REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ENVIRONMENT AND LAND CASE 450 OF 2017

ARCADIUS NJORA CHEGE....................................PLAINTIFF/APPLICANT

VERSUS

GEOFFREY MUCHIRI.......................................DEFENDANT/RESPONDENT

RULING

1. This is a ruling in respect to the Notice of Motion application dated 28th March 2019 filed under certificate of urgency by the Plaintiff / Applicant seeking the following orders;

a. Spent.

b. That the Honourable Court be pleased to reinstate our application dated 21st February 2019.

c. That the costs be in the cause.

2. The following are the grounds for the application;

a. That the application was slated for hearing on 18th March 2019.

b. That Counsel for the Plaintiff / Applicant was late due to unavoidable circumstances.

c. That it was dismissed for non- attendance of the Advocate.

d. That for the interest of justice this Honourable Court be pleased to grant the orders sought.

e. That the mistakes of the Advocates should not be visited on the litigants.

3. The application is supported by an affidavit sworn by Counsel for the Plaintiff/ Applicant namely WILLIAM N. ONWANG'A who explains that after obtaining judgement and extracting the decree the Defendant Respondent refused to vacate the property due to the failure on the part of the Defendant/ Respondent to comply with the Court orders the Plaintiff Applicant proceeded to file the Notice of motion application dated 21st February 2019 under certificate of urgency. The said application was directed for inter-parties hearing on 18th March 2019 and a hearing notice was duly served on the Respondent as per the return of service on record dated 6th March 2019. Counsel claims that on the date of the hearing he came late due to unavoidable circumstances and on arrival he learnt that the matter had already been mentioned and was later advised from the registry that the application had been dismissed for non-attendance. Counsel further deposes that he was prepared to prosecute the application on the said date were it not for his lateness. He takes up the blame squarely for the turn of events and apologizes for the same. And prays for his mistakes not to be visited upon the litigant.

4. This instant application was duly served on the Respondent as evidenced in a return of service dated 2nd May 2019 but no response was preferred by the Respondent the application is therefore unopposed.

5. At the hearing Counsel for the Plaintiff/ Applicant adopted his supporting affidavit to the instant application and prayed for the application dated 21st February 2019 to be reinstated.

6. **Order** 12 Rule 7 reads:

> “where under this Order judgement has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgement or order upon such terms as may be just.”

7. I have looked at the application dated 21st February 2019 that the Applicant herein seeks to reinstate and note that the application seeks execution orders of the Court emanating from a judgement of this honourable Court delivered on 2nd July 2018 and orders subsequently issued on 20th December 2018. Considering that the instant application is also unopposed I shall proceed to determine whether the Applicant has given sufficient reasons to convince the Court to set aside its own orders dated 18th of March 2019. Counsel for the Applicant has explained that on the date of the hearing he came to Court late due to unavoidable circumstances but has not elaborated those circumstances it is therefore not sufficient for Counsel to just state unavoidable circumstances without detailing what the circumstances were in order to give the Court an opportunity to assess the veracity of the reasons given, Counsel being an officer of the Court is obliged to ensure that he attends Court in time at all times. I have also been enjoined not to visit the mistakes of the Counsel on the litigant whilst I am aware that the Applicant herein can well have recourse in law by taking it up against his Counsel, I am also alive to the fact that this Court is clothed with wide discretionary powers to set aside and or vary its orders under Order 12 Rule 7 of the Civil Procedure Rules.

8. I am guided by the principles as expounded in **Shah v Mbogo (1967) EA 116** and **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** cases were in relation to setting aside default judgements, the principle that a Court should follow in exercising its discretion in setting aside an *ex parte* order ought to be the same in that:

> “(it) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.”

9. Such principle is now of course well founded in statute by the provisions of **Section 3A** of the Civil Procedure Act under which the instant application is brought reads:

> “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.”

10. The Court is satisfied that the Applicant’s failure to attend Court on the material date was not intended to delay or obstruct the course of justice. The instant application was filed 10days after the dismissal orders were issued hence there was no inordinate delay. In light of the above I am inclined to exercise my discretion in favour of the Applicant. The application is allowed. Costs are payable by the Applicant.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 16TH DAY OF JULY 2019

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Waweru HB for Bwonwonga for the Plaintiff/Applicant

Defendant/Respondent: Absent

Irene and Njeri, Court Assistants