REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MAKUENI

ELC CASE NO. 230 OF 2017

(Formerly Machakos ELC Suit No. 68 of 2016)

BISHOP PAUL MBOKO MUTUA.....1ST PLAINTIFF/APPLICANT

REV. JOHN BANKOSKY KITINGA.....2ND PLAINTIFF/APPLICANT

BISHOP ARTHUR KITONGA.....3RD PLAINTIFF/APPLICANT

(Suing as the registered Trustees of Redeemed Gospel Church)

-VERSUS-

LAZALUOS MAMBO.....1ST DEFENDANT/RESPONDENT

BERNARD KALITU.....2ND DEFENDANT/RESPONDENT

GEORGE KITETU MAVINDU.....3RD DEFENDANT/RESPONDENT

MRS. ELIZABETH NZILA.....4TH DEFENDANT/RESPONDENT

RULING

1. The application before this Court for determination is dated 16th October, 2019 and was filed under certificate of urgency. It is brought under Article 159 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act and all other enabling provisions of the Law. It seeks;

a) Spent.

b) Spent.

c) THAT the honorable Court be pleased to set aside the orders of the honorable Court, Justice C.G Mbogo of 26/09/2019 dismissing the Applicant's suit and all orders consequential thereto.

d) That the honorable Court be pleased to reinstate for determination on its merits, the Applicant's suit *vide* plaint dated 29/07/2016 as well as all pleadings contained therein.

e) THAT costs be in the cause.

2. The application is supported by the grounds on its face the affidavit of Bishop Arthur Kitonga sworn on the same day and a supplementary affidavit sworn on 30th January, 2020. He has deposed that non attendance on the hearing date is purely attributable to their Advocate's mistake and if the orders are not granted, they will be condemned unheard yet their claim has high chances of success.

3. The application is opposed through the replying affidavit sworn by Counsel Andrew Makundi on 15th September, 2019 and a supplementary affidavit sworn on 08th February, 2020. The gist of the opposition is that this application is an abuse of the Court process since there are other matters pending before other Courts where the parties and subject matter are the same. He has also deposed that this matter was certified ready for hearing in 2018 but the Applicants and their Counsel failed to attend Court on all the hearing dates. He has exhibited copies of hearing notices as annexture **AM-1** and pleadings of the other matters as annexture **AM-2**.

4. In rejoinder, Bishop Arthur Kitonga deposes that he is not aware of the cited suits and if indeed they exist, then he is not a party thereto. On the failure to attend all the hearing dates, he reiterates that it was a mistake of their Advocate and that they would certainly have appeared in Court if they had been informed.

5. In the supplementary affidavit, Mr. Makundi has exhibited further proceedings from the cited suits as annexture **AM-1,2** and **3.** There is also a letter exhibited annexture **AM-4** which, he deposes, is a request from the Applicants' Counsel to withhold any precipitate action for costs arising from one of the suits.

6. Further, he deposed that it is not enough for a party to simply blame the Advocate for all manner of transgressions. He prayed to be granted Kshs. 150,000/= as throw away costs if the Court is inclined to allow the application.

7. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

8. Relying on Order 51 Rule 15 of the Civil Procedure Rules, 2010, the Applicants submitted that the Court has power to set aside its orders. They cited the case of **Richard Ncharpi Leiyagu –vs- Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR** where the Court of Appeal cited with approval the following dicta in **Mbogo & Another –vs- Shah EALR 1968**;

> *"We agree with those noble principles which go further to establish that the Court's discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."*

9. They also submitted that their Advocate's mistake was completely beyond their control and should be excused so as to avoid injustice on their part. They relied on **Belinda Murai & Others –vs- Amoi Wainaina (1978) LLR 2782 (CALL)** where the Court held that;

> *"…the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court my not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of law and adoption of a legal point of view which Courts of appeal sometimes overrule..."*

10. Relying on section 107 of the Evidence Act, they submitted that the respondents did not prove that the cited suits related to the same subject matter and that the Applicants were parties.

11. They also submitted that it would be an assumption to attribute failure to proceed on them for all the previous occasions.

12. The Respondents submitted that the orders sought are equitable and discretionary hence unavailable to the Applicants who are guilty of laches. They contend that it is a clear abuse of Court process to fail to attend Court for more than seven times and then seek to have the suit reinstated. They submitted that the Court must never provide succor and cover to parties who exhibit scant respect for rules and timelines. They rely on **Nicholas Kiptoo Arap Korir Sala –vs- IEBC & 6 Others (2013) eKLR** where the Court of Appeal stated;

> *"Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."*

13. They submitted that Courts have always emphasized that parties have a responsibility to show interest and follow up their cases even when they are represented by Counsel. They contend that while mistakes of Counsel may be excusable, the Advocates in this case are simply accused of inaction. They cite the case of **Rajesh Rughani –vs- Fifty Investment Ltd. & Anor (2005) eKLR** where the Court of Appeal held;

> *"It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not an excusable mistake which the Court may consider with some sympathy."*

14. They submitted that Article 159 of the Constitution and the overriding principle of the Civil Procedure Act apply to all litigants as a shield and sword and the Applicants cannot invoke the same to justify their indolence. They cited the case of **Eric Oluoch –vs- Kenneth O. Obae ELC No. 322 of 2009 pg 2-3** where the Court held;

> *"In the circumstances of this case the Plaintiff was complacent and casual in the manner he handled the suit and I am not persuaded he has furnished any or any valid or reasonable reason for not attending the Court to show cause on 3.2.2012 and further, I am not persuaded the reason proferred for the delay in the prosecution of the Plaintiff's suit is reasonable. There was no order staying the proceedings. The information given by the Applicant that there was an order staying proceedings in this suit was misleading and there was no basis for the same. In the premises, there is no basis upon which I can exercise my discretion to reinstate the suit dismissed by Hon. Justice Mwilu and I accordingly dismiss the Plaintiff's application dated 6th February 2012 with cost to the Defendant."*

15. They also submitted that filing of this application almost one month after dismissal of the suit is an illustration of the Plaintiff's indolence and lack of interest in the suit.

16. Having considered the application, the response and the rival submissions, the only issue for determination is whether the suit should be reinstated.

17. This suit was filed on 29th July, 2016 and transferred to this Court on 03rd March, 2017.

18. On 12th July, 2017, Mr. Makundi was present but there was no appearance for the Plaintiff. The Defendants were given 14 days to file their defence.

19. On 22nd November, 2017, Ms. Loko held brief for Mr. Makundi but there was no appearance for the Plaintiff. The Court was informed that the Plaintiff and its Advocate had never appeared in Court. Parties were given 30 days to comply with Order 11 of the Civil Procedure Rules.

20. On 23rd January, 2018, Mr. Makundi was present as well as Mr. Njenga for the Defendants. The Court was informed that the application for hearing was in ELC 161/2017. Mr. Makundi prayed for the order in that file to be applied herein. The matter was scheduled for further directions on 04th April, 2018.

21. On 04th April, 2018, Mr. Makundi was present but there was no appearance for the Plaintiff. The Court was informed that the Defendants had complied with Order 11 but the 4th Defendant had passed away.

22. On 28th May, 2018, Mr. Makundi was present but there was no appearance for the Plaintiff. The matter was certified ready for hearing.

23. On 17th September, 2018, the Court was not sitting but there was a representative for the Defendants who took the next hearing date *ex-parte*.

24. On 10th December, 2018, representative from both firms took the next hearing date by consent and although the Court did not sit on 04th March, 2018, there was a representative for the Defendants who took the next hearing date *ex-parte.*

25. On 27th May, 2019, Ms. Nzilani held brief for Mr. Makundi but there was no appearance for the Plaintiff. The Court was informed that Mr. Makundi was held up in another matter in Milimani.

26. On 26th September, 2019, Mr. Makundi was present but there was no appearance for the Plaintiff. The Court dismissed the suit after satisfying itself that the Plaintiff had been duly served.

27. From the highlight above and the exhibited mention and hearing notices, it is evident that the Defendants have been more diligent and have ensured continuity of the matter, a role which primarily belongs to the Plaintiff. This is a clear indication that the Plaintiff has lost interest in its own matter. I agree with the Defendants that Plaintiffs have a duty to follow up their cases even where they are represented by Counsel. The record does not show a single day when any of the trustees of the church was present in Court.

28. As for the multiplicity of suits cited by the Defendants, the record and exhibited pleadings show that in **Makindu PMCC 239 of 2008**, the Plaintiff sued eight persons and the 4th Defendant herein was a Defendant in that suit. The subject matter just like in this suit was Emali Township Block 1/126.

29. In **Machakos CMCC 380 of 2010** which was later withdrawn, the two Defendants *(Mbithi Mutinda & Mutinda Mbithi)* had also been sued in Machakos HCCC 216 of 2010 over the same subject matter. The High Court matter had been stayed at some point to pave way for the suit in the subordinate Court but after its withdrawal, the stay order was lifted.

30. In **Machakos HCCC 216 of 2010**, one of the Defendants, Albert Mbithi Mutinda is said to have sold portions of the suit property to some of the Defendants in the current suit.

31. There is also **Machakos ELC 425 of 2012** where the Plaintiff has sued four Defendants over the same subject matter i.e Emali Township Block 1/126. The 3rd Defendant in that matter is also the 3rd Defendant in this matter.

32. While presiding over an application to lift the stay order in Machakos HCCC 216 of 2010, Mutende J observed as follows;

> *"The Applicant (Redeemed Gospel Church) has instituted suits in the same subject matter and does not prosecute them to their logical conclusion…"*

33. In declining to grant an injunction in the current suit, Angote J. expressed himself as follows;

> *"17. Vide a ruling of 27th January 2015, Mutende J ordered that the status quo in respect of the suit property should be maintained pending the hearing of the suit by the Environment and Land Court.*
>
> *18. Instead of pursuing that suit by amending it to join the other parties, the Plaintiff has gone ahead to file a fresh suit in respect to the same suit property.*

19. Clearly, the Plaintiff's action of filing the current suit without disclosing that there are other suits in respect to the same suit property is an abuse of the Court process.

20. The Plaintiff should make up its "mind" and decide which of the three (3) suits it wants to pursue."

34. I fully associate myself with the sentiments of the honorable sister and brother Judges. The Plaintiff is convoluting issues and deploying delaying tactics. I am not persuaded that it is interested in having this matter determined expeditiously. By stating that he is not aware of the cited suits, Bishop Arthur Kitonga was simply feigning ignorance or taking this Court for a ride.

35. The Plaintiff's conduct is not in the realm of *'excusable mistake'* and this Court should not abet the abuse of its process by reinstating the suit.

36. The upshot is that the application has no merit. In the circumstances, I hereby proceed to dismiss it with costs to the Respondents.

Signed, dated and delivered at Makueni via email this 29th day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi