REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 48 OF 2017 (FORMERLY NAKURU 71 OF 2013)

SAMUEL M WANG'OMBE.....PLAINTIFF/APPLICANT

VERSUS

CHARLES MURIITHI NYAMU.....DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 8th February 2019 brought under *Order 9 Rule 9 and 10, Order 12 Rule 7 of the Civil Procedure Rules* and all enabling provisions of the law where the Applicant seeks for orders to set aside the orders of 13th November 2017 that dismissed the Plaintiff's suit with costs.

2. By consent parties were in agreement that the said application be conversed by way of written submission.

Plaintiff/Applicant's submissions.

3. The Applicant's submission is to the effect that the reason why his suit was dismissed was because there had been a breakdown in communication between the Applicant and his former Counsel in the firm of M/S Kimatta & Co Advocates which led to the dismissal of the suit for non-attendance on the 13th November 2017.

4. His submission was that at the time he had instructed Counsel, he was an employee of Kenya Revenue Authority based in Nairobi. That Pursuant to the said instructions, he had retired and had moved to Thika wherein he had entrusted a friend to check on his postal box in Nairobi as that was the address he had furnished his counsel with. His friend did not do as asked which led to the piling of letters and subsequently the miscommunication.

5. That the Respondent's assertion that the Applicant's Counsel communicated to him via phone was not supported by any evidence and should be disregarded.

6. That he has been always willing and ready to pursue the suit herein and has always attended court which fact can be confirmed from the court record. That even when orders were issued to the effect that he pays the Respondent's costs on the 31st January 2018, he readily did so. That he was not a person who would want to obstruct the course of justice and that was why he had filed the present application with no inordinate delay $2^1/_2$ months after the suit had been dismissed. He sought for the application to be allowed. To buttress their submission, he relied on the following cases;

i. **Burhani Decorations & Contractors v Morning Foods Ltd & Another [2014] eKLR**

ii. **Wachira Karani vs Bildad Wachira [2016] eKLR**

iii. **James Moenga Nyakweba & 2 Others vs Jairo atenya Asitiba [2012] eKLR**

iv. **CMC holdins Ltd vs Jaes MumoNzioki [2004] eKLR**

Respondents Submission;

7. The Application was opposed by the Respondent whose view was that the Plaintiff has never been desirous of prosecuting this matter which was filed way back in the year 2012.

8. That after the Plaintiff filed the matter, he went to sleep until he was woken up when judgment was entered against him. That judicial discretion is not designed to assist persons who have deliberately sought by evasion to obstruct and delay the cause of justice. That the Plaintiff's conduct was a repetition of his conduct at the Kipipiri Tribunal dispute No. 234 of 2005 where his whereabouts and bode were equally unknown.

9. That the record speaks for itself, where it was clear that the Plaintiff's Counsel had informed the court that since receiving instructions from the plaintiff in the year 2012, he had not heard from him and had never appeared in court despite Counsel having informed him of the various hearing dates.

10. That the Plaintiff's suit was meant to harass the Defendant herein who had been in possession of the suit land for more than 30 years prior to the filing of the suit, and up to 35 years to date.

11. That from the court record, it was clear that the Plaintiff had been informed of the need to attend court on various occasions but he had chosen to ignore to attend court. He could not now come to court to state that there was communication breakdown between him and his counsel yet counsel had informed the court that he had personally called to notify him of the hearing date. Further, despite knowing his counsel's contacts, he had not bothered to inform him of his alleged re-allocation to Thika, an allegation which was not supported with any evidence, despite the availability of Counsel's postal address, telephone, and email address on his receipts and letter heads. The Plaintiff had therefore not met the required threshold necessary for setting aside the ex-parte judgment.

12. That the principles governing the exercise of judicial discretion to set aside an ex-parte judgment in default of either party to attend court were laid down in the case of **Shah vs Mbogo [1967] EA 116** quoted in the case of **Nyakoya Kaba & Another vs Rashmikant Meghji Shar [2016] eKLR**

13. That the Application herein had been brought in bad faith and in inordinate delay, the judgment having entered on the 13th November 2017 and the same having been filed three months later with no reasons for the delay having been given by the Plaintiff. That the Plaintiff's mischief was further evidenced by the filing and withdrawal of his applications to further delay the hearing of the Defendant's counter claim. They relied on the case of **Simon Waitim Kimani & 3 Others vs Equity Bank Building Society [2006] eKLR** to submit that a party seeking to reinstate a suit must demonstrate good faith and the application should be brought without unreasonable delay otherwise it must fail. The Plaintiff filed this suit in 2012 and then went to sleep. That because this was a land matter, it was incumbent of the Plaintiff to handle the same with sensitivity and diligence as well held in the case of **Peter Kinyari Kihumba Vs Gladys Wanjiru Migwi & Another CA NBI Civil application No.121 of 2005** quoted in the case of **Peter Bekyibei Langat vs Recho Chepkurui Mosonik & Another [2014] eKLR.**

14. That further, the Plaintiff had not proved why he never attended court from the year 2012 when he instituted this suit up to the year 2017 when judgment was entered against him. He made mere statements that were not supported with any evidence alleging that there had been a communication break down between him and his counsel. There was no evidence to prove that he had tried to contact his counsel, further the medical chits produced in court to show that he had been attending to his sick mother could not be the reason for his failure to appear in court for six years. His attempt therefore to explain his indolence and casualness in handling this matter was not acceptable. He came to court with unclean hands.

15. That once a Civil Case was filed, it was owned by the litigant and not his Advocate and it was up to him to follow up his case and check on its progress.

Analysis and Determination

16. Having considered the Application herein to set aside the ex-parte judgment, the submissions for and against allowing the said application, the authorities herein sited as well as the law, I find that the law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules. In addition, the power to set aside judgment or dismissal is a discretionary power exercised with the main aim of doing justice between the parties.

17. I have considered the reasons that were presented by the Plaintiff regarding his failure and the failure of his advocate to fix the matter for hearing on several occasions and keenly perused the affidavits filed in support of the application to find out whether there are valid reasons for the Plaintiff's failure to set down the matter for hearing.

18. In his application to set aside the dismissal, the Plaintiff stated that he was not aware of the hearing dates because of the breakdown of communication between him and his Advocate and that he only learnt that the matter had been dismissed when he called his former counsel inquiring from him why he had not informed him of the progress of his case.

19. I have also asked myself whether the failure to set the matter down for hearing by both the Plaintiff and his advocates constituted an inadvertent excusable mistake or an error of judgment or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the application for setting aside the dismissal order, $2^1/_2$ months after the said order was made, constituted inordinate delay.

20. In my view, though the Plaintiffs claim was that it had been his former lawyer's mistake which caused the dismissal, it appears to me that he was partly to blame. He should have followed up the case to its conclusion. He seemed to have been busy occupied with another business from the year 2012 when the case was filed rather than pursuing the conclusion of their case.

21. In the case of **Belinda Murai & Others – Vs – Amos Wainaina [1978] KLR 278** per **Madan JA** (as he then), described what constitutes a mistake in the following terms:

> *"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."*

His Lordship went further to state that:

> *"It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule…"*

22 In the Court of appeal decision of **Gurcharn Singh T/A Kessar Singh V. Khudroad Rhan s/o Khudadad Construction Co.** – HCCC NO. 1547 of 1969, Hancox J (as he then was) was of the view:-

> *"……..that the advocate's mistake (or that of his clerk) should not weigh unduly, and in my view that should be the correct approach to an application of this nature. As I said in Eldoret HCCC No. 14 of 1980 – The Municipal Council of Eldoret V James Nyakeno, "the court goes by the principle that such an ex-parte judgment having been entered neither upon merits of the case nor by consent of the parties is subject to the court's power of revocation at its discretion." It is unfortunate that advocates' sins and omissions are sometimes visited on their clients who are left without the remedy they sought, but to sue the advocate for professional negligence, but where a litigant shows that his default has been due to the party's advocate's mistake in an application of this nature, unless injustice would be occasioned to the other party the court should consider the applicant's case with broad understanding."*

22. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until its dismissal and I am satisfied that the advocate and his client were not guilty of inaction as the delay/lapse was adequately explained. I do not think that counsel for the Applicant derogated from the overriding objective. I therefore reject the Defendant's submissions as unconvincing and incapable of advancing the overriding objectives intended by the express provisions of Section 1A and 1B of the Civil Procedure Act.

23. Consequently and for the above reasons, I allow the application, with cost in cause, and set aside my order of 13th January 2017 dismissing the Plaintiff's suit for want of prosecution and reinstate the case. The case is thus reinstated to be heard expeditiously.

Dated and delivered at Nyahururu this 25th day of June 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE