REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 170 OF 2016

PAUL MWANGI NJOROGE.....1ST PLAINTIFF

PHYLIS W. NJOROGE.....2ND PLAINTIFF

SUSAN NYAMBURA NJOROGE.....3RD PLAINTIFF

VERSUS

WAFULA SIKUTA.....DEFENDANT

R U L I N G

1. By a Notice of Motion dated **4TH March, 2019** brought under **Order 51 Rule 1 of the Civil Procure Rules, Section 1A, 1B, 3, 3A of the Civil Procedure Act Article 50(1)** and **159(1)** and **(2) the Constitution of Kenya 2010**, the plaintiff is seeking an order to set aside or vacate its order of **18th February, 2019** dismissing the plaintiff's suit for non-attendance and that the suit be reinstated and heard on merit. He also prays for costs of this application be in the cause.

2. The application is supported by the affidavit of the plaintiff's Counsel dated **4th March, 2019.**

3. The grounds upon which the application is made are contained in that affidavit and at the foot of the application. In brief they are that the matter was last in court for hearing on **18th February, 2019**; that the plaintiff's counsel was attending to another matter **Eldoret Environment and Land Court Case No. 50 of 2012**; that the defence amended their defence and counterclaim and time ought to be given to the plaintiffs to respond appropriately and parties ought to comply and take directions before hearing, which has not happened; that the defence has not complied with **Order 11** of the **Civil Procedure Rules**; that the unavailability of counsel for the plaintiff which was inadvertent was prejudice the plaintiff's case; that an order for dismissal of the plaintiff's suit before hearing is prejudicial in an instance where both parties are claiming the same property; that none of the parties to this action will be prejudiced by the reinstatement of this suit; that this application has been timeously presented demonstrating good faith and that the rules of natural justice demand that suits or disputes be heard on merits as opposed to technicalities.

4. On **19/3/2019,** the respondent filed his replying affidavit of the sworn on **18/3/2019**. He depones therein that the hearing date was taken by consent; that the plaintiff's advocate failed to attend court intentionally; that no good reasons have been given for the vacating of the dismissal order, that the application is fatally defective and should be dismissed.

5. The plaintiff filed submissions on **20/3/2019.** It would appear that the defendant did not file submissions in respect of the said application as none were in the file as at the time of the preparation of this ruling.

6. I have considered the application, the response and the submissions on record.

7. He however submits that the setting aside of the order is at the court's discretion and cites **CMC Holdings Ltd Vs Nzioki 2004 1 KLR 173,**

8. Citing the case of **Fran Investments He Vs G4S Security Services Ltd 2015 eKLR** he quotes the following passage:

> **"Dismissal of a suit without hearing it on merit is a such a draconian act comparable on to the proverbial sword of Damocles"**

9. The explanation that counsel for the plaintiff gives is that he was engaged in another matter **Eldoret ELC No. 50 of 2012** at Eldoret on the day of dismissal of this suit and that his failure to attend court was not deliberate. He cites the case of **Philip Chemwolo & another vs Augustine Kubende 1982-88) 1 KLR 103** and quotes the following passage:

> **"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 merit …the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that can not be put right by payment of costs. The court as is often said, exist for the purpose of deciding the rights of the parties and not for the purposes of imposing discipline".**

10. He also quotes the following passage from the decision in **Belinda Murai & Others vs Amos Wainaina 1978 (as cited in Harrison Wanjohi Wambugu vs Felista Wairimu Chege & another 2013 eKLR):-**

> **"A mistake is a mistake it is no less a mistake because it is unfortunate slip it is no less pardonable because it committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blander on a point of law can be a mistake. The door of justice is not closed because a mistake has been make by a lawyer of experience who ought to have known better. The court may not condone but it ought to certainly do whatever is necessary to rectify it if the interests of justice saw dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adaptation of a legal point of view which court of appeal sometimes overrule".**

11. In my view it is necessary for the ends of justice to allow the application so that the applicant, whom I deem to be innocent, does not suffer for the mistakes of his advocate.

12. I therefore exercise my discretion and grant the application dated **4/3/2019** as prayed in **prayers No 1** and **2** thereof. The costs of the application shall be in the cause.

Dated, signed and **delivered** at **Kitale** on this **26th** day of **March, 2019.**

MWANGI NJOROGE

JUDGE

26/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bungei holding brief for Mr. Ngigi for defendant

Mr. Wanyama holding brief for Chepkwony for plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

26/03/2019