



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 95 OF 2010

RUDHIAH KEMUNTO MORONGEPLAINTIFF

VERSUS

OCHWANGI MORONGE1ST DEFENDANT/APPLICANT

TRUPHENA MORAA OCHWANGI.....2ND DEFENDANT/APPLICANT

KENYA COMMERCIAL BANK LIMITED.....3RD DEFENDANT/APPLICANT

MASANJO INVESTMENT AUCTIONEERS...4TH DEFENDANT/APPLICANT

RULING

1. On 20th June 2018 the 3rd Defendant filed the Notice of Motion dated 5th April 2018 under Order 5 Rule 1(6) and Order 17 Rule 2 and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya. The Applicant sought orders that the suit be dismissed for want of prosecution and/or alternatively that the suit had abated for want of taking out and/or service of Summons to Enter Appearance. This application was fixed for hearing on 25th July 2018 when the 3rd Defendant/Applicant did not attend Court and the application was dismissed for want of prosecution.

2. On 8th November 2018 the 3rd Defendant/Applicant filed the Notice of Motion application dated 30th October 2018 which is the subject of this ruling. By the application the Applicant sought the following orders:-

1. That this Honourable Court be pleased to set aside the orders made on the 25th day of July 2018 dismissing the 3rd Defendant/ Applicant's application dated the 5th day of April 2018 and all consequential orders.

2. THAT this Honourable Court be pleased to reinstate the 3rd Defendant/Applicant's application dated the 5th day of April 2018.

3. THAT costs be provided for.

3. The application was supported on the grounds set out on the body of the application and on the annexed affidavit of Peter Lemmy Wasilwa Advocate sworn in support thereof. In support of the application, the Applicant's law firm on record, it is deponed, instructed one of its Associate Advocates a Mr. Edwin Kubebea to attend court on the 25th July 2018 and prosecute the application on behalf of the applicant. Mr. Peter Lemmy Wasilwa an advocate in the firm of Mukele and Company Advocates deposes that the said advocate affirmed that he attended court on 25th July 2018 and vide an email he (Edwin Kubebea) authored on 26th July 2018 he advised that the Court had directed that the application be canvassed by way of written submissions and that the matter be mentioned on 17th October 2018 to confirm compliance and to take a date for ruling (copy of email received on 26th July 2018 annexed and marked ("PLW-2").

4. The deponent Peter Lemmy Wasilwa acting on the information of the advocate who purportedly attended Court but who had since left the firm prepared the written submissions annexed as "PLW-3" dated 12th October 2018 in compliance with the alleged court directions given on 25th July 2018. The deponent stated that on 17th October 2018 when the matter was fixed for mention he deputed Mr. Bigogo Advocate to attend Court on his behalf for purposes of confirming compliance and taking a date for ruling. The said advocate Mr. Bigogo attended court and it is then he was informed by the court that the application had been dismissed on 25th July 2018 for non attendance to prosecute the same. The deponent averred that he honestly believed his colleague in the law firm had attended the court when the application dated 5th April 2018 came up for hearing and that the Court issued the directions communicated by the Advocate through the email.

5. The Plaintiff swore a replying affidavit dated 10th December 2018 in opposition to the Applicant's application dated 30th October 2018.

She deponed that no sufficient reason had been adduced by the Applicant to warrant the setting aside of the Court's order of 25th July 2018. She averred that the advocate who allegedly failed to attend Court had not sworn any affidavit and that the application has not been brought without undue delay. She further contended the application was frivolous, vexatious and scandalous and constituted an abuse of the court process.

6. The application was canvassed by way of written submissions. The Plaintiff in opposing the application submitted that the 3rd Defendant had not demonstrated "**sufficient cause**" to warrant the court to exercise its discretion in its favour. In the instant matter, the thrust of the 3rd Defendant's application was that the advocate who was deputed by the law firm to attend the Court relayed information that was untrue to the effect that the Court had given directions for the application dated 5th April 2018 to be argued by way of written submissions. The said Advocate left the law firm that was acting on behalf of the 3rd Defendant but in compliance with the information furnished, the law firm with in compliance supposedly with the court's directions, prepared the submissions dated 12th October 2018 in readiness for the mention of the matter on 17th October 2018 when the Court was to give a ruling date. It was evident the advocate who was entrusted with handling the matter by the law firm misrepresented to the firm that he had attended the Court and that specific directions were issued by the Court. The law firm only discovered the true position when Mr. Bigogo advocate attended court on their behalf on 17th October 2018 when he was informed the application dated 5th April 2018 had been dismissed. The issue is whether on the basis of the foregoing facts the Applicant would be entitled to have the discretion of the Court exercised in its favour.

7. The Plaintiff takes the position that the 3rd Defendant does not deserve the discretion of the Court. She submits that mistake of counsel and/or indeed negligence of counsel does not automatically afford a party a right to have some adverse order set aside. In her submissions, the Plaintiff relied on the Court of Appeal decision in the case of **Tana and Athi Rivers Development Authority -vs- Jeremiah Kimigho Mwakio & 3 Others [2015]eKLR** where the Court dismissed an appeal against the High Court's refusal to set aside an ex parte judgment following failure by counsel for the appellant to attend Court before the High Court for the hearing of an applications seeking to have their defence struck out and judgment being entered. In the case, the Court observed as follows:-

"From past decisions of this Court, it is without doubt that Courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic."

The Plaintiff further relied on the case of **Habo Agencies Limited -vs- Wilfred Odhiambo Musingo [2015] eKLR** where the Court stated:-

"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

8. The 3rd Defendant/Applicant submitted that on the basis of the facts and circumstances of the present matter, the Court ought to exercise its discretion in favour of the applicant. The Applicant submitted that all along it was under the impression that the Court had given the directions for submission to be filed in regard to the application dated 5th April 2018 and that as soon as it learnt that the application had in fact been dismissed for non attendance it moved with haste to file the present application. The Applicant submitted the Court's power to set aside any order of the Court is unfettered save that the power should be exercised judiciously. The Applicant in support of its submissions referred the Court to the case of **Patriotic Guards Limited -vs- James Kipchirchir Sambu [2018] eKLR** where the Court of Appeal stated:-

"It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in a suit."

9. The Applicant further submitted it had always wanted to have the application dated 5th April 2018 prosecuted and urged the Court not to visit the misconduct of counsel upon it. In support of this submission the Applicant referred the court to the cases of **Richard Ncharpi Leiyagu -vs- Independent Electoral Boundaries Commission & 2 Others [2013]eKLR** and **Nelly Ayanae -vs- Marklevis Ekutan & Another [2018]eKLR** where the Courts dealt with the issue of exercise of judicial discretion. In the **Richard Ncharpi** case [*supra*] the Court of Appeal cited with approval the decision of Apalo J.A (as he then was) in the case of **Philip Chemowolo & Another -vs- Augustine Kubede [1982-88] KAR 103 at 1040** where the Judge stated:-

"Blunder 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. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

10. There is no dispute that the issue for determination in this matter is whether on the basis of the facts and circumstances the applicant is entitled to exercise of judicial discretion in his favour. The court has considered and reviewed the rival submissions of the parties and has to make a determination on the exercise of its discretion having regard to the peculiar circumstances of this matter.

11. The record shows the affidavit in support of the application dated 5th April 2018 was sworn by Edwin Kubebea Advocate then practicing with the firm of Mukele and Company Advocates who had been retained by the 3rd Defendant. The said Advocate on 26th July 2018 authored the email addressed to Ednah Rumadi probably a representative of the 3rd Defendant advising that he appeared in Court on 25th July

2018 for the hearing of the application and that the Court had directed that the application be canvassed by way of written submissions. The email further went on to advise that the matter had been fixed for mention on 17th October 2018 to confirm filing of submissions and to take a date for ruling. This was a clear misinformation as the Court record is clear there was no appearance by the Advocate on behalf of the 3rd Defendant and the application was dismissed for non attendance and the suit fixed for pre trial directions on 17th October 2018. The Advocate is said to have left the firm of Mukele and Company Advocates by the time the matter was coming next for mention on 17th October 2018.

12. Acting on the misinformation Peter Lemmy Wasilwa another Advocate with the firm of Mukele and Company Advocates prepared the submissions dated 12th October 2018 and arranged for counsel to hold his brief and to take the date for ruling only to be advised that the application had been dismissed for non attendance.

13. On the facts, it is evident that a dishonest and nefarious advocate deliberately hoodwinked the client and the other members of the law firm into believing that he had in fact attended Court and directions had been given in the application he had attended Court to prosecute. It is difficult to understand how a person who has taken an oath as an advocate and who is an officer of the Court can do the sort of thing that the erstwhile advocate did to his client and former colleagues at the law firm. Given the circumstances, I find myself unable to penalize the client for the wicked acts of its erstwhile advocate. The practice of law is predicated on the assumption that there will be trust, honesty and honour within the profession. When an advocate deliberately misleads his client on how his case is progressing that is misconduct on the part of the advocate for which he could be disciplined by his professional regulating body.

14. In the instant matter, the 3rd Defendant/Applicant had expectation that its application dated 5th April 2018 would be heard on its merits. It is unfortunate that the reckless and unprofessional acts of the advocate entrusted with the conduct of the matter resulted in its dismissal without being heard. I am persuaded that this is one matter where the party ought not to be punished for the misconduct of counsel. I will in the premises exercise my discretion in favour of the Applicant.

15. I accordingly set aside the orders made on 25th July 2018 dismissing the 3rd Applicant's application dated 5th April 2018. The application is hereby ordered reinstated for hearing on merits. I award the Plaintiff thrown away costs of kshs. 7,500/= for the application.

16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MAY 2019.

J. M. MUTUNGI

JUDGE