



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A
ELC NO. 245 OF 2017

GATHAITE FARMERS COOPERATIVE SOCIETY LIMITED.....APPLICANT/PLAINTIFF

VS

PETER MAINA MIANO.....1ST DEFENDANT/RESPONDENT
JOEL KIRUKU NJENGA.....2ND DEFENDANT/ RESPONDENT
FRANCIS KIGO NJENGA.....3RD DEFENDANT/ RESPONDENT
PETER KNUTHIA NDUNGU.....4TH DEFENDANT/ RESPONDENT
KAMAU KANGI.....5TH DEFENDANT/ RESPONDENT
GIDRAP KINYANJUI KAMAU.....6TH DEFENDANT/ RESPONDENT
DUNCAN NGINYA KAHUHIA.....7TH DEFENDANT/ RESPONDENT
GABRIEL KINYANJUI KABARU8TH DEFENDANT/ RESPONDENT
JOEL KINYANJUI NJENGA & PETER MAINA MIANO.....9TH DEFENDANT/ RESPONDENT
MIRIAM NUNGARI WAITHAKA.....10TH DEFENDANT/ RESPONDENT
ONESMUS NJENGA KIRUKI.....11TH DEFENDANT/ RESPONDENT
LUCY NJERI MUUNDI.....12TH DEFENDANT/ RESPONDENT
BENSON NJUKI KAMAU.....13th DEFENDANT/ RESPONDENT

RULING

1. The Notice of Motion dated the 2/12/19 was filed on the 4/12/19 seeking orders to set aside the dismissal orders of the 29/4/19.
2. The application is supported by the grounds annexed thereto and the supporting affidavit of Arcadius Njora Chege where he deponed interalia that the suit was dismissed for non-attendance on the 29/4/19 and his Counsel learned of the dismissal on the 2/12/19 when he attempted to fix the matter for hearing. That the Advocate failed to appear for the hearing of the matter on the 29/4/19 because he was not aware of the hearing date. That the Counsel who held his brief on the 28/3/19 when the date was taken did not communicate to his Counsel of the hearing date. Further that there is no prejudice that will be no prejudice that will be suffered if the matter proceeds for hearing.
3. The power vested in the trial Court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 Rule 7 of the Civil Procedure Rules. It is a discretionary power that is exercised by the Court. The discretion is 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. See the case of **Stallion Insurance Co**

Limited Vs Rosemary Olao CA 85 of 1998.

4. It is clear from the record that on the 19/2/19 the firm of Bwonwonga and Company Advocates fixed the hearing at the Registry for the 28/3/19. On the 28/3/19 an Advocate by the name Opiyo held brief for Mr. Bwonwonga for the Plaintiff and sought an adjournment on the grounds that Mr. Bwonwonga was unavailable because he had a sick patient at the hospital and therefore pleaded for an adjournment which the Court granted. He then fixed the matter for hearing for the 29/4/19.

5. Come the 29/4/19, neither the Advocate nor his client were present when the matter was called out in and outside the Court room. The Court dismissed the suit under Order 12 Rule 1, hence the current application.

6. Despite being granted an adjournment and fixing another date the Plaintiff appears to have had a slumber for close to 8 months before realizing that the suit had been dismissed. The Plaintiff in his affidavit has explained that his Advocate was not informed of the new date and therefore was unaware that the matter was scheduled for the 29/4/19. His Advocate did not offer any explanation at all. It is not plausible for Counsel to instruct another Counsel to hold his brief and fail to get the feedback of that instruction.

7. The overriding objectives contained in the Civil Procedure Act sec 1A is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed under the Act. A party to civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objectives of the Act and to that effect to participate in the processes of the Court and to comply with the directions and orders of the Court.

8. It is clear from the explanation and the record that both Counsel and the Plaintiff suffer from dereliction of responsibility; the Advocate owes a duty to his client and well as the Court in exercise of his professional conduct whilst the Plaintiff as the client and the one to which the dispute belongs to follow up his Counsel and the progress of his suit. In this case the plaintiff failed to do so.

9. I find that the explanation given is not inexcusable nor inadvertent and no sufficient reason has been given for non-attendance nor for the delay in bringing this application. I decline to exercise my discretion in favour of the Plaintiff.

10. This application is therefore dismissed with no orders as to costs.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 5TH DAY OF MARCH 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mwangi Ben HB for Bwonwonga for the Plaintiff /Applicant

1st – 13th Defendants/Respondents - Absent

Mwaniki for the Plaintiff

Kirubi for the 1st – 5th Defendants

Irene and Njeri, Court Assistants