REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 552 OF 2017

(FORMERLY NRB ELC CASE NO. 1101 OF 2013)

AVID DEVELOPER LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

BLUE HORIZON PROPERTIES LIMITED.....1ST DEFENDANT/APPLICANT

THE DIRECTOR OF SURVEYS KENYA.....2ND DEFENDANT/RESPONDENT

THE REGISTRAR OF TITLES ARDHI HOUSE NAIROBI.....3RD DEFENDANT/RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **30th October 2019** by the 1st Defendants / Applicant seeking for orders that;

1. **That the Honourable Court be pleased to review and set aside its orders made by Honourable Lady Justice L. Gacheru on 23rd October 2019, dismissing the Applicant's Notice of Motion Application dated 30th July 2019.**

2. **The Honourable Court do issue orders reinstating the Applicant's Notice of Motion Application dated 30th July 2019.**

3. **The reinstated Notice of Motion Application dated 30th July 2019 be set down for hearing on priority basis unconditionally.**

4. **Costs be in the cause.**

The Application is premised on the grounds that when the suit was coming up for hearing on **23rd October 2019** at **9.00 a.m** the Advocate on record sent his clerk with instructions requesting the Court to allow the Notice of Motion Application dated **30th July 2019 be** disposed off by way of written submissions as he was attending to two other matters In Milimani being **HCCC No. 502 of 2017 and HCC ACEC Misc. No. 41 of 2019** at the Anti-Corruption and Economic crimes Division. That the clerk attended Court and when he requested one **Mr. Muriuki Advocate** to hold brief, he declined and before the Clerk could get another Advocate to hold brief, the matter was already called out and the Court issued an order dismissing the Applicant's Application.

It was contended that the Notice of Motion Application raises pertinent issues on jurisdiction which ought to be dealt with before the matter is set down for the main hearing. It was alleged that it is not normal for Advocates to decline to hold briefs and that the clerk did not anticipate the said denial. It was further contended that the Application will create way for the hearing of the main suit. Further that the 1st Defendant/ Applicant is keen on prosecuting his Application dated **30th July 2019,** to is logical conclusion and they have always attended Court. That the Plaintiff/ Respondent has already filed their Grounds of opposition dated **16th October 2019**. That the Application has been made in the interest of Justice and to safe guard the Applicant's right of hearing and it is only fair that it is heard on merit.

The Application is supported by the Affidavit of **K.M Mwangi Advocate** on record for the 1st Defendant/ Applicant sworn on **30th October 2019.** He reiterated the contents of the grounds in support of the Application and averred that the failure to attend Court was neither deliberate nor intended. He apologized to the Court for the inconvenience. He further averred that it will not be in the interest of justice if Counsel's inadvertent mistake through his clerk is visited upon the client.

Jacob Mutia also filed a supporting Affidavit sworn on **30th October 2019** and averred that he is employed as a legal clerk at the Law Firm of **Manasses, Mwangi & Associates**. He reiterated the contents of the grounds on the face of the Application and further averred the delay in getting to Thika from Nairobi was occasioned by the Public Service Matatu that he had boarded. He urged the Court to set aside the orders of **23rd October 2019,** to prevent the 1st Defendant/Applicant from being denied justice. He further averred that the Application has been brought without undue delay and that the Respondents will not suffer prejudice when the Application is allowed.

The Application is opposed and the Plaintiff/ Respondent swore a Replying Affidavit dated **25th November 2019,** and averred that the 1st Defendant/ Applicant has not demonstrated sufficient reasons to warrant the discretion of the Court. It was his contention that the conduct of the Applicant throughout the proceedings portray a Defendant who is not keen on having the suit concluded. He alleged that the delay in concluding the matter has been largely occasioned by the 1st Defendant/ Applicant as the suit was initially filed in Nairobi in **2013**. He further averred that the Plaintiff's /Respondent's witness had testified when the presiding Judge was transferred to Thika and on **12th April 2017, Justice Obaga** ordered the file transferred to Machakos. Further that **Justice Angote** on his own motion directed that since the suit had substantially been heard by **Lady Justice Gacheru** the same be transferred to **Thika ELC** for conclusion. That the Applicant did not oppose the said directions and thus the Application it seeks to have reinstated having been brought two years after **Justice Angote's** directions and when the suit is ready for Defence hearing is clearly in bad faith.

It was his contention that for an Application to be reinstated, following dismissal for non-attendance, the Applicant must establish that its non-attendance or that of its Advocate consists inadvertent excusable mistake and it's not meant to delay the course of Justice. He further averred that allowing the application will greatly prejudice him as he has a constitutional right to have the suit heard and concluded. He averred that the Application is an abuse of the Court process and urged the Court to dismiss it.

The Application was canvassed by way of written submissions and the 1st Defendant/ Applicant through the **Law Firm of Manasses, Mwangi & Associates-MMAS Advocates** filed its written submissions on **10th March 2020** and submitted that mistakes of Counsel should not be visited upon an innocent litigant. It was further submitted that it was a genuine and excusable mistake and the Applicant should not be made to suffer the penalty of not having his Application heard on merit since a court exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline. They relied on various decided cases amongst them the case of **Patriotic Guards Ltd…Vs… James Kipchirchir Sambu (2018)** eklr where the Court held that;

> **"In this case however, counsel for the appellant explained himself as to why he was late in availing himself in court. The reason was plausible. Clearly, this is a case where the sins of counsel should not have been visited upon a litigant.**
>
> **The appellant has also contended that the judgment of the Court which directly affected it, was in breach, not only of the law, but also of the Constitution in so far as it condemned him without an opportunity to be heard and in breach of the right to a fair hearing guaranteed by Article 50(1). There is no need to restate the importance of a fair trial as guaranteed by the Constitution. The right to a fair trial remains at the heart of any judicial determination and courts should endeavor to protect and uphold the same. It is a cardinal rule and it emanates from the principle of natural justice."**

It was further submitted that the Application dated **30th July 2019** raises pertinent issues on the jurisdiction of this Honourable Court that ought to be dealt with first before the matter is set down for hearing and that the Respondent will not be prejudiced if the Application is reinstated. The Court was therefore urged to allow the Application.

The Plaintiff/ Respondent trough the **Law Firm of Kiarie Kariuki & Githii Advocates** filed his submissions dated **13th March 2020** and submitted that the Application does not meet the threshold for review as set out in **Order 45 Rule 1 (b)**. It was his submissions that for an Application to be reinstated following dismissal for non-attendance, the Applicant must establish that its non-attendance or that of its Advocates constitutes an inadvertent mistake and it is not meant to delay the cause of justice which the Applicant has failed to establish. It was further submitted that the Application is an abuse of the Court process and the same ought to be dismissed. The Court has carefully perused the Application and the documents in support, together with the ***Replying Affidavit***. It is this Court's opinion that the issue for determination is whether the Application is merited.

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

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 Applicant has argued that the inadvertent and excusable mistake was caused by his Advocate who though he sent his clerk to get someone to hold brief, the clerk was unable to give any Advocate the said instructions as he arrived late and by the time the matter was being called out he was unable to **give out** the instructions on time. It is however the Plaintiff's/ Respondent's contention that the 1st Defendant/ Applicant has not satisfactorily explain the reason for non-attendance but is only trying to delay the cause of justice

It is not in doubt that sometimes Advocates send their clerk to Court with instruction to get another Advocate to hold their brief. Further it is also not in doubt that it is common for Applications to proceed by way of written submissions. In the Court's considered view, getting to Court late and failing to get an Advocate to hold brief on time is an inadvertent and excusable mistake. The Applicant's Advocate and his

Clerk have sworn supporting Affidavits acknowledging that the mistake was on their part and in so doing exonerated the Applicant from any wrongdoing. Being that the said Affidavits have not been challenged, the Court is inclined to believe that the same was the factual sequence of events.

However, the Court having gone through the proceedings in this case notes that the 1st Defendant/ Applicant has a tendency of failing to attend Court. The Court notes that on various occasions amongst them the **13th August 2019, 23rd October 2019, 3rd December 2019, 9th June 2020** and **15th July 2020,** the 1st Defendant failed to attend Court which begs the question whether the 1st defendant/ Applicant is seeking to delay the cause of justice deliberately. 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.''**

Whether or not the same is meant to delay the cause of justice is still debatable as the Court cannot conclusively make the said finding .See the case of **Patriotic Guards Ltd…Vs… James Kipchirchir Sambu (2018)** where the Court held that;

> **"Be that as it may, we take the view that the Judge was wrong in failing to exercise his discretion in the appellant's favour. There is nothing on record to infer that failure to attend court by the appellant's counsel was meant to delay the determination of the claim, or had ulterior motives or was meant to defeat the ends of justice."**

Further In 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."**

Therefore, it is not in doubt that though a litigant is bound by the acts of his Advocate, the litigant ought not to bear the consequences of the Advocate default. However, the litigant also has a duty to check on his case to ensure that there is no delay of justice and that it is prosecuted promptly. The fact that there is failure to attend Court on various dates by the 1st Defendant/ Applicant even when their matter was coming up for hearing is a worrying trend. See the case of **Edney Adaka Ismail …Vs…Equity Bank Limited [2014] eKLR** where the Court cited the case of **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J** expressed himself as follows:-

> **"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)**

If it was purely on the issue of non-attendance the Court would have no option but to hold that the 1st Defendant/ Applicant had not satisfied it to exercise its discretion and set aside the exparte orders. However the Court recognises that it is required to exercise its discretion judiciously and to ensure that the ends of justice are met and no party suffers prejudice. For these reasons the Court further acknowledges that the Application that the Applicant is seeking to reinstate involves whether this Court has jurisdiction to hear and determine the matter. It is trite that if a Court has no Jurisdiction it must down its tools and any determination that is made without jurisdiction is futile. In the Court's considered view the issue of jurisdiction can be brought up at any point. However, it would be futile and an exercise in futility if the Court is to proceed to the main hearing without first dealing with the issue of jurisdiction which it would still deal with at the main hearing.

If the suit is to proceed to the main hearing and the Court is left to decide the issue of jurisdiction after the matter has already been heard, it is the Court's considered view that the same would prejudice the parties if the Court is to find that it does not have jurisdiction to deal with the matter. Further the Court takes cognisance of the fact that this is a matter that was filed in **2013** and it needs to be expeditiously dealt with. However, as the issue of jurisdiction has been raised, the Court is inclined to exercise it discretion in favour of allowing the Application and reinstating the Application dated **30th July 2019**. This is also so because the instant Application was also brought without inordinate delay.

In 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.''**

For the above reasons, the Court finds and holds that the Application is merited. The Court notes that the Applicant had sought to have the

Application dated **30th July 2019,** reinstated unconditionally. However, as already noted above the instant suit was filed way back in **2013** and it is important that the same is determined expeditiously and therefore timelines within which the Application is to be prosecuted must be set.

In applying the above principles, the Court finds that there are sufficient reasons to set aside the exparte orders. The Respondent 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. Further, the Court finds that Justice would be sufficiently served if the Application is heard and determined on merit and the parties are given an opportunity to be heard.

The upshot of the foregoing is that the Applicant's ***Notice of Motion*** dated ***30th October 2019 is merited***. The **same is allowed with throw away costs of Kshs.15,000/= to the Plaintiff/ Respondents**. For the avoidance of doubt the Court makes the following orders;

1. That the Court orders made on 23rd October 2019 dismissing the Applicant's Notice of Motion Application dated 30th July 2019 be and are hereby set aside.

2. The Applicant's Notice of Motion Application dated 30th July 2019 be and is hereby reinstated.

3. The reinstated Notice of Motion Application dated 30th July 2019 be set down for hearing on priority basis.

4. That the 1st Defendant/ Applicant to pay the Plaintiff/ Respondent throw away costs of Kshs.15,000/=, plus costs of the Application.

Let the Application be set down for hearing expeditiously and be decided on merit.

It is so ordered.

Dated, signed and ***Delivered*** at **Thika** this **24th** day of **September, 2020.**

L. GACHERU

JUDGE

24/9/2020

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 **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.

With Consent of and virtual appearance via Video conference

M/s Githii for the Plaintiff/Respondent

Mr Mwangi for the 1st Defendant/Applicant

No appearance for the 2nd Defendant/Respondent

No appearance for the 3rd Defendant/Respondent

L. GACHERU

JUDGE

24/9/2020