



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 287 OF 2017**

**FRANCIS MUISYO MAITHYA .....PLAINTIFF/APPLICANT**

**VERSUS**

**BERNARD MAITHYA NTHENGE ... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AGNES NTHAMBI MAITHYA..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**FREDRICK DAVID MUEMA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before this Court for ruling is the one dated 10<sup>th</sup> September, 2019 and filed in court on 01<sup>st</sup> October, 2019 by the Plaintiff's/Applicant's Counsel for orders: -

**1. THAT the Court do set aside its dismissal orders of 13<sup>th</sup> May, 2019 and reinstate the suit herein together with the interim orders that were in force prior to the dismissal.**

**2. THAT the cost of this application be provided for.**

2. The application is expressed to be brought under Order 12 Rule 7 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the Civil Procedure Act and all other enabling provisions of the law and is predicated on the grounds on its face and supported by the affidavit of Francis Muisyo Maithya, the Plaintiff/Applicant herein, sworn at Nairobi on 10<sup>th</sup> September, 2019.

3. The Defendants/Respondents have opposed the application vide the replying affidavit of Fredrick David Muema, the 3<sup>rd</sup> Defendant/Respondent herein, sworn at Machakos on 09<sup>th</sup> December, 2019 and filed in court on 10<sup>th</sup> December, 2019.

4. Amongst the grounds that the application is predicated upon are that the Applicant's advocate was indisposed on the 13<sup>th</sup> May, 2019 when the matter came up for hearing and therefore he was unable to attend court and that the Counsel had communicated his predicament to the Respondents and had sought for indulgence. The Applicant has repeated the same grounds in paragraphs 7, 8 and 9 of his supporting affidavit. Of importance to note is that the affidavit by the Applicant's Counsel as well as his medical report were not attached to paragraph 9 of the Applicant's supporting affidavit despite direction by the Court on 31<sup>st</sup> October, 2019 to the Applicant to serve the Respondents with the annexures to serve the Respondents to enable them respond to the disposition in the said paragraph.

5. In paragraphs 3 of their replying affidavit, the 3<sup>rd</sup> Respondent has deposed that the alleged annexures in the supporting affidavit marked FMM1(a) and (b) have not been attached to the application neither have they been supplied to their advocates on record despite the request vide a letter dated 11<sup>th</sup> November, 2019 marked as FMM1.

6. By the time of writing this ruling, it is only the Respondent's Counsel who had filed their submissions. The Counsel urged the Court to dismiss the application with costs to the Respondents for being a waste of judicial time and lacking in merit.

7. The Respondent's Counsel submitted that the Applicant has failed to demonstrate that non-attendance in court on 13<sup>th</sup> May, 2019 by the Applicant's Counsel was a result of an excusable mistake, inadvertence, accident or error. The Counsel added that in as much as the Applicant avers that failure to attend court on the part of the Applicant's Counsel was because of indisposition, no such evidence was adduced to support the position. The Counsel pointed out that their request for copies of the mentioned annexures FMM1 (a) and (b) in the supporting affidavit leaves the averment in the affidavit uncorroborated. The Counsel relied on the case of **CMC Holding Ltd vs. Nzioka**

[2004] 1 KLR 173 where it was held: -

“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 among other things an excusable mistake or error. It would... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error...”

The Counsel further relied on the case of **Bains Construction Co. Ltd vs. John Mzare Ogowo 2011 eKLR** as cited by the Court of Appeal in **Habo Agencies Limited vs. Wilfred Odhiambo Musingo (2015) eKLR** as follows: -

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but is equally true when Counsel as agent is vested with authority to perform some duties and does not perform as principal and does not perform it, surely such principal should bear the consequences.”

8. It was further submitted by the Respondents’ Counsel that the Applicant herein had a duty to follow up the progress of the matter and to provide all necessary evidence in good time to his advocate as it is the trite law that a case belongs to a litigant and not the advocate. The Counsel was of the view that failure by the Applicant’s Counsel to attend Court on 13<sup>th</sup> May, 2019 was not founded on excusable mistake. In support of his submissions, the Counsel filed the case of **Savings and Loans Limited vs. Susan Wanjiru Muritu in Nairobi (Milimani) HCC No.397 of 2002** where Kimaru, J expressed himself as follows: -

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocate’s failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.”

9. Having carefully read the application together with the replying affidavit as well as the submissions filed by the Respondents’ Counsel, my finding is that in the absence of the affidavit by the Applicant’s Counsel and medical report annexed as FMM1(a) and (b) to paragraph 9 of his supporting affidavit, the disposition that the Applicant’s Counsel was indisposed and thus unable to attend court and that he had notified the Respondent’s Counsel about his predicament remains uncorroborated. I would therefore agree with the Respondents’ Counsel that there is nothing to demonstrate that the Applicant’s Counsel’s failure to attend court on the 13<sup>th</sup> May, 2019 was a result of excusable mistake, inadvertence, accident or error. The Applicant has not set forth any grounds to warrant this court exercise its discretion in his favour. The upshot of the foregoing is that the application lacks merits and I proceed to dismiss it with costs to the Respondents.

**Signed, dated and delivered at Makueni via email this 29<sup>th</sup> day of April, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: Mr. G. Kwemboi**

**MBOGO C.G, JUDGE,**

**29/04/2020.**