



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**MISC. ELC NO. 8 OF 2011**

**ENGINEER CHARO WA YAA.....PETITIONER**

**VERSUS**

**1. JAMA ABDI NOOR**

**2. TRADE PLUS INTERNATIONAL LIMITED**

**3. MUNICIPAL COUNCIL OF MOMBASA**

**4. COUNTY OF MOMBASA**

**5. THE. HON. ATTORNEY GENERAL.....RESPONDENTS**

**RULING**

1. The application for determination is the Notice of Motion dated 16<sup>th</sup> April 2019 in which the Petitioner/Applicant is seeking to set aside and/or vary the orders issued on 10<sup>th</sup> April 2019 which dismissed the Petitioner's suit for non-attendance and to have the suit reinstated. The Application is brought under Order 12 Rule 7, Order 45 Rules 1 & 2 and Order 51 Rule of the Civil Procedure Rules and Section 3A and 63 (e), 1A and 1B of the Civil Procedure Act. The application is premised on the grounds on the face of the motion and supported by the affidavit of Stephens Kithi Ngombo the Petitioner's advocate sworn on 16<sup>th</sup> April 2019 in which he deposes that on 10<sup>th</sup> April, 2019, he sat in a wrong court room because he did not have the cause list, and that by the time he knew the matter was before this court, the suit had already been dismissed for non-attendance. He states that failure to attend court was not intentional and that the respondents will not suffer prejudice if the orders sought are granted.

2. In opposing the application the 3<sup>rd</sup> Respondent filed a replying affidavit sworn by M. M. Nyaga Advocate on 19<sup>th</sup> September 2019 in which he deposes that the Petitioner's counsel fixed the date for hearing and served a hearing Notice upon the Respondents but failed to attend court and therefore should bear the responsibility. That the Petitioner has always known that this matter is listed before this court and therefore the excuse that he was seated before another court is a blatant lie. That the Petitioner has not provided sufficient reasons as to why the suit should be reinstated. The 3<sup>rd</sup> Respondent avers that the applicant is not a vigilant litigant and should not be allowed to reap from his indolence. It is contended that the application has been made in bad faith and brought with unreasonable, inordinate and inexcusable delay and that it is misconceived, frivolous, bad in law and an abuse of the process of the court. That no cogent and sound reason and/or grounds have been set forth to warrant the court to exercise its discretion in favour of the applicant.

3. The application is also opposed by the 5<sup>th</sup> respondent through grounds of opposition dated 2<sup>nd</sup> December, 2019 on the grounds that the application is misconceived, frivolous, vexatious and an abuse of the process of court; that the applicant is guilty of laches and material non-disclosure and that there has been unexplained delay in filing the application.

4. I have considered the application, the affidavits in support and against, the grounds of opposition as well as the submissions filed. This suit was before Waithe J on 7/12/18 when the court noted that there was no indication that all the parties were served with notice. The petitioner was directed to serve the respondents with a hearing notice for 9<sup>th</sup> April 2019. However on 9<sup>th</sup> April, none of the parties was present in court and accordingly, the court dismissed the suit for non-attendance.

5. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit. In the affidavit in support of the application, the petitioner's advocate has explained why he did not attend court in time on the material day. He states that on the material date he did not have a cause list and sat in a wrong court and by the time he knew the matter was before this court the suit had already been dismissed for non-attendance. This application was filed on 16<sup>th</sup> April 2019 while the suit was dismissed on 10<sup>th</sup> April 2019. This is a period of six days. Therefore I am satisfied that the application was

filed timeously.

6. I have perused the court record. It is clear that the matter has come up on various occasions before different judges, including this court. It is therefore not true that the matter has always come up before me. The applicant's counsel has given an explanation as to why he did not attend court in time before the suit was dismissed. From the material before court, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the applicant and his advocate. In my view, the failure to attend court has sufficiently been explained and the same is excusable. The respondents have not shown what prejudice they will suffer if the suit is reinstated and decided on merit. In the case of **Shah –v- Mbogo (1967) EA 116**, it was stated that the exercise of discretion of the court to set aside ex-parte orders is to avoid injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. In the present case, the overriding objective of the court would also come to the aid of the applicant.

7. For the foregoing reasons, I am satisfied that the Petitioner's application dated 16<sup>th</sup> April 2019 has merit. The application is allowed. The order made on 10<sup>th</sup> April 2019 dismissing the suit is set aside and the case is reinstated for hearing on merit. Each party to bear own costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 7<sup>TH</sup> day of July 2020.**

**C. K. YANO**

**JUDGE**

**In the presence**

Yumna Hassan Court Assistant