



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 394 OF 2011**

**FRANCIS CHEGE MAINA.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH MACHARIA MAINA.....2<sup>ND</sup> PLAINTIFF**

**JAMES KIHARA MAINA.....3<sup>RD</sup> PLAINTIFF**

**DEDAN MUTHAIGA MAINA.....4<sup>TH</sup> PLAINTIFF**

**AMBASSADEUR INVESTMENTS LIMITED.....5<sup>TH</sup> PLAINTIFF - RESPONDENTS**

**VERSUS**

**JOHN KAGUMA MAINA.....1<sup>ST</sup> DEFENDANT**

**STANLEY KARIUKI MAINA.....2<sup>ND</sup> DEFENDANT**

**CHARLES KANYUGA MAINA.....3<sup>RD</sup> DEFENDANT - APPLICANTS**

**RULING**

1. This ruling relates to a notice of motion application dated 7<sup>th</sup> June 2017, brought under the provisions of; Order 9 Rule 5, 6 and 9, Order 10 Rule 9, Order 51 Rule 1, 4 and 15 of the Civil Procedure Rules Section 1A, 1B of the Civil Procedure Act and all other enabling provisions of the law. The Application is filed by the 1<sup>st</sup> Defendant (herein “the Applicant”) with the authority of the other Defendants.

2. The Applicants are seeking for orders that; the Honourable court be pleased to set aside the proceedings before the 10<sup>th</sup> April 2017 and any consequential order or proceedings and grant leave to the Applicants to cross examine the Plaintiffs’ witnesses and present their defence. The costs of the application be in the cause.

3. The application is premised on the grounds on the face of it and an affidavit of even date sworn by the 3<sup>rd</sup> Defendant. He avers that this matter was slated for hearing on 10<sup>th</sup> April 2017, however, the Defendants were not informed by their Advocates on record of the hearing date, as a result, the Plaintiffs witnesses were heard without cross examination and the Defendants

4. The non-attendance of the hearing of the suit on the due date is wholly excusable and not due to any deliberate omission on the Applicants part. It was a mistake on the part of the counsel initially on record and should not be vested on the Defendants, participation in the hearing. The Defendants have since appointed the firm of; Muchemi & Company Advocates to represent them in the matter.

5. That the matter involves a large amount of money and the Defendants also have a counterclaim, it will therefore be just and equitable if the Defendants are allowed to prosecute and defend the suit. On account of the totality of the circumstances herein, it is just and equitable to set aside the proceedings and any consequential orders or proceedings of 10<sup>th</sup> April 2017.

6. However, the Plaintiffs filed a Replying affidavit dated 11<sup>th</sup> June 2017, sworn by the 3<sup>rd</sup> Plaintiff; James Kihara Maina, with authority of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Plaintiffs. He deposed that the Defendants’ Advocates M/S Swaleh, Mwangi & Company Advocates, were present on

17<sup>th</sup> November 2016, when the hearing date was taken. There is no sufficient reason proffered for the cause of the non-attendance by counsel. The Plaintiffs witnesses have already testified and submissions filed on 24<sup>th</sup> May 2017 and due for highlighting.

7. Further, the Defendants have not shown interest in this matter since the year 2014. They seem to be hell bent on further delaying the matter. The timing of the change of Advocates after the hearing and filing of the Plaintiff's submissions appear to be mischievous on their part and amounts to an abuse of the process of court. Therefore, the interests of justice will be served if the application is dismissed with costs to the Plaintiffs and the Plaintiffs be given a date for highlighting.

8. The matter was disposed of through filing of the submissions. The Defendants submitted that, apart from the 5<sup>th</sup> Plaintiff, the Plaintiffs and the Defendants are siblings born to one Samuel Mainga Gatonga, the deceased. They are beneficiaries of the estate of the deceased's company known as Ambassadeur Investment (K) Limited. That the company was purchased on terms that; each member would be allowed 666 shares; automatically become a director of the company; and h be entitled to and receive dividends.

9. That after the purchase of the said company, there arose a dispute as to the bona fide directors of the same and the Plaintiffs then filed suit claiming that the company was under sole control of the Defendants who did not act in their best interest. The matter proceeded to full hearing on 10<sup>th</sup> April 2017 in the absence of the Defendants.

10. However, the Defendants submitted that, Article 50 of the Constitution of Kenya provides for the right of fair hearing. It will be unfair for the Plaintiffs to be heard in absence of the Defendants and/or their counsel. The Defendants has instructed to another law firm to conduct its matter, as a demonstration that they are still interested in the case and willing to see it through to its conclusion. The case of; Richard Ncharpi Leiyagu vs Independent Electoral Commission & 2 Others (2013) eKLR, was cited where the Court of Appeal held that, it is not proper to shut out a litigant.

11. It was reiterated that, the defence raises triable issues for consideration by the court. That the Court of Appeal in the decision of; CFC Stanbic Limited vs John Maina Githaiga & Another (2013) eKLR, was of the view that, the Appellant should not suffer because of mistakes of its counsel. In so stating, the court was guided by the case of; Lee G. Muthoga vs Habib Zurich Finance (K) Ltd & Another, Civil Application No. 236 of 2009, where the court held; it is a widely accepted principle of law that a litigant should not suffer because of his Advocate's oversight. Further reference was laid on the case of; Chepkulul Arap Melek vs Kibimar Arap Melek (2008) eKLR.

12. It was further submitted that the Plaintiffs case was precipitated by malice and falsehoods. It is therefore of high importance that the Plaintiffs witnesses be cross-examined so as to traverse and bring to light these falsehoods and aid the court in reaching a fair conclusion on the matter.

13. However, the Plaintiffs submitted that the Defendants are the litigants in this matter and not their Advocates and are mandated to follow up on their case and ensure its prosecution as held in various cases. They should not use the alleged mistakes of their Advocates on record as an excuse for their non-attendance in court. Reference was made to the case of; Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002, where the Court stated;

*"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates 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 to account of such Advocate's failure to attend court. It is the duty of the litigant to constantly check with her Advocate the progree of her case.*

14. Further reference was laid on the case of; Habo Agencies Limited vs Wilfred Odhiambo Musingo (2015) eKLR, where the court stated that;-

*".....it is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that the parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."*

15. Further, the case of; Tana and Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR, Civil Appeal No. 41 of 2014, was cited where court cited which Lord Griffith stated, in the case of; Ketteman & Others vs Hansel Properties Ltd (1988) 1 All Er 38 that;

*"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings."*

16. Finally the case of; Three Ways Shipping Services (Group) Ltd vs Mitchel Cotts Freighters (K) Ltd (2005) eKLR, Civil Appeal No. 49 of 2005, where the court held that;-

*"The question of Advocates mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in "The due process of law" London Butterworths at p.93 said:-*

*"Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damage against him; as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen, I*

*regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe, been quick to compensate the suffering client; or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done."*

17. I have considered the application in the light of the arguments and submissions filed. I find that, the key issue to determine is whether, the Applicants have advanced sufficient reasons to grant the orders sought. In that regard, it suffices to note that, this matter has been pending in court since 16<sup>th</sup> September 2011, when it was filed. There have been several applications filed, canvassed and determined. The court record indicates that the Memorandum of Appearance was filed on 29<sup>th</sup> May 2012, by the firm of M/S Swaleh Mwangi & Company Advocates on behalf of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. By the year 2016, the parties were still in the process of complying with the pre-trial preparations and/or directions.

18. However, on 18<sup>th</sup> November 2016, the parties took the date of; 10<sup>th</sup> April 2016 for hearing by consent. On that date, the Defendants were not in court, and neither was their counsel. That counsel has not deposed to his absence from Court. The Plaintiffs witness Joseph Macharia and Jones Nzioka testified and the Plaintiffs case was closed. The court then directed that the Plaintiffs file their submissions and the same be highlighted on 20<sup>th</sup> June 2016. I entirely agree with the submissions of the Respondent that the Applicants are the litigants and should have been vigilant with the prosecution of their case.

19. However in view of the fact that this matter was coming up for hearing for the first time and the parties are of blood relationship and the fact that it involves a dispute over family property and/or company, it is only just and fair that the entire matter be heard on merit. In that regard I allow the application as prayed on conditions that:-

- a) The plaintiff's witness will be recalled for cross-examination and re-examination only;*
- b) The Defendants must set down the suit for hearing within two (2) months of the date of the order;*
- c) In default of (b) above the order allowing the application will stand vacated forthwith; and*
- d) The Defendants to pay the Plaintiffs throw away costs of; Kshs. 15,000.*

20. Those then are the orders of the court.

**Dated, delivered and signed in an open Court this 8<sup>th</sup> day of November 2019, at Nairobi.**

**G.L. NZIOKA**

**JUDGE**

In the presence of;

Ms. Nyasanga holding brief for Mr. Muchemi for the Applicants

Mr. Kahindi holding brief for Mr. Wena for the Respondents

Dennis -----Court Assistant