



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC NO. 591 OF 2017**

**KAGWE KIRAGU MEN & WOMEN GROUP.....PLAINTIFF/APPLICANT**

**VERSUS**

**MAHIIRA HOUSING COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MARTIN GITAU NG'ANG'A.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**LAND REGISTRAR THIKA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated **16<sup>th</sup> March 2020** by the Plaintiff/ Applicant seeking for orders that;

- 1. The dismissal orders issued in this case on the 11<sup>th</sup> March 2020, be set aside***
- 2. The Defendant's Application dated 30<sup>th</sup> October 2019 be reinstated for hearing and disposal.***
- 3. Costs of this Application be in the cause.***

The Application is premised on the grounds that the Plaintiff's/ Applicant's Application dated **30<sup>th</sup> October 2019**, was dismissed on **11<sup>th</sup> March 2020**, for non-attendance. That failure to attend Court was occasioned by the legal clerk at the Plaintiff's/ Applicant's Advocate misdiarizing the matter and indicating that the matter would be coming up on **11<sup>th</sup> May 2020**. Further that **Mr. Tumu**, Advocate for the Plaintiff/ Applicant had all along believed that the matter was properly diarized and would have attended the matter on the erroneously diarized date. It was further contended that Counsel for the Plaintiff/ Applicant shall be diligent in the prosecution of the claim once the Application dated **30<sup>th</sup> October 2019**, is allowed and that failure to attend Court on **11<sup>th</sup> March 2020**, was a mistake which was not intentional. Further, that no prejudice will be suffered by the Defendants as they will have a chance to defend the application.

In his supporting Affidavit **Joseph Njoroge Mungai**, Advocate for the Plaintiff/ Applicant averred that he had initially instructed his clerk one **Dickson Musila** to diarise the matter, after filing the Application and out of practice experience he knew that his clerk had properly diarized and would pull the file once it was time for any Advocate in the Law Firm to attend Court. He further averred that it was only on **16<sup>th</sup> March 2020**, when the Chairman of the Plaintiff / Applicant group asked to inquire on the progress of the case that he learnt that there was no indication on the file as to what transpired on **11<sup>th</sup> March 2020**, and that is when he learnt of the misdiarising leading to the dismissal of the Application. That it is in the interest of Justice that the Application be allowed since the Plaintiff/Applicant should not be punished for mistake of Counsel.

On **9<sup>th</sup> June 2020**, **Ms. Nyawira** appearing for the Attorney General indicated that she would not be opposing the Application. The Court directed that the Application be canvassed by way of written submissions.

In compliance with the said directive, the Plaintiff / Applicant through the **Law Firm of Musa Boaz & Thomas Advocates** filed its submissions on **16<sup>th</sup> June 2020**, and submitted that the instant case is a typical case where an advocate's mistake comes to adversely affect the client for no fault of the client, but with devastating effects. It was further submitted that this case falls squarely within the ambit of cases where the Courts have held that mistakes of an Advocate should not be visited on an innocent litigant.

The Court was urged to exercise its equitable discretion in allowing the Application and discharging the orders made on **11<sup>th</sup> March 2020**,

and have the Application dated **30<sup>th</sup> October 2019**, reinstated.

Though the Application was not opposed, the Plaintiff/ Applicant still has an obligation to satisfy the Court that it deserves to have the suit reinstated. The Court has carefully read and considered the Application and the documents in support, together with the written submissions and finds that the issue for determination is ***whether the Application is merited.***

The Plaintiff/ Applicant has sought for setting aside of the orders dated **11<sup>th</sup> March 2020**, dismissing the Application dated **30<sup>th</sup> October 2019**. In deciding whether or not to set aside ex parte orders, the Court is guided by the provisions of **Order 12 Rule 7** of the **Civil Procedure Rules** which 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.”***

Further it is not in doubt that 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.”***

On **11<sup>th</sup> March 2020**, the Court issued orders dismissing the Plaintiff’s/ Applicant’s Application as a result of the Plaintiff’s/ Applicant’s and or its Advocate non attendance on the particular day. While exercising its discretion, the Court must decide whether the Plaintiff/ Applicant has given sufficient reason for non attendance and whether an injustice will occur if the Application is not allowed.

It is the Applicant’s contention that its Advocate relied on his legal clerk to properly diarise the matter and failure by the clerk to diarise the same properly and having diarised the said matter as coming up on **11<sup>th</sup> May 2020**, caused the applicant and its advocate fail to attend Court on the material day.

The Court has seen extracts from the Applicant’s Advocate diary which indeed indicate that the matter was to come up on **11<sup>th</sup> May 2020**. The Application by the Applicants is dated **16<sup>th</sup> March 2020**, and filed in Court on **12<sup>th</sup> May 2020**. The Court takes judicial notice of the **COVID 19 Pandemic**, that hit the Country and which led to the slowdown of Court’s operations and therefore the Court finds that there was no inordinate delay in bringing the Application.

The Court recognises that misdiarising a matter is an inadvertent mistake that could befall anyone and therefore taking Judicial Notice that litigants do not always attend Court to be able to verify the dates granted, the Court is satisfied that an inadvertent mistake occurred, a mistake which could befall anyone and it 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.”***

In applying the above principles, the Court finds that there are sufficient reasons to set aside the ex parte orders herein. Noting the nature of the Applicant’s Application dated **30<sup>th</sup> October 2019**, in which the Applicant is seeking to set aside the Orders dismissing the suit, the Court finds that an injustice may occur if the Applicant is not allowed to ventilate the said Application and have the said suit heard on merit. 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 instant Application.

The upshot of the foregoing is that the Applicant’s **Notice of Motion Application** dated **16<sup>th</sup> March 2020**, is found **merited**. The same is allowed entirely in terms of **prayers no. 1 and 2 with no orders as to costs**.

It is so ordered.

**Dated, signed and Delivered at Thika this 5<sup>th</sup> day of November 2020**

**L. GACHERU**

**JUDGE**

5/11/2020

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 of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Tumu for the Plaintiff/Applicant**

**No appearance for 1<sup>st</sup> Defendant/Respondent**

**No appearance for 2<sup>nd</sup> Defendant/Respondent**

**No appearance for 3<sup>rd</sup> Defendant/Respondent**

**L. GACHERU**

**JUDGE**

5/11/2020