



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC CASE NO. 42 OF 2015**

**ROBELLA BETTY AYODE OMAIDO.....PLAINTIFF**

**VERSUS**

**ELIPHINEAS JACKSON EKIM OMAIDO.....DEFENDANT**

**AND**

**ESHIKHONI AUCTIONEERS.....RESPONDENT**

**KENNEDY KWEYU.....RESPONDENT**

**ARCHBOLD NYUKURI.....RESPONDENT**

**RULING**

1. This ruling arises out of an application by way of Notice of Motion dated 25/9/2019 brought under *Section 3A, 63(e), Order 12 Rule 7 of the Civil Procedure Rules, 2010*. The plaintiff is seeking the following orders:-

(1) ...spent

(2) ...spent

(3) **THAT the orders of this court pronounced on the 24/9/2019 dismissing the application dated 27/8/2019 be set aside.**

(4) **THAT the application dated 27/8/2019 be reinstated and heard inter-parties.**

(5) **THAT the interim orders granted by this court on the 3/9/2019 be reinstated pending hearing and determination of this application.**

(6) **Costs of this application be provided for.**

2. The application is supported by the affidavit of Kepher W. Nakitare, Advocate of the High Court sworn on 25/9/2019.

3. The grounds relied upon are that the plaintiff/applicant moved the court through an application dated 27/8/2019 seeking for orders of stay of proceedings herein pending hearing and determination of **CMCC No. 332 of 2019**; that the application was certified urgent and a stay of execution was issued pending inter-partes hearing of the application on 24/9/2019; that due to inadvertent misdiarizing of the said date for hearing inter-partes, the application dated 27/8/2019 was dismissed; that the non-attendance of counsel for the applicant was not intentional as the application was filed in good faith and that in the interest of justice the same should be reinstated and heard inter-partes.

4. The plaintiff filed submissions on 17/6/2019 while the respondents on 20/6/2019.

5. In response to the application the counsel for the 1<sup>st</sup> respondent/decree holder filed replying affidavit dated 28/9/2019. He deponed that the application is an abuse of the process of court calculated to subvert the cause of justice and defeat the decree and certificate of costs; that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are improperly joined as they are not parties to the suit; that the applicant has never challenged the taxation in this matter through a reference and has never appealed and has failed to satisfy the decree; that attempts to execute against her have floundered on the basis of technicalities; that the applicant has filed the instant application only after being served with proclamation and no

plausible reasons have been advanced for failure to attend court on 24/9/2019; that the applicant simply seeks to delay the matter; that setting aside orders are only issued to avoid injustice or hardship resulting from accident inadvertent mistake or error but not to assist a litigant who has sought to obstruct or delay the cause of justice; that **Article 159 of Constitution** is not panacea for all mistakes and illegalities and that the application has not met the threshold for setting aside judgment as required by **Order 12 rule 7** of the Civil Procedure Rules.

6. The applicant filed her submissions dated **11/10/2019**. I have perused the court record and found no submissions filed on behalf of the respondent.

7. The main issue that arises for determination in this matter is whether this court should reinstate the application dated 27/8/2019 for hearing interpartes.

8. The grounds advanced by applicant's counsel are brief. He simply states in **paragraph 4** of the supporting affidavit that the application was dismissed by reason of misdiarizing and non-attendance was not intentional and that the application had been filed in good faith. He also averred that the plaintiff/applicant has been diligent in prosecuting this matter and would suffer irreparable harm if the application is not reinstated and heard on merit.

9. The question is whether the evidence in the supporting affidavit is sufficient to warrant the reinstatement of the application dated 27/8/2019.

10. A court is called upon to exercise its discretion in matters of setting aside.

11. In this particular case it is not a judgment but an application that was finalised by way of an order of dismissal for non-attendance.

12. Courts are called upon to exercise discretion to ensure substantive justice is not lost at the altar of technicalities.

13. In this case evidence reflects the existence of two suits that involve the same parties: this case and **Kitale CMCC No. 332 of 2019**.

14. In both cases the applicant is the plaintiff while the respondent is the defendant. Whether the two cases are connected with one another is clarified by **paragraph 6** of the supporting affidavit in the application dated 27/8/2019. It states as follows:

**“That I have now filed a suit in the Chief Magistrates Court under Civil Suit No... of 2019 seeking reliefs of compensation for damages for irregular proclamation and attachment, of setting of the amount awarded as damages with the judgment debt, loss of user and interests thereon.”**

15. A perusal of “**RBAO-3**” the plaint in **Kitale CMCC No. 332 of 2019** reveals that the prayers are as follows:

**(a) General damages**

**(b) Costs of the suit**

**(c) Interests at court rates**

**(d) Any other relief the court deems fit.**

16. I find no claim for set off in that plaint. There is no reference to this case and in my view the cause of action in this case is not similar to the cause of action in that case.

17. That forms a brief background to the instant application. However the instant application must be independently assessed on its own merits as to whether it satisfies the condition of setting aside of an order of dismissal for want of prosecution upon non-attendance.

18. Failure to attend court must be explained fully if the orders sought are to be granted. In my view the supporting affidavit sworn by the applicant's counsel on 28/9/2019 falls short of availing the requisite evidence that would enable this court exercise its discretion in applicant's favour; though misdiarizing is said to be the cause of non-attendance that led to the dismissal, copies of the diary for the dates involved in the misdiarizing have not been annexed to the supporting affidavit. The only statement that the applicant's counsel puts forward in that affidavit at paragraph 4 is as follows:

**“That due to inadvertent misdiarizing of the said date for hearing of the application dated 27/8/2019 interparties (sic) the application was dismissed for non-attendance.”**

19. None of the other paragraphs in that affidavit give any dates or allow the court to have an idea of how that misdiarizing occurred.

20. Time and again courts have been lenient on applicants when their advocates commit blunders that risk the litigation pending before court. However such blunders must be described clearly in order to give the court a clear picture of what happened and to avoid any taking of advantage of the other party under the banner of “*counsel's mistake*”.

21. In this particular case I find that no evidence of such blunder was brought to the fore in the supporting affidavit. As evidence that could have supported the grant of the prayer sought is missing the application dated 25/9/2019 is incompetent and it is hereby dismissed with costs.

**Dated, signed and delivered at Kitale on this 24<sup>th</sup> day of October, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**24/10/2019**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Teti for respondent

N/A for the applicant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**24/10/2019**