REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

MISC. APPLICATION NO. 29 OF 2018

PETER MWANGI MACHARIA……..…....APPLICANT

VERSUS

ALPHAXARD WAROTHO KOMU.....1ST RESPONDENT

NDUNGU KARANJA.....2ND RESPONDENT

MBUGUA GICHU.....3RD RESPONDENT

RULING

The matter for determination is the Notice of Motion Application dated **6th February 2019,** brought by the Applicant under ***Order 12 Rule 7, Order 1 Rule1 of the Civil Procedure Rules' Sections 1A,1B,3A & 63 (e) of the Civil Procedure Act*** seeking for orders that:

> ***a) This Honourable Court be pleased to set aside the orders made on 6th December 2018 dismissing the Applicants suit and all other consequential orders hereto.***
>
> ***b) THAT this Honourable court be pleased to reinstate the instant suit herein.***
>
> ***c) THAT the costs of this application be provided for.***

The Application is premised on the grounds that the instant application was dismissed on **6th December 2018,** for non-attendance by the Counsel for the Plaintiff and Defendant. Further that the Plaintiff's Advocate mis-diarized the said date and was not able to attend Court. Being that the Application is made without delay, it would be fair and in the interest of justice that thee application be reinstated to allow the applicant ventilate the matter to its logical conclusion.

In support of the Application, **Mr. John Muturi Njoroge,** the Counsel for the Applicant swore the supporting Affidavit. He averred that he caused the application to be filed on **19th September 2018,** to which a hearing date for **1st November 2018,** was set. That however, when the application came up for mention on **6th December 2018**, to confirm whether the Defendants had filed a **Preliminary Objection**, an administrative error had occurred in their offices as the matter was not diarized and therefore they failed to attend Court. It was his contention that mistake of counsel should not be visited on a client. He further averred that the orders sought will not prejudice the Respondents but will help the Court make an informed decision.

The Application is opposed and the Respondents filed a Replying affidavit sworn by their Advocate, who averred that it has taken the Applicants over 60 days from the date the Application was dismissed to bring the instant application and therefore the delay is inordinate and no explanation has been given.

On the **26th of March 2019,** the parties agreed to dispose the Application by way of written submissions.

The Court has carefully perused the Application and the documents in support, together with the ***Replying Affidavit***. It is this Court's opinion that the issue for determination is whether the Application is merited.

Order 12 Rule 7 **of** the ***Civil Procedure Rules*** provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in ***Patel….Vs….E.A Cargo Handling Services Ltd (1974) EA 75,*** held that:-

> ***"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just . The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to feter the wide discretion given it by the Rules.''***

In deciding further on whether or not to grant the orders sought and exercise discretion, the Court is also guided by whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the Application is allowed.

The Applicant has argued that the inadvertent mistake was caused by his Advocate who failed to diarize their diary and therefore they were unable to attend Court. On the other hand, the Respondents have averred that the Applicant failed to attend Court and have not given any explanation

It is evident that Advocates are mostly guided by their diaries and having numerous files to deal with, one may not know exactly what date each matter has been placed unless they check their diaries. In failing to diarize the matter, it might therefore have escaped the mind of the Counsel. This Court therefore finds that such a mistake may happen to anyone and therefore excusable.

In the case of ***Philip Chemwolo &Another…Vs…Augustine Kubende (1986) eKLR***, the Court of Appeal held that:-

> ***"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 this case heard on merits.''***

In the case of ***Shah….Vs…Mbogo (1967) EA 166 ,*** the Court stated that:-

> ***"this discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice.''***

The Applicant's Advocate has sworn the supporting Affidavit acknowledging that the mistake was on his part and in so doing exonorated the Applicant from any wrongdoing. This fact has not been controverted or challenged and therefore remains the gospel truth. This Court will take judicial Notice that in most cases when matters come up for hearing of Applications the parties to the suit usually do not attend Court and rely on the advice of their Advocates as to when matters are listed for hearings and mentions. See the case of ***Gideon Mose Onchwati….Vs….Kenya Oil Co. Ltd & Another (2017) eKLR*** cited the case of ***Shah….Vs…Mbogo*** and ***Ongwom …Vs….Owota,*** where the Court held that;

> ***"Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate , is bound by the acts and omissions of the advocates in the course of representation ,in applying that principle , Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequence s of the advocates default unless the litigant is privy to the default or the default results from failure , on the part of the litigant , to give the advocate due instructions.***

In applying the above principle therefore, the Court finds that there are sufficient reasons to set aside the exparte orders. The Respondents would not suffer any prejudice as they would be compensated by costs for any delay of the trial occasioned and costs herein would be sufficient to cover any prejudice occasioned. The Court further finds that Justice would be sufficiently served if the matter is heard and determined on merit and the parties are given an opportunity to be heard bearing in mind further that this is an appeal.

Further there was no unreasonable delay in bringing the Application as time stopped running from the **21st of December 2018** to the **13th of January 2019** and the Court finds the Application is merited.

The upshot of the foregoing is that the Applicant's ***Notice of Motion*** dated ***6th February 2019 is merited***. The ***same is allowed entirely with throw away costs of Kshs.5, 000/= to the Respondents***. Let the matter be set down for hearing and be decided on merit.

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this ***4th day of October 2019***.

L. GACHERU

JUDGE

4/10/2019

In the presence of

M/S Njoka holding brief for Mr. Ngaruiya for Defendant/Respondent

Mr. Murgor holding brief for Mr. Muturi Njoroge for the Applicants

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

4/10/2019