REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISC. APPLICATION NO.28 0F 2017

PETER KABIBI KINYANJUI (Suing through

his Donnee JAMES NJOROGE KINYANJUI.....APPLICANT

VERSUS

KIAMBU COFFEE GROWERS

CO-OPERATIVE UNION LIMITED.....RESPONDENT

RULING

The matter for determination is the Application dated ***21st June 2018***, brought by the Applicant Under ***Section 1A, 3A, 63(e***) of the ***Civil Procedure Act , Order 15 Rules 1*** and ***15*** of the ***Civil Procedure Rules 2010*** seeking for orders that:-

1. ***That this Honourable Court be pleased to vacate the orders made by this Court on 12th June 2018 and the Applicant's Application dated 12th April 2017 be reinstated.***

2. ***That Costs of this Application be in the cause.***

The Application is premised on the grounds stated on the face of the Application and the ***Supporting Affidavit*** of ***Patricia Waruhiu.*** These grounds are:- that the Application was dismissed for non-attendance. The matter was being handled by an Associate from the ***Firm of Waruhiu & Company Advocates,*** acting for the Applicant who has since left. On ***15th March 2018,*** in the presence of both Counsels the Court gave a hearing date of ***12th June 2018,*** and the Associate Advocate mistakenly recorded

the hearing date as ***21st June 2018***. On ***21st June*** when the matter was missing in the cause list, the Applicant's Advocate discovered the inadvertent error and upon perusal of the court file, it was discovered that the matter was coming up on ***12th June 2018,*** and it was dismissed for non-attendance.

It was averred that the non-attendance is regrettable and is a forgivable mistake and the Advocate mistake should not be visited on a client. It was stated that the Application is meritious and justified in view of the substantial amount of money invested by the Applicant in the property and the said application has been brought without undue delay and the Respondents will not in any way be prejudiced as it is the interest of Justice.

In her ***Supporting Affidavit***, the Applicant reiterated the grounds in the face of the Affidavit and averred that the Applicant has invested a substantial amount of money and resources amounting to ***Kshs.74,523,419/=*** and stands to lose it should the Application not be reinstated and the Court was urged to allow the Application.

The Application is opposed and the Respondent through its ***Chairman,*** filed a ***Replying Affidavit*** sworn on ***6th July 2018.*** He averred that he has authority to make depositions on behalf of the Respondents. He further averred that the Applicant's Advocates on record were all along aware of the hearing date was ***12th June 2018,*** and the allegation that the date had been wrongly diarized is an afterthought. Further that their

Advocates on record had written to the Applicants a letter and in it they referred to the hearing date of ***12th June 2018*** as evidenced *by* ***annexture KCGU-1*** and via a letter dated ***4th June 2018,*** the Applicant's Advocate also acknowledged the said date. He averred that the letter dated ***4th June 2018*** is signed by ***Patriciah Waruhiu,*** who is also the deponent of the Affidavit in support of the Application and alleged that the annextures ***PW-1*** and ***PW-2*** are documents that have been easily prepared purely for purpose of aiding the application to make it appear that failure to attend court was a genuine mistake.

He further averred that he has been informed by his Advocates that the Applicants have all along been aware of the outcome of the proceedings of ***12th June 2018,*** through their representative who sought to know what transpired on that day through a phone call. He further alleged that no Court receipt has been exhibited to show that the Applicant perused the Court file on ***21st June 2018,*** and what has been exhibited is an order which was drawn without their consent. He further alleged that it is not the first time that the Applicants have failed to attend court and the record shows there are two other times that they had failed to attend court without any valid reason. He further averred that he has been advised by his Advocates on record that discretionary orders are not meant to aid a party who has tried to evade the course of Justice.

The Applicant filed a further affidavit and reiterated the contents of her ***Supporting Affidavit*** and averred that the reasons for non-attendance on ***12th June 2018,*** were genuine and a true account of what transpired. She stated that they disclosed the name of the Associate ***Davis Asiimwe*** who worked in their firm and they had to terminate his services due to unsatisfactory work performance. She further denied that the documents in her affidavit are forgeries as the same was signed by her partner who has signed letters before and averred that she signed the letter dated ***4th June 2018,*** but the same was because she had allocated the file to an Associate. She alleged that it was only on presentation of the letter to the registry that the Clerk was informed that the Application dated ***12th April 2017***, had been dismissed.

She denied that their representative called to inquire about the proceedings of ***12th June 2018***, and averred that the ***Court Order*** as extracted is an exact replica of the orders of the Court and they are drawn and sealed by the Court and the allegations are unfounded and misplaced. She averred that the order is not marked or commissioned as they obtained it after the Affidavit had been commissioned as they were informed that the ***Deputy Registrar*** was unavailable on the ***22nd June*** and only secured duly sealed order on ***25th June 2018.*** She denied ever failing to attend court and stated that they have acted promptly in filing the instant Application.

The Application was canvassed by way of written submissions and the Applicant through the ***Law Firm of Waruhiu & Co. Advocates*** filed their submissions on ***20th September 2018***. They relied on various decided cases amongst them, the case of ***Branco Arabe Espanol….Vs…. Bank of Uganda (1999) 2 EA 22,*** where the Court stated:-

> ***"…….The Administration of Justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.''***

They also relied on the case *of* ***Burhani Decorators & Contractors…Vs… Morning Foods Ltd & Another (2014)eKLR,*** where it was stated that:-

> ***"The right to a hearing, in my view has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. The Appellant having produced all extracts of diaries , delivery books and offering all manner of explanation , the learned Chief Magistrate by dismissing the Appellants Application departed from a long line of judicial precedents set over many years that Courts are always reluctant to dismiss a suit and thereby deny a claimant an opportunity to ventilate his or her grievance.''***

The Respondent filed its submissions on ***9th October 2018,*** through the ***Law Firm of Musyoka, Muigai Advocates*** and submitted that the Application dated ***21st June 2018,*** does not meet the threshold for exercise of the courts discretion in favour of the Applicant. They relied on various decided cases and submitted that it is evident that there was negligent inaction on the part of the applicant's legal Counsel.

The Court has carefully perused the Application and the documents in support, together with the ***Replying Affidavit***. The issue for determination is whether the Application is merited. ***Order 12 Rule 7*** of the ***Civil Procedure Code*** 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 feter 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 mistake was caused by one of its associate who had diarize the matter and put in an incorrect date in its diary, The Respondent on the other hand has argued that the Applicant had all along been in the know, having written letters and received ones that had the correct date indicated.

It is evident that Advocates are mostly guided by their diaries and having numerous files to deal with one may not know exactly what date each matter has been placed unless they check their diaries. That in most cases, the Advocates might sign letters with dates and fail to know the exact date the matter is supposed to come to court and would need to go back to their diaries and confirm the date. In this regard, the Court finds that such a mistake may happen to anyone and therefore excusable.

The Respondent has alleged that the documents that have been provided before Court are forgeries. However no evidence has been provided as to the extent of the forgery and therefore it would be difficult to believe the allegations without any evidence provided.

A substantial amount of money is involved in this matter and the Court finds that Justice would be sufficiently served if the matter is heard and determined on merit. From the court records and a fact that has been acknowledged by the Respondent, the parties were pursuing an out of Court settlement and it would be in the interest of Justice that this matter is heard on merit.

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.''***

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.''***

The Court in ***Gideon Mose Onchwati….Vs….Kenya Oil Co. Ltd & Another (2017) eKLR*** cited the case of ***Shah….Vs…Mbogo*** and ***Ongwom.. Vs….Owota,*** where it was stated 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 consequence s 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.***

The Respondent has not in any way alleged any failure on the part of the Applicant, but the mistake which has been explained seems to be on the part of its Advocate. In applying the above principle therefore, the Court finds that there are sufficient reasons to set aside. The Respondent would not suffer any prejudice as he would be compensated by costs for any delay of the trial occasioned and costs herein would be sufficient to cover any prejudice occasioned.

Further there was no unreasonable delay in bringing the Application and the Court finds it merited.

The upshot of the foregoing is that the Applicant's ***Notice of Motion*** dated ***21st June 2018 is merited***. The ***same is allowed entirely with costs of Kshs.10,000/= to the Respondent***. Let the matter be set down for hearing and be decided on merit.

It is so ordered.

Dated, Signed **and** ***Delivered*** **at** ***Thika*** **this** ***18th day*** **of** ***March 2019*****.**

L. GACHERU

JUDGE

18/3/2019

In the presence of

Mr. Monari for Applicant

Mr. Mungai for Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

18/3/2019