REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 18 OF 2010

JOHN WEFWAFWA MBAKAYA.....PAINTIFF

VERSUS

MOSES WASIKE WABOMBA

(Substituted by JUDITH MUYOKA

WABOMBA).....DEFENDANT

R U L I N G

This suit which is part heard was filed on 14th July 2003. The record shows that the plaintiff testified before **MUCHEMI J** on 1st November 2010 and was cross – examined by **MR KITUYI** counsel for the defendant. **MR BWONCHIRI** counsel for the plaintiff then sought an adjournment to call the plaintiff's witness. For one reason or another, including the transfer of Judges, no much progress was made in the trial.

When the suit next came up before **ANNE OMOLLO J**, the Court was informed that the defendant had passed away on 5th May 2012. The trial therefore stalled to await the substitution of the deceased defendant. That process took a while and it was not until 11th September 2017 that the plaintiff filed a Notice of Motion dated 20th August 2017 seeking orders to have the abated suit reinstated and the deceased's wife **JUDITH MUYOKA WABOMBA** substituted in his place. That application was not opposed and was allowed by **MUKUNYA J** on 7th November 2017.

When the matter came up before me on 11th July 2018 it was agreed by counsel that the matter proceeds from where it had reached. **MR BWONCHIRI** then closed the plaintiff's case whereupon **MR KITUYI** for the defendant sought time to get his client. The defence case was therefore listed for hearing on 29th October 2018. It did not proceed for hearing on that day and on 30th September 2019 the parties took a date in the registry for hearing of the defence case on 20th February 2020. However, on that day, neither **MR KITUYI** nor his client attended Court and on the application of **MR BWONCHIRI**, the Court marked the defence case as closed and invited submissions which were duly filed by the plaintiff on 10th March 2020. However, when the case came up on 12th March 2020 to confirm the filing of submissions, **MR BWONCHIRI** informed the Court that he had been served with an application dated 27th February 2020 by the defendant's counsel. It became necessary therefore to put the Judgment on hold pending the determination of that application which is the subject of this ruling.

The application seeks the following orders: -

(a) Spent

(b) Spent

(c) That the Honourable Judge do make an order setting aside the proceedings of 20th February 2020 and the matter proceed de novo to it's logical conclusion.

(d) That costs of this application be provided for.

The application is based on the grounds set out therein and supported by the defendant's affidavit.

The gist of the application is that although the hearing date was taken by consent in the registry, one **ELECTINE** who is a clerk in the office of **MR KITUYI** failed to diarise the date and proceeded on maternity leave. The hearing on 20th February 2020 therefore proceeded ex –

parte and both the defendant and her counsel only learnt about it at 2 pm on the same day. The defendant adds that she is a widow whose only livelihood is the suit land and if the Judgment is delivered without hearing her, there will be a grave violation of the Constitution.

The application is opposed and the plaintiff in his replying affidavit dated 12th March 2020 has deponed, inter alia, that this suit was filed in 2003 and has therefore been pending in Court for 17 years. That he first testified on 1st November 2010 and closed his case on 11th July 2018 when the defendant's counsel sought an adjournment. The hearing date of 20th February 2020 was taken by consent but on that day, both the defendant and his counsel were absent and so the defence was marked as closed. That the orders sought by the defendant are not available to her since the plaintiff has already closed his case.

The application was canvassed by way of written submissions which were filed late following the scaling down of Court processes due to the **COVID – 19** pandemic.

I have considered the application, the rival affidavits and the submissions by counsel.

The defendant has beseeched this Court to set aside the orders of 20th February 2020 when her case was marked as closed due to her absence. The plaintiff has pleaded, and rightly so, that this case has been in Court for the last 17 years and the defendant's counsel was aware about the hearing date which was taken by consent. That is not in dispute. However, the defendant and her counsel did not attend Court because one **ELECTINE** failed to diarise the hearing date.

Setting aside ex – parte orders is a daily occurrence in our Courts but in doing so, the Court must exercise it's discretion in a judicious manner. That discretion is not designed to assist a party whose intention is to delay the trial to the prejudice of the other party. Litigation must be brought to an end and the fact that the dispute involves land is not in itself a reason to keep a dispute in Court for 17 years as is the position in this case. The overriding objective now is to have disputes heard and determined expeditiously. The Court must of course also consider the Constitutional imperatives under **Article 50** that a party is entitled to a fair hearing. Those are the competing interests that this Court must consider.

In **CMC HOLDINGS LTD .V. NZIOKI 2004 1 KLR 173**, the Court stated thus: -

> ***"That discretion must be exercised upon reasons and must be exercised judiciously …..... Our view is that in law, the discretion that a Court of law has, in deciding whether or not to set aside ex – parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be a wrong principle."***

In **PHILIP CHEMWOLO & ANOTHER .V. AUGUSTINE KUBENDE 1986 KLR 492, APALOO J.A** said: -

> ***"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 his case heard on it's merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."***

However, that is not to say that the Courts will accept all bunders by counsel as the basis of setting aside orders. Counsel and their clients must also play their proper role towards achieving the overriding objectives of determining cases expeditiously. Each case must be considered on it's own peculiar circumstances.

In urging this Court to dismiss the application, **MR BWONCHIRI** has cited the decision in **GIDEON MOSE ONCHWATI .V. KENYA OIL CO LTD & ANOTHER 2017 eKLR**. I have looked at the case and it is distinguishable from the circumstances in this case in various aspects. Firstly, in the **GIDEON MOSE ONCHWATI** case (supra), Counsel for the 1st defendant was not present in Court though served and so his case was closed. On the next mention date, counsel for the 1st defendant attended and sought time to file submissions and was allowed to do so. Thereafter a Judgment date was fixed in the presence of counsel for the 1st defendant and was also delivered in his presence. One month later, the 1st defendant filed an application to set it aside on the grounds, inter alia, that the previous advocate did not inform it about the date and it only learnt about it in the Standard Newspaper. The Court had no hesitation in dismissing the 1st defendant's application to set aside the Judgment as there was no evidence of any ***"lapses or mistake of counsel to inform the 1st defendant to attend Court."*** It is also instructive to note that in the **GEDION MOSE ONCHWATI** case, the 1st defendant had even intimated ***"that it would not be adducing evidence."*** **ABURILI J** therefore wondered what defence or Counter – Claim it was going to prosecute even if the Judgment was set aside. In the matter now before me, the defendant has deponed, and it is not rebutted, that the failure to attend Court on 20th February 2020 was because the clerk to her counsel failed to diarise the hearing date and proceeded on maternity leave. In his submissions, **MR KITUYI** has stated as follows: -

> ***"That this matter was fixed by clerks from both law firms in the registry. Unfortunately, the clerk from the defendant's advocate inadvertently failed to insert the said dates of 20/2/2020 in the diary and hence the defendant was never informed of the hearing dates and neither has advocate who had no knowledge of the said dates."***

It would be an injustice, in the circumstances of this case, to deny her the opportunity to defend the claim against her. Unlike the 1st defendant in the **GEDION MOSE ONCHWATI** case (supra), the defendant herein has filed a defence which she wishes to prosecute and the failure to attend Court on 20th February 2020 was not a deliberate scheme to frustrate the plaintiff. Rather, it was due to a mistake by the office of her counsel which has been explained to my satisfaction.

Having said so, the defendant other than seeking to set aside the proceedings of 20th February 2020 when her case was marked as closed due to her absence together with her counsel, also prays that the matter proceeds de novo to its logical conclusion. I am un – able to accede to that request for two reasons; Firstly, the plaintiff testified before **MUCHEMI J** on 1st November 2010 almost 10 years ago and was cross – examined at length by **MR KITUYI**. Secondly, when the parties appeared before me on 11th July 2018, it was agreed that the case proceeds from where it had reached. It would be a travesty of justice of the highest order for this Court to direct that he takes the witness box again to testify in this case. That prayer is rejected. The case will proceed from where it had reached as directed on 11th July 2018.

On costs, the mistake herein was caused by Counsel's office. I will direct, as I did in **MOSES LUMBASI SIMIYU .V. JOHN KIPTOO NGEIYWO 2020 eKLR**, that **MR KITUYI** personally meets the costs occasioned by this application and which I assess at Kshs. 10,000/=.

Ultimately therefore and having considered the defendant's Notice of Motion dated 27th February 2020, I make the following orders: -

1. **The orders of 20th February 2020 marking the defendant's case as closed are hereby set aside.**

2. **The hearing shall not commence de novo but shall continue from where it had reached.**

3. **In view of the age of this case, the defence shall be HEARD and CLOSED on 13th July 2020 by video link.**

4. **MR KITUYI shall personally meet the costs of this application which I assess at Kshs. 10,000/= payable before the next hearing date.**

Boaz N. Olao.

J U D G E

1st July 2020.

Ruling dated, delivered and signed at **BUNGOMA** this 1st day of July 2020. To be delivered through electronic mail with notice to the parties in view of the guidelines following the **COVID – 19** pandemic.

Boaz N. Olao.

J U D G E

1st July 2020.