



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 111 OF 2011

SILAS SIELE SISIMWO.....1ST PLAINTIFF/RESPONDENT

DAVID SISIMWO STEPHEN (*Suing as the administrators of the estate of*

STEPHEN SISIMWO.....2ND PLAINTIFF/ RESPONDENT

VERSUS

SUSAN MOSS.....DEFENDANT/APPLICANT

RULING

1. The application dated **3/12/2018** seeks that the orders made by this court on **20/11/2018** dismissing the application dated **10/10/2018** be set aside, vacated and/or varied and that the application dated **10/10/2018** be reinstated for prosecution.

2. The applicant's grounds are that on **25 /10/ 2018** when the matter came up for hearing of the application dated **10/10/2018**, this court directed that counsel for the respondent do file a replying affidavit and serve within 14 days from the date thereon and leave was granted to counsel for the applicant to respond to any news issues and file submissions in 7 days thereafter. Subsequently, the matter would be mentioned on the 20/11/2018. The applicant's counsel avers that on 20/11/2018, he was indisposed and could not attend and move court as a result which counsel for the respondents misled court by stating and/or intimating that they had complied with Court's directions.

3. Grounds of opposition were filed by the Respondents who oppose the application principally on the following major grounds: that there is no evidence that counsel for the applicant was indisposed, that counsel for the Applicant ought to have informed counsel for Respondents that he is indisposed or instruct another counsel to hold his brief and inform the court of his indisposition which he failed, that the alleged mistake or error on the part of the applicant's counsel was deliberate and the application to reinstate application dated 10/10/2018 is an afterthought and that the matter has been completely finalized without any issues or avenue of re-opening it other than for costs which have been agreed and partially paid.

4. The last ground in my view, goes into the merits of the application intended to be reinstated rather than the instant application and this court must refrain at this point from dealing with the same. The only issue the court must deal with is the question as to whether sufficient reasons have been laid before this court to warrant setting aside of the dismissal orders of 20/11/2018.

5. It is not in doubt that counsel for the applicant failed to attend court when the matter was scheduled for mention on 20/11/2018. The question is whether the reasons advanced by the applicant's counsel amount to 'sufficient reason' to justify the exercise of the court's discretion in favour of the applicant. I have gone through the supporting affidavit by the said counsel but unfortunately there is no evidence in the nature of a medical treatment chit to support this claim.

6. However, counsel contends in his supporting affidavit that the mistakes acts and/or omissions of an Advocate should not be meted out on the Applicant. It is therefore important for this Court to discern as to whether the alleged mistake of counsel can be excused.

7. **Section 3A of the Civil Procedure Act** provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. It provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

8. The court has discretion to set aside a judgment or order. The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In **Shah vs Mbogo & Another (1967) EA 116**, it was held that:

“The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

9. In **Haji Ahmed Sheikh t/a Hasa Hauliers vs. Highway Carriers Ltd (1982 - 88) 1 KAR 1184**, Gachuhi JA stated as follows:

“The powers of the court in dealing with application under order IX rule 10 is to do justice to the parties. In Pithon Waweru Maina vs Thuku Mugiria, Civil Appeal No. 27 of 1982 (unreported) (ibid) (Porter, Kneller, J.J.A. and Chesoni, Ag. J.A.) Potter, J.A. in quoting Duffus, P., in Patel vs E.A. Cargo Handling Services Ltd., (1974) E.A. 75 stated at page 1 of his judgment this:

There are no limits or restrictions on the judge’s discretion 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 to it by the rules”.

10. In the instant case, I find that to condemn the applicant for the non-attendance of her advocate in this matter would be unfair.

The Court will therefore exercise its discretion and grant the application dated 3/12/2018 in terms of **Prayers No.2** and **3** of that application. The costs of the said application shall be in the cause.

Dated, signed and delivered at Kitale on this 25th day of February, 2019.

MWANGI NJOROGE

JUDGE

25/2/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

25/2/2019