



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO 462 OF 2011**

**JAMES MWANGI NG'ANG'A.....1<sup>ST</sup> PLAINTIFF**

**MARY KIMANI MBUGUA.....2<sup>ND</sup> PLAINTIFF**

**WASWA INVESTMENT COMPANY LIMITED.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**SAMMY MAINA.....1<sup>ST</sup> DEFENDANT**

**JAMES NYAKOE.....2<sup>ND</sup> DEFENDANT**

**VINCENT OGILO.....3<sup>RD</sup> DEFENDANT**

**JOHN MUCHIGI.....4<sup>TH</sup> DEFENDANT**

**MARY MUMBI.....5<sup>TH</sup> DEFENDANT**

**HANAH KARUTHI.....6<sup>TH</sup> DEFENDANT**

**VANICE MAKALE.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. For the determination of the Court is the application by the Defendants dated 25<sup>th</sup> January 2016 and filed on 28<sup>th</sup> January 2016. The application was made pursuant to the provisions of Order 12 Rule 2(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicants sought the following orders *inter alia*;

1. *Spent*
2. ***THAT this honourable Court be pleased to set aside its order issued on the 22/1/2016 dismissing this suit for non-attendance.***
3. ***THAT this honourable Court be pleased to vacate the said order and reinstate the suit herein for hearing on merit.***
4. ***THAT there be stay of execution of the consequential orders flowing therefrom entered by this Court in respect of this suit pending the hearing and determination of this application.***
5. ***THAT in the alternative, the Plaintiff's witnesses be called for purposes of examination-in-chief***

*and re-examination.*

6. **THAT the costs of this application be in the course.**

2. The application was predicated upon the grounds that there was inadvertent failure by the advocate for the Applicants who wrongly diarized the matter as 28/1/2016 instead of 22/1/2016. Further it was averred that the Applicants should not suffer the mistake of the advocate should, and that no prejudice would be occasioned on the Respondents should the application be allowed. These averments were reiterated in the supporting affidavit, and in which it was further contended that the matter was part heard, and that it would be in the interest of that the matter was argued and determined n merits.
3. The application was opposed. In the Respondents' replying affidavit dated 22<sup>nd</sup> February 2016, it was contended that the Applicants were underserving of the Court's discretion in allowing the application, and that further, the failure to attend Court was deliberate. It was contended that the Respondents had suffered, and would continue to suffer great prejudice if the application was allowed, and that the Applicants were not diligent or keen to have the matter heard. Further, it was averred that if the Court deemed it fit to issue the prayers in the application, the same would not serve the ends of justice.
4. I have considered the application and the responses to the application, the averments and dispositions made by the respective parties. For the consideration of the Court is whether the instant application by the Applicants has merit and for the Court to reconsider the reinstatement of the suit after the same was dismissed for non-attendance.
5. Under Order 12 Rule 3(1), the Court is empowered to dismiss a suit for non-attendance by the Plaintiff. The said rule 3(1) under Order 12 reads;

**If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.** (Emphasis added).

6. As with regards to showing just and/or good cause why the suit should be reinstated, the Applicants relied on the provisions of Order 12 Rule 2(a) which reads;

**If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—**

**(a) that notice of hearing was duly served, it may proceed ex parte;**

It is not clear why the Applicants relied upon these provisions as they did not attend to Court on 22<sup>nd</sup> January 2016, but they went further ahead to contend that they have demonstrated diligence and were keen on prosecuting the suit on its merits. Reliance was also placed on Order 12 Rule 7 of the Civil Procedure Rules, where it is provided 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 or order upon such terms as may be just.** (Emphasis added).

Under Order 12 Rule 7, the Court has the discretion, upon consideration of the circumstances in the case, to set aside judgment that has been entered due to non-attendance.

7. The Court considered the case of **Netplan East Africa Ltd v Investments & Mortgages Bank Ltd (2013) eKLR** where Kimondo, J relied on the pronouncement made in **Fitzpatrick v Batger & Co Ltd (1967) 2 All ER 657** where Lord Denning, citing his decision in **Reggetine v Beecholme Bakeries Ltd (1967) 111 Sol. Jo 216** held *inter alia*;

*“It is the duty of the Plaintiff's advisers to get on with the case. Public policy demands that the business of the Courts should be conducted with expedition...the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want*

of prosecution.”

8. Further, in the case of **Civil Case No 633 (A) of 2008 Prudential Building Society (In Liquidation) v Sigal Investments Ltd & 7 Others (Sued as the Legal Representatives of the estate of the late Phillip Kimaiyo Kandie Kimutai)**, Kimondo, J, with regards to establishing delay as a substantive issue that may be considered by the Court in dismissing a suit for want of prosecution, cited the case of **Mugo Njogu v Mary Githinji (2010) eKLR** where it was stated;

*“With the overriding objective in place, it is no longer acceptable in my view for the Court to automatically excuse the mistakes and lapses of counsel. Counsel have a role and duty to assist the Court in realizing the overriding objective and incompetency or lapses of counsel derogate from the objective.”*

9. In both these cases, as was in the case of **Fitzgerald v Batger & Co. Ltd** (supra), the Court found that there was inordinate delay. In **Netplan East Africa Ltd v I & M Bank Ltd** (supra), Kimondo, J dismissed a similar application for having been made ten (10) months after the suit was dismissed. No plausible explanation was given for the delay according to the learned Judge. Further, he stated that there was failure in executing the suit and that there had been impropriety on the part of the lawyers, and therefore, a deliberate cause at obstructing the course of justice.
10. In the instant, however, the advocates for the Applicants contended that there had been an inadvertent error in recording of the dates for the hearing, and that there was no delay in filing the instant application. Indeed the matter was dismissed on 22<sup>nd</sup> January 2016, whilst the application instant was filed on 28<sup>th</sup> January 2016. It cannot, by any stretch, be said that there was a delay in the filing of the application.
11. As to whether there was obstruction to the course of justice, the error in diarizing of the dates taken by consent by the parties may be excusable. The action by the Applicants’ advocate though excusable, show incompetence and lack of diligence. The advocate failed to explain why none of the other advocates within the law firm would have taken up the matter, even though he was in charge of litigation, or that he took any steps to mitigate the non-attendance of the Applicants.
12. Further, the advocate did not present cogent and sustainable evidence that they had informed the Applicants of the Court date, and that they were aware that there had been an error on its part to correctly diarise the date.
13. It is true that the mistakes of the advocates should not be visited upon the Applicants, and, but for good reason, it is the advocate that should be made to pay for his incompetence and lack of due care and diligence in handling his clients matters.
14. In exercise of the powers conferred upon this Court and as provided under Section 1A and 1B, as well as Articles 50 and 159(2) of the Constitution, in aiming to achieve the overriding objective, and in the interests of justice, the application by the Applicants is allowed, with costs to be paid by the firm of Otieno Arum & Co. Advocates. The said firm shall be subject to pay thrown away costs of Kshs 20,000/- which shall be paid before any dates may be taken for hearing.

**Written, dated and signed at Nairobi this 5<sup>th</sup> day of May 2016.**

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**C. KARIUKI**

**JUDGE**

**Dated, signed and delivered in court at Nairobi this 6<sup>th</sup> day of May, 2016.**

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**O. SEWE**

**JUDGE**