REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 70 OF 2016

ESTHER CHEROP CHEBELYO.................................PLAINTIFF

VERSUS

ORIENTAL COMMERCIAL BANK LTD..........1ST DEFENDANT

MOSES CHEPTOEL...2ND DEFENDANT

CHARLES MUSAKU MUYANGE....................3RD DEFENDANT

WATTS AUCTIONEERS....................................4TH DEFENDANT

RULING

1. This ruling is with regard to an application by way of Notice of Motion dated **12/7/2019** brought under ***Section 3A of the Civil Procedure Acts, Chapter 21 of the Laws of Kenya, Order 12 Rule 1 and 7 of the Civil Procedure Rules.*** The plaintiff is seeking orders thus:-

> **(a) That the service of this application be dispensed with in the first instance in view of its urgency.**
>
> **(b) That orders of court made on 8/7/2019 dismissing the plaintiff's suit for want of prosecution be set aside and the suit be reinstated.**
>
> **(c) THAT there be stay of court orders issued on 8/7/2019 dismissing the plaintiff's suit for want of prosecution.**
>
> **(d) …spent**
>
> **(e) Costs be provided for.**
>
> **(f) Any other or further orders this court may deem fit and expedient to grant.**

2. The application is premised on the applicant's supporting affidavit of even date.

3. The grounds relied upon are that both the counsel for the applicant and counsel for the respondent agreed that they were going to take out the matter on the hearing date and that counsel for the plaintiff needed not in the circumstances travel to Kitale; that a Mr. Kidiavai, the 2nd and 4th defendant's counsel, would hold the plaintiff's counsel's brief and another date and the defence counsel would serve a hearing notice a fresh for the new date; that the plaintiff's counsel believed that what he was told by the defence counsel was true; that however come the hearing date Mr. Kidiavai, the 2nd and 4th defendant's counsel, indicate that he was ready to proceed and the court dismissed the suit for want of prosecution.

4. It is averred that the plaintiff was keen to pursue her case, that she had a valid claim and that on that date of dismissal she was present in court with her witnesses; it is also averred that the plaintiff would suffer irreparable and damage should the suit not be reinstated. The plaintiff undertakes to be ready to avail himself for hearing of the suit at any time should this court fix the case for hearing in the event the dismissal orders are set aside.

5. The application was opposed by the 3rd respondent only. The other respondents did not file any replying affidavit or submissions in

respect thereto.

6. The replying affidavit of the 3rd defendant was filed on **1st August, 2019**. He simply deponed that on **8/7/2019,** which was the hearing date, he attended court and that there was no appearance for the plaintiff and the suit was dismissed and that this application should be dismissed with costs.

7. I must determine if there is good ground to set aside the order made on 8/7/2019 dismissing the suit. The record of the court for that day reads that Mr. Kidiavai was present for 2nd and 4th defendants, Mr. Barongo was present for the 3rd defendant and there was no appearance for the plaintiff. Though not expressly recorded, it appears that there was no appearance for the 1st defendant. Mr. Kidiavai indicated to the court that he was ready to proceed while Mr. Barongo opined that the absent parties should be in court. Nothing shows that the plaintiff and his witnesses were present and if they were then they did not address the court or otherwise make their presence known to the court.

8. Subsequently Mr. Kidiavai supported by Mr. Barongo prayed that the suit be struck out whereupon this court dismissed the suit for want of prosecution with costs to the defendants hence the instant application.

9. The main ground in support of the application is based on alleged understanding between the counsel for the 3rd defendant that the matter may be taken out of the cause list for 8/7/2019 and another date be taken, reason being that Ms. Arunga counsel for the 3rd defendant was scheduled to attend an interview on 9/7/2019. Counsel for the plaintiff assumed that on basis of that understanding the suit would not proceed to hearing on 8/7/2019 and failed to attend court. As a result on that day the plaintiff was not represented in court and the suit was dismissed.

10. It is noteworthy that the plaintiff never personally played any role in the supposed agreement between counsels.

11. It is also noteworthy that the counsel for the 3rd defendant has not sworn any affidavit to controvert the allegation that there was an agreement that the matter should be taken out. The supporting affidavit does not indicate whether counsel for the 1st, 2nd and 4th defendants were involved in that agreement. That notwithstanding I am convinced that there was communication between the plaintiff's counsel and the 3rd defendant's counsel. However on the date of the hearing Mr. Barongo, rather than Mr. Kidiavai held brief for Ms. Arunga for the 3rd defendant. In this new scenario of changed roles, Mr. Barongo holding brief for Ms. Arunga appears to have remained silent on the issue of the supposed understanding between Ms. Arunga and Mr. Chemwok, and, surprising as it seems now, proceeded to support Mr. Kidiavai's application for the striking of the suit.

12. I am convinced that there was an understanding between the plaintiff and 3rd defendant's counsel which excluded the other defendants' counsel. This court may never know whether Ms. Arunga instructed Mr. Kidiavai to hold her brief in the matter on the 8/7/2019. I find the supporting affidavit unsatisfactory in that it does not state clearly the role of the counsel for the 1st 2nd and 4th defendants in the agreement. However the fault lies squarely on Mr. Chemwok's lap, he being the plaintiff's counsel, in that he never appears to have communicated with them and in presuming that the memorandum of understanding would be communicated to court and that the court would automatically adjourn the matter.

13. Adjournments are not a right of any party to litigation and once a suit has been fixed for hearing, an adjournment is at the discretion of the court. Indeed **Order 12 rule 2** provides that if on the date the matter has been fixed for hearing the suit is called on for hearing and only the plaintiff attends and if the court is satisfied that notice of hearing was served it may proceed *ex-parte*.

In **Mugachia v Mwakibundu [1984] eKLR** the Court Of Appeal was faced with a situation where an advocate failed to secure an adjournment after advising his client not to attend court on the basis that the expert witness the doctor was not available to testify. The Court of Appeal observed as follows regarding the action on the part of the advocate:

> **"Sympathetic as I am to Mr. Jiwaji, and even more so for the plight of his wretched client, I am bound to say that in my view, the advocates, in not having their own client available on the day fixed and indeed confirmed, for hearing anticipated the decision of the court. They took a dangerous course for as is shown on the affidavits, no compromise had been reached."**

In the instant case the hearing date was set way back on **March, 2019** in the presence of advocates for all the parties. On that fateful day Mr. Wafula held brief for Mr. Chemwok, Mr. Kidiavai for 1st and 4th defendants and Ms. Arunga for the 3rd defendant. It is not disputed that Mr. Chemwok knew of the hearing date hence he did not have any good reason for not attending court notwithstanding the supposed agreement between him and Ms. Arunga. I note that the replying affidavit is sworn by Mr. Chemwok and not his client. It is not clear that his client has knowledge of anything that transpired on that day of dismissal.

14. I do not condone the plaintiff's counsel's conduct and I find that it is such reprehensible conduct on the part of counsel that delays hearings and occasionally leads to dismissal of an innocent plaintiff's case.

15. Be that as it may it has been said time and again in many a decision that as far as it is practicable the court should where it is still possible to do justice between the parties order a setting aside a dismissal order in favour of hearing the case on merits. None of the parties truly gain when a matter is dismissed on a technicality such as non-appearance of counsel.

16. In the **Mugachia case (supra)** the Court of Appeal stated as follows:

> **"But equally it cannot be denied that Mr Jiwaji, with full knowledge that the case had been fixed for that date and confirmed, took it upon himself to advise the appellant not to attend. He frankly admitted this to the judge and to us. That**

was undoubtedly his fault, but I nevertheless think that in exercising his discretion to refuse an adjournment even until the afternoon, the learned Acting Judge failed to take into account a consideration which he should have taken into account (see Brandon LJ in The Elamria (1981) 2 Lloyds Reports page 123), namely that by visiting the error of his advocate on the unfortunate appellant, he denied him the right of having his case heard at all, which surely, as Ainley J (as he then was) said in Sodha v Hemraj (1952) Uganda Law Reports, Vol 7 page 11, should be the last resort of any court. A reading of Mr. Hemant Patel's reports show that the injuries, if proved to have been sustained, can certainly not be classed as trivial. In my judgment, even though the advocate was to blame, the decision of Aragon Ag J if allowed to stand, would result in grave injustice to one of the parties, in that he would be shut out from a hearing of his case. It may be that no evidence was offered for the appellant, but that flowed directly from the refusal of the adjournment."

17. Article 159 2(d) of the Constitution of Kenya 2010 provides as follows:

"In exercising judicial authority the court shall be guided by the following principles:

(a)….

(b)…

(c) …

(d) Justice shall be administrator without undue regard to technicalities."

18. I find that this is a case in respect of which it is necessary to exercise my discretion in favour of the plaintiff notwithstanding the blameworthy conduct on the part of his advocate. In many instances also this court has overlooked the mistakes of counsel in favour of doing justice to the parties. See the well-known cases of **Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR** and **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [Eklr].**

19. In the **Philip Chemwolo case (supra)** the court observed as follows:

"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 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".

20. In this case, the dismissal order will hold fast and deny the plaintiff a hearing for no fault of her own unless set aside. In the case of **Patel -vs- E A Cargo Handling Service Ltd [1974] EA 75** at **76C** and **E**, the court stated as follows:-

"There are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as are just. 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. Secondly as Harris J said in Shah -vs- Mbogo, 1967 EA 116 at 123B, "This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. That judgement was approved by the Court of Appeal in Mbogo -vs- Shah [1986] EA 93. And in Shabir Din -vs- Ram Parkash Anand [1955] 22 EACA 48 Briggs JA said at 51:-

"I consider that under Order IX Rule 20 the discretion of the court is perfectly free, and the only question is whether upon the facts of a particular case it should be exercised. In particular mistake or misunderstanding of the appellants legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised".

21. I have earlier stated that the dismissal order will hold fast and deny the plaintiff in this case a hearing for no fault of her own unless set aside which I consider unjust in the circumstances. In order to avoid an unjust result in this matter, I find that it is proper to grant the application dated **12/7/2019**. I therefore the following orders:

(a) That the order of court made on 8/7/2019 dismissing the plaintiff's suit for want of prosecution is hereby set aside and the suit is hereby reinstated.

(b) That the costs of this application and the costs of the proceedings of 8/7/2019 shall be agreed on and, if not, taxed and paid by Mr. Michael Chemwok the advocate for the plaintiff before the next hearing date.

Dated, signed and **delivered** at **Kitale** on this **30th** day of **September, 2019.**

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for 3rd defendant

Mr. Bisonga for the 1st, 2nd and 4th defendants

Mr. Bororio holding brief for Chemwok for the plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

30/9/2019