the merits, it leaves open its options for revisiting an order made on account of default it being stressed that a default should not be the only reason a court of law denies a litigant and citizen his right to access justice and day in court. The only caution or caveat against that very wide latitude given to court is that the discretion even when unfiltered is intended to achieve the ends of justice and never ever designed to assist a party who has by designed deliberately sought to obstruct or delay the course of justice.

6. The overall consideration is the reason leading to the default and the ensuing order sought to be set aside. In this matter counsel says, and it has not been rebutted, that the failure to attend court and file submissions was the inadvertence in failing to diarise the matter. This court appreciate that human being are prone to mistakes because all are not infallible. I do not doubt that Mr. Kirui made a mistake just as I have no substance to show that in failing to file the submissions in time and attend court on 3/3/2020 he was propelled by a deliberate design to obstruct and defeat justice. I am prepared to accept that a mistake, even a blunder did occur and that the occurrence of a blunder should not by itself be the reason to drive away a litigant for the seat of justice. Upto that extent, I am prepared to find as I did in ***Bupinder Singh Dogra vs Coast Development Authority [2019] eKLR*** in the following words:

**“I am prepared to take it that by some blunder of counsel the defendant applicant has found itself with a judgment it views should not have been entered if not for the blunder. I resist the temptation that the mere occurrence of blunder should condemn the defendant unheard. I am minded to set aside and I do grant to the defendant/applicant the orders sought”.**

7. Here, I do find that the only reason the application was dismissed on the 3/3/2020 was failure to diarise the matter and attend court and not the ulterior motive to delay the hearing of the matter. I consequently do set aside the default order of 3/03/2020 and reinstate the application date 18/9/2018. As a condition of setting aside, I direct that a date be given for that application to be heard at the earlier available opportunity and that the plaintiff applicant pays thrown away costs to the defendant.

8. The default having been occasioned by the mistake of counsel, and the counsel having offered to pay the costs which have been thrown away by the respondent having to defend this application, and even on the face of success by the applicant, I do order that the applicant pays

to the respondent the thrown away costs which I assess at Kshs.20,000/=. That be done within 14 days from today and in default the defendant be at liberty to execute.

**Dated, Delivered and Signed at Mombasa this 9th day of October 2020.**

**P.J.O. OTIENO**

**JUDGE**