



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 451 OF 2017**

**PAULINE WANJIKU NDEGWA - PLAINTIFF/APPLICANT**

**VS**

**MARGARET MAGIRI MWANGI - DEFENDANT/RESPONDENT**

**RULING**

1. This is a ruling in respect to application dated 28<sup>th</sup> 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 21<sup>st</sup> 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 18<sup>th</sup> 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 21<sup>st</sup> February 2019 under certificate of urgency seeking executory orders of the Judgment. The said application was directed for inter-parties hearing on 18<sup>th</sup> March 2019 and a hearing notice was duly served on the Respondent as per the return of service on record dated 6<sup>th</sup> March 2019. Counsel claims that on the date of the hearing he came to Court 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 that 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 2<sup>nd</sup> 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 21<sup>st</sup> 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 judgment or order upon such terms as may be just.”

7. In the case of: **Philip Chemowolo & Another v Augustine Kubede**, [1982-88] KAR 103 at 1040 Apalo, J.A. (as he then was), posited as follows:

“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.”

8. In the case of **Muthaiga Road Trust Company Ltd v Five Continents Stationers Ltd & 2 Others, Civil Appeal No. 298 of 2001** the learned Judges of the Court of Appeal stated:

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

9. Those 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.”

10. 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.”

11. Guided by the principles of law and precedent enunciated above, I have looked at the application dated 21<sup>st</sup> February 2019 that the Applicant herein seeks to reinstate and note that application seeks execution of the orders of this Court emanating from a judgement of this honourable Court delivered on 31<sup>st</sup> of May 2018 and orders subsequently issued on 13<sup>th</sup> 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 18<sup>th</sup> of March 2019.

12. 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 and Order 51 of the civil procedure rules. I also note that the instant application was filed only 10 days after the dismissal orders were issued there was there no inordinate delay. No evidence has been laid before this Court to point that the Applicant’s action in not attending Court was intended to obstruct or delay the course of justice. In view of the above I am inclined to exercise my discretion in favour of the Applicant.

13. The application dated 28<sup>th</sup> February 2019 is allowed. The application dated 21<sup>st</sup> February 2019 be and is hereby reinstated.

14. Costs shall be payable by the Applicant.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 16<sup>TH</sup> 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