REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 34 OF 1998

EUNICE MUGURE MUCHORI.....................................1ST PLAINTIFF

IBRAHIM BAIYA MUCHORI..2ND PLAINTIFF

JIM B. MUCHORI..3RD PLAINTIFF

VERSUS

PETER MACHARIA..DEFENDANT

RULING

1. The defendant filed an application under certificate of urgency, dated **25/2/2020** on even date seeking the following orders:-

a. Spent.

b. Pending hearing and determination of this application, there be arrest of judgment scheduled to be delivered on the 23rd march 2020 and the matter herein be reopened for plaintiffs and defense hearing.

c. Costs of this application be provided for.

2. The application is brought under **Article 159(2) (b) and (d) of the Constitution, Section 1A, 1 B** and **3A of the Civil Procedure Act; Order 51 of the Civil Procedure Rules and the Inherent Jurisdiction of the Court.** The application is supported by an affidavit by **Jacob Auma Okoth,** advocate, and another by the defendant, both sworn on the **25th February 2020.** A supplementary affidavit of the defendant was subsequently filed on **12/3/2020.**

3. According to the application and the supporting and supplementary affidavits the principal grounds relied on are that the intended delivery of the judgment without his participation will defeat his constitutional right to a fair hearing as it will shut the defendant from being heard. It is averred that on the **25th November 2019** when the matter was to be heard counsel for the defendant was scheduled to attend to a matter at the Court of Appeal Nairobi, and though this matter was adjourned to the next day he was not in a position to attend the hearing as he and his client had been assured (by an unnamed source) that the reason for adjournment was sufficient and there was therefore no need to waste money travelling for the hearing that would not take off. Also, states counsel, having had a long hearing before the Court Of Appeal, he was not in the right frame of mind to conduct the long hearing in Kitale in this suit. Counsel states that a grant of an adjournment on the **26th November 2019** would have harmed no-one at all not even the plaintiffs, and that assuming that the plaintiff was to suffer any harm, it was not of such a magnitude as to be capable of compensation by an award of costs. The application also states that this court failed to consider the cumbersome situation and impracticability of the counsel attending to the hearing on the **26th November 2010** as he had other matters scheduled for that day also in Malindi Environment and Land Court. It is also stated that the counsel who held Mr Okoth's brief had no file and was not aware of the facts of the case and, further, did not have any witnesses and was not in a position to cross examine the prosecution witnesses. Therefore, states the application, it is in the interests of justice and fairness that the orders sought be granted. The defendant avers that he was advised of the predicament facing Mr. Okoth on **25th November 2019**. He was also updated on the securing of Mr Wanyama to hold Mr Okoth's brief on **25th November 2019**. At 1 pm on that day he was informed that this court would hear the matter the next day. He later learnt that an adjournment had been denied and Mr Wanyama had been compelled to proceed with his case on **26th November 2019** in the absence of the defendant and his counsel. He laments the lack of an opportunity to interrogate the plaintiff's documentary evidence or cross examine the prosecution witnesses or present defence witnesses. He, as advised by counsel believes that this is a contentious matter that can only be concluded by such interrogation and cross examination, and the court's refusal to grant an adjournment amounted to injustice. He blames the delay in the progress of the suit on the demise of some parties and the subsequent need to take out grants and effect substitution. He reiterates that the prejudice occasioned to the plaintiffs, if any at all, could have been compensated for by way of costs payable by himself. In the supplementary affidavit he states that the notice of appeal filed timeously and gives an account of why there is no appeal which this court needs not delve into at this stage. The defendant further asserts that the discretionary power of the court should be applied judiciously and not whimsically or capriciously and that the court ought to consider the adequacy of the reasons given for seeking an

adjournment and the extent to which the adjournment may cause prejudice and whether the other party may be adequately compensated for by costs and that no such consideration was made on the **25th** and **26th November 2019** when the court denied the defendant an adjournment.

4. In the replying affidavit sworn on behalf of all the plaintiffs the 2nd plaintiff states that the application lacks merit because the case is already concluded and the submissions of the plaintiffs have been filed; that the application had not been filed by the time the judgment date was set; that the application is meant to further delay the conclusion of this old suit yet **Article 159(2) (d)** and **section 1A** of the **Civil Procedure Act** and **section 3(i)** of the **ELC Act** require that justice shall not be delayed; that it took long to substitute the 2nd -5th initial defendants; that counsel holding brief for Mr Okoth proceeded with the hearing and cross examined the witnesses; that the defendant was not available in court on both the **25th** and **26th November 2019** and he should not have assumed that an adjournment would be granted; that owing to the age of the matter the defendant and his counsel were obliged to make arrangements and attend court on the **26th November 2019**; that the issue of the adjournment was dealt with by the court on **26th November 2019** and can not be revisited and there is no appeal against the court's decision to proceed with the hearing; and that the court accorded the defence a chance to be heard and the defence can not be heard to blame the court for its failures.

5. On the **26th November 2019** this court ordered the defence case to be marked as closed in the presence of Mr Wanyama who had been commissioned to hold brief for Mr Okoth, and ordered the parties to file submissions. Those orders are the origin of the instant application. Judgment was scheduled for **20/2/2020.** However judgment was not read on that date and it was rescheduled to **3rd March 2020** and the defendant, taking advantage of that limited window filed the instant application.

6. When the application first came before this court this court ordered that it be served for a mention on the **3rd March 2020** and that automatically stayed the judgment. Come **3rd March 2020** and Mr Okoth was absent but Mr Mukabane was holding his brief. Mr Kiarie lamented that he had been served only on **2nd February 2020**. This court allowed a reply to be filed to the application within **3** days. Mr Okoth appeared on **11/3/2020** the date next set for a mention and was granted leave to file a supplementary affidavit. Mention was scheduled for **19/3/2020** but it never took place due to the closure occasioned by the onset of the covid 19 pandemic.

7. The question that arises for determination in the present application is whether the matter herein should be reopened for defence hearing. Though the **prayer no 2** in the application mentions the reopening of the plaintiff's case, I do not consider that as a proper prayer for the defendant to make because the plaintiffs have already closed their case and only the defendant's case remains.

8. This court's decision regarding that question is dependent on the grounds given by the defendant for his own failure and his counsel's failure to personally attend and conduct the hearing. I use the word "*personally*" intentionally because it is clear that though Mr Okoth the defendant's counsel was not personally present to conduct the case for the defence on both the **25th** and **26th November 2019**, Mr Teti held his brief on **29th November 2019** and Mr Wanyama held his brief on the **26th November 2019**. The hearing failed to proceed solely on account of the absence of Mr Okoth and the defendant on **25th November 2019** but it proceeded on the following day.

9. There is no doubt that this court has the discretion depending on the soundness of the grounds advanced in an application to grant or deny an adjournment, and to order a matter to be reopened for hearing.

10. This is not a simple setting a side application but upon a reading of the grounds one would suppose that it were so; the application for the reopening of the case for the hearing of the defence case is in effect an application to review and set aside orders of **26th November 2019** denying Mr Wanyama an adjournment. I must therefore of necessity treat the application before me as an application for review. Therefore though the law relied on is not **Order 45 Rule 1** those provisions must apply herein for the disposal of this application.

11. An examination of the proceedings of **26th November 2019** shows that Mr Wanyama holding brief for Mr Okoth. He applied for an adjournment and it was denied and the hearing began. The reason given by Mr Wanyama at **9.00 am** on that day was that Mr Okoth was not able to catch a flight to Kitale the previous day and so he could not attend to the matter personally. To this Mr Kiarie replied that there were several airlines serving the Kitale airport and opposed the application for adjournment. The court then heard the plaintiff's case commencing at **10:56 am**. Mr Wanyama, who participated opted not to cross examine **PW1.** He cross examined **PW2** and **PW3**. Those were the plaintiff's only witnesses. The plaintiff then closed his case. Mr Wanyama then told the court that Mr Okoth did not have a witness that day and that he did not know why no witness was obtained. He applied for the matter to be adjourned to another date. At this point Mr Kiarie submitted that no statements of witnesses had ever been filed in the matter. The court gave a reasoned ruling noting that the defendant was absent, that the matter was filed in **1998**; that the court had already issued a general notice to all advocates and the public that all old matters filed before **2013,** i.e. more than **5** years old required to be finalised urgently to clear the way for the hearing of newer matters; that Mr. Okoth was aware of the hearing scheduled for that day and that no good ground had been given to warrant the adjournment sought. However instead of proceeding right away after the ruling the court granted Mr. Wanyama time to prepare so that the matter could be heard later that afternoon. At **1:40 pm** with Coram as before and with the matter being mentioned at that hour by consent of the parties, Mr Wanyama informed the court that he was unable to get instructions from Mr. Okoth and that he was leaving it to the court to make the appropriate directions. Mr Kiarie in response urged the court to order the defence case to be marked as closed. The court then ordered that the defendant's name be called out again, and there was no response from the audience. At this point the court ordered the defence case to be marked as closed and that both parties do file and submissions within **14** days with the plaintiff taking up the first **7** days. Judgment was then set for **20/2/2020** and later rescheduled to **3/3/2020** but this application intercepted the delivery of judgment in the matter when it was filed on **25/2/2020** and brought up before this court. That is the historical background to the application.

12. Order 45 rule 1 of the **Civil Procedure Rules** provides as follows:

> **"(1) Any person considering himself aggrieved-**

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

13. According to the above provisions review of an order is therefore possible only where there is:

a. discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made;

b. Some mistake or error apparent on the face of the record, or

c. any other sufficient reason.

14. I have considered the grounds in the application and the question that arises is whether they meet the above three criteria.

15. There is no allegation of discovery of new and important matter or evidence within the grounds cited in the application. There is no allegation of mistake or error on the face of the record alleged. This court must therefore examine whether they fit the third category, that is, any other sufficient reason as provided for in **order 45 rule 1** of the CPR.

16. In **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** the court considered the appropriate definition of the phrase "*any other sufficient reason*." It referred to several decisions in his ruling including **Sadar Mohamed vs Charan Singh and Another {1963}EA 557** where it was held as follows:

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

17. Not persuaded by the reasons advanced for review the court in the **Stephen Gathua case (supra)** stated as follows:

"The reason offered by the applicant is that there were orders issued in the various cases he referred to. This is not new evidence. The applicant has not satisfied that the orders in question were not within his knowledge. In fact he says he was an interested party in one of the cases. Alternatively, he has not demonstrated when he came to know about the said court decisions or that he could not obtain them despite due diligence. There is no allegation that there is an error apparent on the face of the record. It has not been shown that there is a sufficient reason to warrant the review.

In other words, I am not persuaded that the reasons offered amounts to 'sufficient reason' within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1."

18. Are there any grounds analogous to *"error on the face of the record"* or "*discovery of new and important matter or evidence*" in the instant application?

19. On **26th November 2019**, the ground advanced at the hearing was that Mr Okoth could not catch a flight on **25th November 2019** to enable him attend the hearing the next day. No explanation was advanced as to why the defendant was not in court.

20. This ground is different from the grounds advanced in the instant application. The grounds for the application are that the advocate for the defendant was too tired from a long hearing at the Court Of Appeal and could not attend the hearing at Kitale; that he and his client took it for granted that an adjournment would be granted in the matter and failed to attend court; that he had other matters in other courts on the **26th November 2019** when this matter proceeded; that the counsel who held Mr Okoth's brief at the hearing had no file and was not aware of the facts of the case and, further, did not have any witnesses and was not in a position to cross examine the prosecution witnesses. These grounds were not raised at the hearing to support the application. In this court's view none of them are even remotely analogous to discovery of "*new and important matter or evidence*" or "*error on the face of the record*."

21. The instant application therefore has no merit.

22. That leaves the defendant's application moribund, only propped up by the provisions of **Article 159(2) (b) and (d) of the Constitution, Section 1A 1 B** and **3A of the Civil Procedure Act** and the inherent jurisdiction of the court. **Section 1A** of the **Civil Procedure Act** came in provides for the facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the **Act**. Duties of the court in achieving the overriding objective are set out in **section 1B** of the **Act.**

23. However, even in the exercise of the court's discretion under these provisions, the court must have regard for the conduct of an applicant. It is not normal to exercise discretion in favour of a litigant who has clearly attempted to delay the court process all along.

24. How has the defendant conducted himself in this suit?

25. Having regard to the defendant's conduct, it must be stated that the duty to obtain the grants of letters of administration in respect of the deceased defendants was solely upon their kin and the defendant being one, and who was also conversant with this matter, was in a position to expedite the securing of such grants to enable substitution in this suit. No difficulties in obtaining those letters was narrated by the defendant. The dates of death of the other defendants are given in the defendant's revival and substitution motion filed on **11/10/18** and the plaintiff's similar application dated **13th April 2019** as **18/8/2003**, **28/8/2004, 25/10/2007** and **2/7/2010**. No grants were annexed to the defendant's application and it could not proceed. Mr Okoth kept away from court on a number of occasions while the issue of substitution was being discussed between **22/2/2017** and **24/4/2019**. It took the plaintiff's intervention to file the application dated **13th April 2019** to attain revival and substitution any progress in this suit whereupon the present defendant who has also been a party to the suit since inception, was substituted in place of all the deceased while the defendant's application for similar orders lay in the record, unprosecuted. It is doubtful that the defendant intended to prosecute that application expeditiously given that he omitted to annex the grants of letters in favour of three of the deceased defendants which were already issued by then. In the absence of evidence of any acrimony in the succession proceedings, it is also doubtful that that the inordinate delay in substitution of the deceased defendants can not be blamed on the court process. In this court's view the delay was occasioned by the defendant and him, instead of demonstrating that it was not deliberate, blamed the allegedly slow court process.

26. The provisions of the law cited in section **1A, 1B** and **3A** must not be abused as the court watches, but the defendant must be compelled to provide evidence of the *bona fides* of his application that, if granted, is, given the defendant's previous record in the matter, most likely to protract this **22** year old suit indefinitely.

27. In the case of **Pan Africa Life Assurance Ltd v Carolyne Chegero Vereso [2015] eKLR** the Court Of Appeal stated as follows regarding the application of the provisions of **Sections 3A** and **3B** of the **Appellate Jurisdiction Act** whose provisions are save for applicability to different levels of courts, *in pari materia* with those of **Sections 1A** and **1B** of the **CPA**:

> **"In WESTMONT POWER (K) LTD V. COMMISSIONER OF INCOME TAX, CA NO. 128 of 2006 this Court, in an application to strike out a notice of appeal, explained the limits of the overriding objective as follows:**
>
> **"It is, accordingly, clear to us that the amendment to section to 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away well-known and established principles of law hitherto in place before the said amendment…This to our understanding means sections 3A and 3B of Cap. 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this Court."**
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> **And in KENYA COMMERCIAL FINANCE CO. LTD V. RICHARD AKWESERA ONDITI, CA NO. NAI. 329 OF 2009, the Court reiterated:**
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> > **"In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act."**
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> **Lastly, in MRADURA SURESH KANTARIA V. SURESH NANALAL KANTARIA, CA NO. 277 OF 2005, regarding resort to the overriding principles the Court stated:**
>
> > **"The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judiciary ascertained."**
>
> **It is not lost to us too, that expeditious disposal of appeals is a core value of the overriding objective. On the face of it, the respondent's conduct and approach in this matter is not consistent with a party that is mindful of expeditious determination of the dispute. We are therefore satisfied that the applicant's Motion is well founded and merited. Accordingly, we allow the same and strike out the Notice of Appeal dated 13th January 2014 and lodged on 14th January 2014. The applicant shall have costs of the application."**

28. Section 1 A and **1B** of the **Civil Procedure Act** provide as follows:

> **"A. Objective of Act**
>
> **(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**
>
> **(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**
>
> **(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective 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.**
>
> **[Act No. 6 of 2009, Sch.]**

“1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

[Act No. 6 of 2009, Sch.]”

29. Section 3 A of the **CPA** saves the inherent power of the court.

30. The provisions of **Article 159 (2((b)** and **(d)** provide as follows:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) ………….

(b) justice shall not be delayed;

(c) …………..

(d) justice shall be administered without undue regard to procedural technicalities.

31. It would appear that the defendant should be coming under article **159(2) (d)** because in this court’s view **(b)** does not suit him, he being the party likely by this application to occasion more delay in the finalization of this suit.

32. However courts have in the course of time been wary of the abuse or misuse of **Article 159** as a bronze serpent to which of late every litigant who has been stung by a procedural slip in the pursuit of his litigation, oftentimes out of his own willful default or lackadaisical mien, gazes at for restoration. In the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR** the Court of Appeal (Kiage J.) observed as follows:

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. 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.”

33. In the case of **Law Society of Kenya versus the Centre for Human Rights and Democracy and 12 others Petition No. 14 of 2013** the Court of Appeal stated as follows:

“Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls not all procedural deficiencies can be remedied by Article 159; and such is clearly the case where the procedural step in question is a jurisdictional requisite.” Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [2014] eKLR

34. In **Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others Civil Application No. 7 Of 2014 -[2014] eKLR** the Supreme Court observed as follows:

“[54] We have discussed the application of Article 159 already (See the Law Society case above). In Raila Odinga v. I.E.B.C & others (2013) eKLR, this Court observed further:

“Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with

procedural imperatives as they seek justice from the Court.""

35. With the above decisions in mind this court must reassess the same material it tested against the provisions of the overriding principle contained in **section 1A** and **1B** of the **Civil Procedure Act** as set out herein above. However, in this case where the defendant has conducted himself in the manner described above this court is not convinced as to the *bona fides* of the current application. It appears to be one more ruse in the defendants sleeve calculated at delaying further the finalization of the suit. However the rights of both parties in any litigation must be balanced. The plaintiff's too deserve justice and, in this matter they have been manifestly patient to the extent of seeking substitution, a task that was more suitable for the defendant, in order to expedite the hearing.

36. When the defendant laments in his affidavit dated **25/2/2020** that he never had an opportunity to cross examine the plaintiff's witnesses, that is an untruth. When he moans that he did not have an opportunity to present his witnesses, the question that arises is *"Even if his advocate was engaged elsewhere as he says he was, where was the defendant while Mr Wanyama was being asked to proceed with the hearing?"*

37. Though the defendant had representation on **26th November 2019** this court is inclined to draw from situations in which *ex parte* orders are sought to be vacated. The court in **Richard Ncharpai Leiyangu vs IEBC & 2 others Civil Appeal No. 18 of 2013** observed as follows:

> **"[18]. We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte 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. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice. The appellant and his counsel failed to attend Court on 10th June, 2013; they, nonetheless, made it to court on 11th June, 2013, and promptly offered an apology and explanation and offered to proceed with the petition on the 11th June, 2013, which date was reserved for the appellant's case."**

38. The court in **Hillary Rotich v Wilson Kipkore Nairobi Civil Appeal No. 232 OF 2010, [2018] eKLR** stated that whether to grant an adjournment or not is also at the discretion of the court depending on the circumstances of each case and that that discretion is to be exercised judiciously and according to law and reason, not according to private opinion, whim, humour, arbitrarily, or fancifully. The court in that case further observed as follows:

> **"We cannot, in the circumstances, fault the exercise of discretion by the learned judge in refusing to adjourn the hearing of the application. She adverted to relevant considerations, which guided her in the exercise of discretion. As this Court stated in Mohammed Hassan Musa & Another v. Peter M Mailanyi & Another, CA No. 243 of 1998, casually granting an adjournment on the mere asking for it is antithetical to the public policy, and we may add, the constitutional value and principle of expeditious disposal of cases. Even if we consider that we would have granted the adjournment if we were in the shoes of the learned judge, that in itself is not a good ground for interfering with her decision. (See Gideon Muriuki & Another v. Cleophas Wekesa & Another, supra)."**

39. There is no doubt that had he been in court with his witnesses, he would have provided this court with the evidence required of the defence. However his whereabouts on the material day were not explained. His conduct of absenting himself with knowledge that hearing was scheduled for those two dates goes totally contrary not only to the constitutional value and principle of expeditious disposal of cases but also to the recognized principle that the suit belongs to the client and not to the counsel. In the case of **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCC No.397 of 2002** Kimaru, J stated as follows:-

> **"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 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."**

40. In my view had the defendant appeared, even alone, the course of events on the material day may have been different. Having conceded that he knew of the hearing date, the defendant has in his application painted a picture of a litigant with a bloated sense of entitlement to the indulgence of the court even when no proper excuse for his absence and the absence of his witnesses has been offered.

41. In this court's view also Mr Okoth should have advised his client to attend court with all his witnesses on **25th and 26th November 2019** as in any event he had a counsel who was holding brief for him so that hearing could proceed. In fact, having been aware that his overburdened diary would deny him a chance to attend court, he should have allowed the defendant and his witnesses to be present to enable hearing. He never did so. It appears that this is a blunder of such great magnitude on the part of counsel which put the defendant's defence at risk. Nevertheless courts have in the past overlooked such kinds of blunder in favour of doing substantive justice to the parties. (see the cases of **Philip Keiptoo Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492, Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [eKLR]. Lucy Bosire -vs- Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR and Sheikh t/a Hasa Hauliers v Highway Carriers Ltd [1988] eKLR.)**

42. In the case of **Edney Adaka Ismail v Equity Bank Limited Nairobi Milimani Civil Case No. 727 OF 2012 [2014] eKLR** the court stated as follows:

> **"In my view, the Court has to take cognizance of the effect of allowing the Plaintiff's application. If the Plaintiff's dismissed application is reinstated for hearing and thereafter the same is found to be unmerited, there would be no prejudice caused on the part of the Defendant. This must however be weighed against the consequences of shutting out the Plaintiff from the hearing of his application and hence losing his vehicles held as collateral for the loan facility by the Bank. The Court must take into account the principle of proportionality and see where the scales of justice lie. The law is now clear that the business of the Court, so far as possible, is to do justice between the parties and not to render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See Suleiman -vs- Ambose Resort Limited [2004] 2 KLR 589."**

43. In the same case of **Edney Adaka Ismail (supra)** the court observed as follows:

> **"9. Further, under the overriding objective in Sections 1A and 1B of the Civil Procedure Act, this Court is enjoined to ensure that there is just determination of the proceedings, in a timely and efficient manner at a cost affordable to the respective parties. Under the said objective, it has been held that the challenge to the Courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible. See Stephen Boro Gitiha -vs- Family Finance Building Society & 3 Others Civil Application No. Nai 263 of 2009 and Lucy Bosire -vs- Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR."**

44. In the case of **Deepak Chamanlal Kamani & another v Kenya Anti-Corruption Commission & 3 others Civil Appeal (Application) No. 152 Of 2009 [2010] eKLR** the Court Of Appeal stated as follows:

> **"What will happen, for example, if we were to strike out the appeal? The common experience of the Court is and has always been that whenever an appeal is struck out, the losing party invariably invokes the jurisdiction of the Court under rule 4 of the rules under which the Court can enlarge time within which to file a fresh notice of appeal and a fresh record of appeal. That invariably increases the costs of the litigation. In addition to increasing the costs, since the parties are starting all over again, the time within which an appeal would take to be eventually determined on merit is unnecessarily lengthened. In a case where the party whose appeal has been struck out does not start afresh his appeal would not have been determined on merit at all, and, therefore, it cannot really be said that a just determination has been made in the case. These are the situations which Parliament must have intended to remedy by incorporating the overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act. Similar provisions have been incorporated in the Civil Procedure Act to cover litigation in the High Court and in the subordinate courts."**

45. In the instant application this court has considered that delay will of necessity ensue from a grant of the orders sought. The principal demerit of dismissing or striking out the instant application is that perchance there was good cause which the defendant has been unable to put down in writing for assessment by this court, then he may go home feeling like he has been denied justice. The demerit of granting the application is that the plaintiff's **22** year wait for the conclusion of this case will be indefinitely prolonged. However In **Argan Wekesa Okumu -vs- Dima College Ltd & 2 Others 2015 eKLR, Mabeya J referred to** the case of **Venture Capital & Credit Ltd -vs- Consolidated Bank of Kenya Ltd 2006 eKLR** where Ochieng J quoted from the case of **Allen -vs- Sir Alfred Mc Alpine [1968 1 ALL ER 543** as follows:-

> **"Lord Denning MR captured, in the following words, the fundamental reason why courts do dismiss suits for want of prosecution:**
>
> > **"The delay of justice is a denial of justice ……To no one will we deny or delay right or justice. Over the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3. Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain".**

46. In the case of **Christopher Shivambo Karamoja & 2others (As the personal Legal Representative of Judraph Ndungu Mwaura (Deceased) v Jane Njeri & 2 others (As the Personal Representative of the Estate of Elizabeth Wanjiru Karanja (Deceased) [2017] eKLR** the court set out all the plaintiff's usually successful attempts at delaying the hearing as borne out by the court record between the years **2012** to **2017** this court stated as follows:

> **"26. The court is more concerned with the fact that all the parties may collectively lose the advantage of having a real dispute herein determined on its merits in order to settle an age old contest with finality. Besides, the court recognizes that the parties themselves may not be entirely to blame for the non-prosecution of the matter, as can be seen from the analysis of the conduct of their counsel hereinabove. As seen in the case of Joseph Mweteri Igweta -vs-Mukira M'Ethare & Attorney General 2002 [eKLR] this court is capable of overlooking the blunders made by litigants and their counsel from time to time, if there is possibility that justice may be done to the parties at last. In the case of Kitale Land Case No. 97 of 2008 Marcellus Lazima Chegge Versus Mary Mutoro Sirengo and Others this court stated as follows:-**
>
> > **"Nevertheless this court finds that it is better for the plaintiff to suffer a little inconvenience which can be compensated for by way of costs rather than let the 2nd defendant walk away from court with the feeling that he has**

been denied a hearing on the basis of a mistake on the part of his counsel. He may have other recourse for the redress of that mistake.

However the court looks farther than this. The granting of the application at hand will mean the rescheduling of the intended judgement in the case, and the setting down of the suit for the hearing of the 2nd defendant's evidence, and the application of more judicial time for the purpose of hearing of the 2nd defendant's evidence. It will mean that the time that could have been spent better hearing parties who were ready for their cases will be now spent on a party who has been negligent in the conduct of his case. This is improper and the 2nd defendant can not walk away without any sanctions."

27. In that case the court imposed costs of Kshs.30,000/= upon the defendant whose conduct appeared deliberately tailored to delay the completion of the proceedings.

28. I have considered the fact that the plaintiffs' case is almost closed. I have also considered the fact that the defendant was ready to proceed with 3 witnesses on 15/3/2017. I have also considered that costs may for now be panacea to the inconvenience created for the defendants over the time this application has dragged on in place of the hearing of the suit, by reason of the plaintiffs' or their counsel's default."

47. In the instant case the denial of the orders sought may not bring the litigation to an end sooner for there may further proceedings by the defendant thereafter. Having considered the case law cited above in its totality, it would appear that this litigation may be finalised sooner if the court granted the application, and, by applying its inherent jurisdiction under **Section 3A** of the **Civil Procedure Act,** firmly stamped out the defendant's proclivity to delaying tactics in the matter.

48. I therefore grant the application dated **25th February 2020** in terms of **prayer 2** only to the extent that this matter is re-opened for the defence hearing. I also order that the defence case in this matter shall be heard on **7/7/2020** and all the witnesses for the defence who may have filed their witness statements shall be present on that day. The plaintiff's case having closed, the defence hearing shall proceed only on the basis of the documents on the record. For the purpose of enforcing proper case management in this matter, it is hereby ordered that **no interlocutory application shall be filed** henceforth without the leave of court in this matter.

49. Finally, when this court issues a notice to all litigants and their counsel that they need to co-operate in order to end old litigation in accordance with the Sustaining the Judiciary Transformation, that is not an idle warning. Parties who are in breach are liable to appropriate consequences, and punitive costs may be imposed before the party is granted audience again. Therefore, in view of what I have stated, the costs of this application are hereby assessed by this court at **Ksh 30,000/=** and those costs shall be paid to the plaintiffs by the defendant before the hearing of the suit scheduled **7/7/2020**.

50. It is so ordered.

Dated, Signed and **Delivered** at **Kitale via electronic mail** on this **30th** day of **June, 2020.**

MWANGI NJOROGE

JUDGE, ELC KITALE.