REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO.1 OF 2017 (OS)

LAVENDER SIGAR

(Suing on his own behalf as the legal

representative of the Deceased's estate) and 21 OTHERS.....APPLICANTS

VERSUS

EDWIN OMOLO ONG'ONG'A SIGAR

(Sued as the legal representative of WILSON ONG'ONG'A,

the Trustee of the estate of the late JAMES SIGAR OMOLLO).....RESPONDENT

RULING

The Applicants filed this application dated 7th February 2019 seeking orders setting aside the court order issued on 23rdJanuary 2019 dismissing the suit for non-attendance, and reinstating the application dated 19th September 2018 to enable it to proceed to its natural conclusion.

The application is based on the ground that when the suit came up for hearing of the application, Applicants' counsel was before Justice Ochieng on another matter. That by the time the Applicants' counsel came before this court, the matter had already been called and the application dismissed for non-attendance. That the failure to appear was not deliberate and the Applicants will suffer irreparable loss if the application stays dismissed. That the Applicants should not be punished for the mistakes, if any, on the part of his Advocates.

Respondent's Grounds of Opposition

The Respondent opposed the application on the grounds that the application was incompetent as it intends to reinstate an incompetent application which also emanated from an incompetent suit; that orders sought will be granted in vain; that there is no prejudice the Applicant stands to suffer; and that the application is frivolous and highly vexatious.

By consent of both parties, this application was to proceed by way of written submissions.

Applicants' Submissions

Counsel for the Applicants submitted that the Applicants had provided a satisfactory explanation for non-attendance, and that the Applicants' Counsel's lateness on the day of hearing of the application was not deliberate, as he had thought that the matter before the High Court would take a short time and that the counsel's firm was overwhelmed with cases before different could and therefore were unavailable to find someone to hold his brief.

Counsel submitted that Article 159 of the Constitution encouraged courts to dispense justice without undue regard to procedural technicalities. That the right to a hearing, fair trial and access to justice are enshrined in the Constitution, and it is the duty of the court to ensure that every person that submits themselves to its jurisdiction gets an opportunity to ventilate their grievances. Counsel cited the case of ***Burhani Decorators & Contractors v Morning Foods Ltd & another*** **[2014] eKLR.**

Issues for Determination

1. Principles for setting aside ex-parte orders

Order 12 Rule 7 of the Civil Procedure Rules 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 Court of Appeal in ***Samson Karino Ole Nampaso v Kaana Ka Arume Co. Ltd*** **[2016] eKLR** held that the court is also obligated to consider whether the applicant had raised a triable issue which ought to have been allowed to be ventilated on merit at trial "for it should never be lost sight of that courts exist for the purpose of determining rights and entitlements of parties substantively and on merit upon hearing them and considering such evidence as they may tender."

2. Whether Mistakes by Advocate is a sufficient reason for setting aside the ex-parte orders

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.

Phillip?***Chemwolo***?***& Another v***?***Augustine***?***Kubede*** **[1986] eKLR**?

> **"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." (Apaloo**?**J, as he then was)**

Lucy?***Bosire***?***v***?***Kehancha***?***Div***?***Land Dispute***?***Tribunal & 2 others*** **[2013] eKLR**?:

> **"It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits**?**…**?**The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice." (Odunga**?**J)**?

Analysis

The gist of the application dated 19th September 2018 was that the Applicant was never served with a hearing notice hence the dismissal of the suit should be set aside. This is a triable issue that should have been determined on merit. Further, the Respondent's Grounds of Opposition to the application of 19th September 2018 claiming that the application was incompetent have not been determined on merit.

The Applicant's Advocates have provided a sufficient cause for their failure to attend court for the hearing of the application, further their attempt to remedy their mistake through this application was made without inordinate delay. Therefore the Applicant should not be made to suffer for the mistakes of the Advocate.

In conclusion, the orders dismissing the application of 19th September 2018 ought to be and is hereby set aside with costs and the application determined on merit.

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Mr. Owino for Mr. Ngila for Applicants

Mr. Anyul for Respondent

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE