



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CAUSE NO. 190 OF 2017**

**REGINA NJERI NJOROGE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**LILIAN WANGUI NDICHU**

**& 20 OTHERS.....DEFENDANTS/RESPONDENTS**

**RULING**

The matter for determination is the Notice of Motion Application dated **27<sup>th</sup> June 2019**, by the Plaintiff/ Applicant seeking for orders that;

- 1. THAT this honourable court be pleased to set aside and/or vary its order issued on 25<sup>th</sup> June 2019 for non-attendance.**
- 2. THAT this Honourable Court be pleased to reinstate the suit herein and the same be heard on merit.**
- 3. That the costs of this application be in the cause.**

The Application is premised on the grounds that **the** matter was dismissed on **25<sup>th</sup> June 2019**, when the same was coming up for hearing. That neither the Plaintiff/Applicant nor her Advocate was present when the suit was being dismissed as they both were of the innocent belief that the matter had been scheduled for hearing on **26<sup>th</sup> June 2019**. Further That it was not intentional that neither the Plaintiff/Applicant nor her Advocate was present in court, but it was only due to the fact that the plaintiff's advocate mistakenly recorded the date as **26<sup>th</sup> June 2019**, instead of **25<sup>th</sup> June 2019**.

It was contended that the mistake was an innocent mistake of error occasioned inadvertently and such mistake should not be occasioned upon the applicant as the applicant is desirous of prosecuting the suit and it is in the interests of justice that the application is allowed.

In her supporting Affidavit, sworn on **27<sup>th</sup> June 2019**, **Margaret Waithera Kanja**, an Advocate of the High Court of Kenya, averred that on **31<sup>st</sup> January 2019**, she attended this matter before the **Deputy Registrar** when it was coming up mention for **Pre-trial directions**. That when the hearing date was given, she recorded in her note the material date for **26<sup>th</sup> June 2019**, which was not the actual date given for hearing by the **Deputy Registrar**, which date she then recorded in her diary.

That on the same date, a letter was written to the Plaintiff/ Applicant informing her that the date for hearing as **26<sup>th</sup> June 2019**. Unfortunately, the date for the **26<sup>th</sup> June 2019**, was not the date given by the Deputy Registrar and that occasioned an innocent mistake of error on their part. She contended that the mistakes of an advocate should not be occasioned on an innocent litigant, who has the right to be heard regardless of the mistake herein so as she may have her day in court and the matter be concluded on merit.

On **27<sup>th</sup> June 2019**, the Plaintiff/Applicant also filed a Supporting Affidavit and averred that she learnt that the suit had been dismissed, when she came to Court for hearing on **26<sup>th</sup> June 2019**, yet the same was coming up for hearing on **25<sup>th</sup> June 2019**. That she received a call from her Advocate on **13<sup>th</sup> February 2019**, informing her of a hearing date for **26<sup>th</sup> June 2019**, to which she went to their offices and was issued with a letter confirming the same.

It was her contention that the matter was dismissed owing to the confusion in the dates which her Advocates confirmed and are apologetic. Further that she is desirous of prosecuting the suit and her advocates made an innocent mistake on error and their mistake should not be visited on her. That it would only be fair that the Court considers her Application for reinstatement of the suit so that she is given her day in Court.

The Application is opposed and **Grace Wangui Ngunjiri** the 2<sup>nd</sup> Defendant/Respondent swore an Affidavit on **30<sup>th</sup> July 2019**, which she

swore on her own behalf and on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> 7<sup>th</sup> 8<sup>th</sup> 9<sup>th</sup> 10<sup>th</sup> 11<sup>th</sup> 12<sup>th</sup> 13<sup>th</sup> 14<sup>th</sup> 15<sup>th</sup> 16<sup>th</sup> 17<sup>th</sup> 18<sup>th</sup> 19<sup>th</sup> and 20<sup>th</sup> Defendant/Respondents having obtained authority from them to do so.

She averred that on the **31<sup>st</sup> January 2019**, the hearing date was issued in court with the advocates of all the parties to the suit present and that they were all ready to proceed with the hearing on the **25<sup>th</sup> June 2019**, but the Plaintiff/Applicant or her advocate did not show up. It was her contention that the explanation of misdiarising as demonstrated by the diary extract and the copies of letters attached to the application is an afterthought crafted after the Plaintiff/Applicant realized that the matter was dismissed for want of prosecution.

She averred that the Plaintiff/Applicant was not keen in prosecuting her case as the case was filed in **2017**, and has never been heard. Further that she is advised by her advocates on record, which advice she believes is true that litigation must come to an end, more so in instance of circumstance of this case where plaintiffs show disinterest in their case and fails to attend court.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered. The Court has carefully perused the Application and the documents in support, together with the **Replying Affidavit**.

The issue for determination is **whether the Application is merited**.

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 fetter the wide discretion given it by the Rules.”***

**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 or order upon such terms as may be just.”***

In deciding further on whether or not to grant the orders sought and exercise discretion, the Court is also guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed.

The Application is premised on the fact that when the matter came before the Deputy Registrar to take a hearing date, the Applicant’s advocate inadvertently misdiarised the matter as coming up for hearing on **26<sup>th</sup> June 2019**, while the Court had set the matter for hearing on **25<sup>th</sup> June 2019**.

Though the Respondents have denied these allegations and have averred that these allegations that the matter was misdiarised are an afterthought, the Court has seen the annexures that have been annexed to the Supporting Affidavit of the Plaintiff’s/ Applicant’s Advocate. Further the Court has seen the letter written to the Applicant indicating that the matter was set to come up for hearing on **26<sup>th</sup> June 2019**. The Court has also noted that the instant Application was filed on **27<sup>th</sup> June 2019**, just a day after the date that the Applicants have averred that they had misdiarised the matter to come up for hearing. Further having perused the file, the Court notes that it is the first time the matter was coming up for hearing and the Plaintiff/ Applicant through her Advocate has never failed to attend Court. The Court is therefore satisfied that an inadvertent mistake occurred, a mistake which could befall anyone and it therefore excusable. See the case of **Philip Chemwolo & Another ...Vs... Augustine Kubende (1986) eKLR**, the Court of Appeal held that:-

***“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merits.”***

Further 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.”***

This Court will take **Judicial Notice** that in most cases when matters come up for Mentions, the parties to the suit usually do not attend Court and rely on the advice of their Advocates as to when matters are listed for hearings and mentions. In this case, the Plaintiff/ Applicant relied on the advice given by her Advocates and therefore she cannot be condemned for that. See the case of **Gideon Mose Onchwati ....Vs .... Kenya Oil Co. Ltd & Another (2017) eKLR** cited the case of **Shah....Vs...Mbogo** and **Ongwom ...Vs...Owota**, where the Court held that;

***“Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.***

In applying the above principles therefore, the Court finds that there are sufficient reasons to set aside the exparte orders. The Respondents

would not suffer any prejudice as they would be compensated by costs for any delay of the trial occasioned and costs herein would be sufficient to cover any prejudice occasioned. The Court further finds that Justice would be sufficiently served if the matter is heard and determined on merit and the parties are given an opportunity to be heard.

Further there was no unreasonable delay in bringing the Application.

The upshot of the foregoing is that the Applicant's *Notice of Motion* dated **27<sup>th</sup> June 2019** is merited. The *same is allowed entirely with throw away costs of Kshs.5,000/= to the Respondents*. Let the matter be set down for hearing and be decided on merit.

It is so ordered.

***Dated, signed and Delivered at Thika this 9<sup>th</sup> day of July 2020.***

**L. GACHERU**

**JUDGE**

**9/7/2020**

**Court Assistant – Lucy**

**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 **15<sup>th</sup> 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.

**With consent and virtual appearance of:**

**M/s Kanja for the Plaintiff/Applicant**

**M/s Mwangi holding brief for Mr. Kimani Kahete for the Defendants/ Respondents**

**L. GACHERU**

**JUDGE**

**9/7/2020**