REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.585 OF 2017

JAMES NDEGWA NG'ANG'A.....PLAINTIFF/APPLICANT

VERSUS

PETER KAMAU KARIUKI.....1ST DEFENDANT/RESPONDENT

GRACE WANGARI WAIRIM.....2ND DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **30th May 2019** by the Plaintiff/ Applicant seeking for orders that;

1. That orders of this Honourable Court issued on the 14th day of May 2019 dismissing the suit be and are hereby set aside.

2. ***An order be and is hereby issued reinstating the suit***.

The Application is premised on the grounds that on **19th March 2019,** the Court ordered the Plaintiff to comply with Pre-trial directions within **thirty (30) days.** However on that material day, the advocate on record was not present as he had attended the burial of his relative but sent his clerk with instructions. That the Court set the mention for **14th May 2019** to confirm compliance. However the matter was inadvertently diarized to come up on the **15th May 2019.** Further that the Plaintiff/ Applicant complied with the pre-trial directions and the same was filed on **14th May 2019,** and served upon the Defendants. Further that on the **15th may 2019**, the Advocate attending Court found that the matter was set for the previous day and subsequently dismissed. It was contended that the mistake was inadvertent and regrettable and that as the same was mistake of counsel, it should not be visited upon the client and it is therefore in the interest of justice that the suit be reinstated. That since and as land is an emotive subject it is in the interest of justice that the suit be reinstated.

In his supporting affidavit, **Muguro Irungu** Counsel for the Plaintiff/ Applicant, reiterated the grounds on the face of the Application and averred that he took over the conduct of the suit from the firm of **Mathenge Gitonga** long after the ruling of the court granting injunction on **18th December 2017,** and his first action was responding to the application seeking to dismiss the suit for want of prosecution. He further averred that he took full responsibility for the mistake and further averred that if the application was allowed, he was ready to pay throw away costs. It was his contention that his client should not be punished for his conduct and that as it stands, his client had the original title to the land and transfer forms and if the matter is not reinstated, there is the threat of a quarrel ensuing between the parties which would be regretful.

The Application is opposed and the 1st Defendant/ Respondent with the authority of the 2nd Defendant/Respondent swore a Replying Affidavit on the **21st June 2019,** and averred that from the Court's record the Law Firm of **Mathenge Gitonga & Company Advocates,** have never been on record for the Plaintiff/ Applicant and that from the onset **Muguro Irungu, Advocate** has always been on record for the Plaintiff and that the Plaint was filed by him and he has all along been aware of the of the orders granted on **18th December 2018** ,ordering the Plaintiff to set down the matter for pre trial Conference within **forty five days** of the ruling. It was his contention that the Plaintiff/ Applicant failed to comply with the said orders and that is clear that counsel has been handling the matter very lightly. He further averred that the Court further indulged the Plaintiff/ Applicant on the **19th March 2019** granting him an additional 30 days to comply with **Order 11 of Civil Procedure Rules** and a mention date was set for the **14th of May 2019,** to confirm compliance. He contended that despite the indulgence, the Plaintiff/ Applicant still failed to comply and is now seeking for more indulgence. It was therefore his contention that indolence should not be rewarded by the Court and that the Plaintiff/ Applicant had not demonstrated nor proved that he will suffer irreparable loss in any event that his application is dismissed.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered together with the affidavits and the annextures thereto. The Court finds that the issue for determination is ***whether the Applicant is entitled to the orders sought.***

Order 12 Rule 7 **of** the ***Civil Procedure Rules*** provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in ***Patel….Vs….E.A Cargo Handling Services Ltd (1974) EA 75,*** held that:-

> ***"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just . The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to feter the wide discretion given to it by the Rules."***

Further it is this Court's considered view that in deciding further on whether or not to grant the orders sought and exercise its discretion, the Court is also guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed and thereby prejudice occasioned to the Respondent.

In the instant case the Plaintiff/ Applicant is seeking to have the orders dismissing his suit be set aside. The anchor upon which the Plaintiff/ Applicant is relying on the said orders is premised on the facts that his Counsel misdiarized the case in his diary and consequently failed to attend Court on time. However the Defendants/ Respondents are opposed to this Application and have averred that the Plaintiff/ Applicant has been given various opportunities which he has abused, The Court has noted that on the **19th March 2019**, the Court had granted the Plaintiff/ Applicant thirty(30) days to comply with pre-trial directions and this was after the Court being guided by Section 3A of the Civil Procedure Act directed the Defendants/Respondents to abandon their Application for the suit to be dismissed for want of prosecution. While the Plaintiff/ Applicant has given a reason which the Court does not find satisfactory as to why they failed to appear in Court on the **14th of May,** the Plaintiff/ Applicant has not given any reason why the documents were filed on that particular day **14th of May 2019,** way past the **30 days** granted to him to file the documents had past.

While the Court acknowledges that the Advocate might had inadvertently misdiarized the matter, however the Court finds that the Court orders including payment of the costs were never adhered to by the Plaintiff/ Applicant. For the Court having perused the file also agrees with the Defendants/Respondents that the Applicant has never had a change of Advocates and it is therefore not proper to mislead the Court.

In the case of ***Shah….Vs…Mbogo (1967) EA 166*** **,** the Court stated that:-

> "***this discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice.''***

With the above in mind, this Court is of the opinion that the Defendants/Respondents will be prejudiced by the continuance commissions and omissions acts of the Plaintiff/ Applicant and this will result in hardship that the Defendants/ Respondents will continue to have the case hanging over their heads while the Plaintiff/ Applicant fails to prosecute the case.

Though the Plaintiff/ Applicant has submitted that this is mistake of Counsel, the Court will agree with the Defendants/Respondents that a litigant too has an equal responsibility to follow up on their matter and it is not enough to only blame their Advocate. See the case of Eric **Malu t/a Mailu & Mailu…Vs… Iilulwe Development Company Ltd & others(2019) eklr** where the Court held that;

> "***It has been held by the Courts that it is the Responsibility of parties to a suit to make follow up of their cases.If a litigant does not make a follow up of his matter to acquaint himself with its position in Court , he cannot blame his Advocate or the Court when the matter is dismissed for non attendance on his part."***

Having carefully considered the facts of this case, the affidavits filed by both parties, the rival submissions herein and the relevant provisions of law, and authorities cited, the Court finds that the Applicant has failed to satisfactorily convince this Court that he deserves the orders sought and that the Court should exercise its discretion in his favour and allow the instant Application.

The Upshot of the foregoing is that the **Notice of Motion Application** dated **30th May 2019,** is found not merited and the same is dismissed entirely with costs to the Defendant/ Respondents.

It is so ordered.

Dated, signed and **Delivered** at **Thika** this **15th** day of **June 2020.**

L. GACHERU
JUDGE
15/6/2020
Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of ;

No consent for the Plaintiff/Applicant

No consent for the Defendants/Respondents

L. GACHERU

JUDGE

15/6/2020