



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 250 OF 2017

GATHAITE FARMERS CO-OPERATIVE SOCIETY LIMITED.....APPLICANT

VS

NICHOLAS KIGO NDUNGU.....1ST RESPONDENT

GEDION KAMAU KARANJA.....2ND RESPONDENT

RULING

1. The Notice of Motion dated the 19/12/19 and filed on the 23/12/19 seeking orders to set aside the dismissal orders of the 11/6/19.
2. The application is supported by the grounds annexed thereto and the Supporting Affidavit of Arcadius Njora Chege where he deposed inter alia that he learnt of the dismissal of the suit on the 10/12/19 when he attempted to fix a date for hearing. That his Counsel on record was not aware of the hearing date as the Counsel who held brief for his Counsel did not brief his Counsel on record about the hearing date. According to him his Counsel had instructed the Counsel who held his brief to apply for witness summons to the cooperative officer for fresh witness summons to testify in Court. He deposed that no prejudice will be visited on the Respondents if the application is allowed as this is a land matter that ought to go to full hearing. That he brought the application without any inordinate delay.
3. The Respondents did not respond to the application despite service.
4. During the hearing of the application, The Learned Counsel for the Applicant Mr Bwonwonga submitted that the Applicant learnt of the dismissal on the 10/12/19 when he attempted to file the case for hearing. That the Plaintiffs' Counsel was unwell and was not aware of the hearing date of the 11/6/19. That the Counsel who held his brief on the 11/6/19 did not give him feedback or that the suit had been dismissed. That the Counsel who held brief did not inform the Court that the cooperative officer was not available to testify. That the application has been brought without delay and there will be no prejudice at all to the Respondents as there was an interlocutory judgement entered in the matter.
5. 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**.
6. According to the record, this matter was fixed for hearing on the 6/5/19 for the 11/6/19. Come the hearing date the Plaintiff was absent but an Advocate by the name Ms Onsembe held brief for Mr. Bwonwonga and informed the Court that she had instructions from the instructing Advocate to seek for a hearing date in the matter. The Court pointed out to Ms Onsembe that the matter was cause listed for formal proof hearing after which she informed the Court that she had no instructions to proceed with the hearing and immoderately reclused herself from the record. The matter was then dismissed for want of prosecution/non-attendance.
7. I have considered the application, the affidavit of the Applicant and the oral submissions made by his Counsel at the hearing. The learned Counsel has stated that he was not aware of the hearing date on the 11/6/19. This begs the question who fixed the matter for hearing? I have had to peruse the record carefully and it is clear that the hearing date was taken in open Court on the 6/5/19 when Mr Waitthaka Advocate held the brief of Mr Bwonwonga. He informed the Court that he had instructions to seek another hearing date in 30 days on the grounds that the Cooperative Officer who was expected to testify as a witness was not available as he had not traced the file. The matter was taken out of the hearing cause list for that date and the Counsel fixed the matter for 11/6/19, which was 35 day away.
8. It is entirely up to Counsel to inquire from the Advocate who held his brief of what transpired in Court. Counsel being an officer of the

Court retains the cardinal duty to his client and to the Court as well. He cannot be said to be a passive bystander in a matter that he has instructions to act for a client. The client relies on him as his legal adviser in the conduct and direction of his case before the Court. To the extent that he did not know the hearing date, which date, was taken on his instructions is to say the least, derogative of his duty as an Advocate and an officer of the Court. I note that the said Mr Waithaka did not swear an affidavit to confirm that he did not convey the orders of the Court to his colleague.

9. Fast forward on the date of the hearing another Counsel Ms Onsembe on realizing that she had the wrong instructions from Mr Bwononga decided to seek recusal from holding his brief leaving the Court with no choice but to dismiss the suit.

10. Is the time inordinate? It is to be noted that there is no clear-cut test in assessing what is inordinate and Courts have to look at the circumstances of each case in answering this question. In this case the suit was dismissed on the 11/6/19 and it took the Applicant about 5 months exactly on the 10/12/19 to realize that the suit had been dismissed. 5 months may be inordinate for a matter that had a fixed hearing date in my view. Had the Applicant been vigilant with his case he would have noticed that there was a hearing date fixed for the 11/6/19 on the 6/5/19 and made attempts to attend Court. It did not.

11. Although the Court is unable to find evidence that the action of the Applicant and its Advocate as being deliberate in obstructing the course of justice, to avoid injustice or hardship resulting from accidental, inadvertence or excusable mistake or error, and noting that it is a part heard matter, I find that justice can still be done in the case by allowing the parties to have their day in Court. I therefore exercise discretion to set aside the dismissal orders issued on the 11/6/19.

12. The Application is granted. In view of the ongoing COVID-19 Pandemic, the Applicant is ordered to take steps to set the matter for expedient hearing as soon as the Registry operations normalize.

13. The Applicant shall meet the costs of the application.

14. **It is so ordered.**

DATED, SIGNED & DELIVERED VIA EMAIL THIS 14TH DAY OF MAY 2020

J G KEMEI

JUDGE