



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 184 OF 2010**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**GILBERT MWANGI NJUGUNA.....1<sup>ST</sup> DEFENDANT**

**WILSON GACHANJA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application for determination is the Notice of Motion dated 3<sup>rd</sup> June 2019 in which the plaintiff/applicant is seeking to reinstate the suit which was dismissed on 3<sup>rd</sup> June 2019 for non-attendance. The application is brought under Section 1A, 1B, 3A and 63( e) of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule (1) (15) of the Civil Procedure Rules.
2. The application is supported by the affidavit of Francis O. Makori sworn on 3<sup>rd</sup> June 2019 and Supplementary Affidavit sworn on 1/8/2019 and is based on the grounds that the person who received the hearing notice for 3<sup>rd</sup> June 2019 at the plaintiff's office inadvertently failed to diarize and bring to the attention of the plaintiff's counsel on record, and that the plaintiff's counsel did not attend court when the matter came up for hearing on 3/6/19 since he was attending hearing before Ogola J in Mombasa **Constitutional Petition No. 28 of 2018- John Grossert & Company Limited –v- KPA & EACC**. That the plaintiff is and has always been desirous to prosecute the suit to its logical conclusion and that this being a suit in which the plaintiff seeks to recover allegedly fraudulently acquired public land, it is in the best interest of justice and public interest to reinstate the suit so that the issues in controversy are heard and determined on merit.
3. In opposing the application, the 1<sup>st</sup> defendant filed a replying affidavit sworn by Gilbert Mwangi Njuguna on 15<sup>th</sup> July 2019. The 1<sup>st</sup> defendant avers inter alia, that the suit has been dismissed on three occasions for want of prosecution and non-attendance hence is clear that the plaintiff has been unwilling to prosecute the suit to its logical conclusion. That the application is misguided, misconceived and utter abuse of the court process and should be dismissed because it is intended to delay the course of justice. That justice delayed is justice denied, and that litigation must come to an end.
4. The application was canvassed by way of written submissions. The plaintiff filed their submissions on 31<sup>st</sup> October 2019 while the 1<sup>st</sup> defendant filed his on 27<sup>th</sup> November 2019.
5. I have considered the application, the affidavits in support and against as well as the submissions filed. This case was before court for hearing on 3/6/19 when only the 1<sup>st</sup> defendant's advocate attended court. The plaintiff and the 2<sup>nd</sup> defendant were absent. The hearing date had been taken on 13/2/2019 by the advocate for the 1<sup>st</sup> defendant who served both the advocate for the plaintiff and the advocate for 2<sup>nd</sup> defendant. Upon perusing the affidavit of service filed, the court was satisfied that service was duly effected upon the plaintiff and the 2<sup>nd</sup> defendant and since the plaintiff and their advocate were not present in court, and following an application by the 1<sup>st</sup> defendant's advocate, the court went ahead and dismissed the plaintiff's suit for non-attendance.
6. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit. In the affidavit in support of the application, the plaintiff's counsel has explained why he did not attend court on the material day. He states that the person who received the hearing notice forgot to diarize the matter for that day and that he was also attending another matter before Ogola, J in the High Court which was also coming up for hearing.
7. In the case of **Shah –v- Mbogo (1967) EA 116**, the Court of Appeal held that the exercise of discretion of the court to set aside ex-parte orders is to avoid injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. From the material before court, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the plaintiff and their advocate. In my view, the failure to attend

court has sufficiently been explained and the same is excusable. The person who received the hearing notice at the plaintiff's offices might have forgotten to diarize the matter as explained. The plaintiff's advocate has also shown evidence indicating that he was before another court on the material day. The overriding objective of the court would, in my view, come to the aid of the plaintiff in this case. The 1<sup>st</sup> defendant has not demonstrated how he will suffer prejudice if the orders sought are granted and the suit is reinstated and heard and decided on merit. The 1<sup>st</sup> defendant can adequately be compensated by award of costs.

8. The upshot is that the application dated 3<sup>rd</sup> June, 2019 is allowed. The order made on 3<sup>rd</sup> June 2019 dismissing the plaintiff's suit is set aside and the case is reinstated. Costs of the application are awarded to the 1<sup>st</sup> defendant.

Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 12<sup>th</sup> day of March 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Makori for plaintiff

Mwandeje for Lumatete for 1<sup>st</sup> defendant

No appearance for 2<sup>nd</sup> defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**