REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 35 OF 2016

PETER MUIGAI KIHARA.....PLAINTIFF

VERSUS

THE CHAIRMAN, SECRETARY AND TREASURER OF PCEA

MUTEERO CONGREGATION KAREN

PARISH, MILIMANI SOUTH PRESBYTERY.....1ST DEFENDANT

KIRINYAGA COUNTY LAND REGISTRAR.....2ND DEFENDANT

NYAWIRA WANGECHI & WANGAI MUHIU MAINA

(The Administrators of the Estate of FRANCIS

GICHAMBA MAINA Alias F.G. MAINA Alias FRANCIS

MAINA MUGOIYO.....3RD DEFENDANT

RULING

INTRODUCTION

The application before me is the Notice of Motion dated 4th April 2019 brought under ***Section 1A, 1B, 3A, Rule 51 (1) CPA and Section 151 (2)*** of the Constitution of Kenya. The applicant is seeking leave to re-open the defendants' case and to be allowed to cross-examine the defence witness number 4 and 5.

The background of the application is that this case was listed for defence hearing on 11th February 2019 when three witnesses testified. The matter was adjourned to 18th March 2019 for further defence hearing. The plaintiff and his counsel failed to attend Court and the matter proceeded in their absence. The defence called two more witnesses and closed its case. The Court directed that the parties do file their submissions within 21 days. On 2nd May 2019, counsel for the plaintiff filed their instant application under certificate of urgency. The application is opposed with a replying affidavit sworn by Olivia Koranje

APPLICANT'S CASE

According to the applicant, this matter came up for hearing on 18th March 2019 but one Mr. Mwangi advocate who held brief for his advocate erroneously indicated on the office file that the matter was adjourned for hearing to 19th March 2019 instead of 18th March 2019. On 19th March 2019, she came to Court but was informed that the matter proceeded on 18th March 2019 and the defence closed their case. He stated that the error in indicating the hearing date as 19th March 2019 instead of 18th March 2019 was not deliberate but was an innocent mistake by his advocate and that he should not be punished for the innocent mistake of his advocate. He stated that it will be in the interest of justice that the two defence witnesses be recalled for cross-examination and that he is ready and willing to meet any conditions that may be imposed by the Court in order to recall the witnesses for cross-examination.

RESPONDENTS CASE

The respondent through her advocate M/S Olivia Koranje opposed the application stating that the affidavit in support of the application is not signed. She deponed that the applicant has not produced the extract of their office file wherein Mr. Mwangi had erroneously indicated the hearing date as 19th March, 2019 The learned counsel also stated that despite counsel for the applicant attaching a copy of a diary indicating that the hearing was diarized as coming up for hearing on 19th March 2019, it cannot be verified with certainty when the entries were made and that there were no attachments of the entries made on 18th March 2019 to verify the alleged erroneous entries. The respondent stated that although the orders sought are discretionary in nature, such discretion must be exercised judicially and a party who seeks to benefit from such discretion must demonstrate sufficient cause for the same.

She stated that an error in diarizing a wrong date does not amount to sufficient cause which would prompt this Honourable Court to exercise its discretion in favour of the applicant. She stated that if indeed Mr. Mwangi who was holding brief for the plaintiff's counsel did not diarize the next hearing date correctly, the plaintiff who was in Court during the previous hearing should have corrected him on the actual date given by the Court. The respondent also contends that the application if allowed has the effect of wasting public resources and judicial time thus preventing the timely disposal of this case. She stated that if the Court is inclined to allow the application, they would be asking that the applicant should bear the costs of securing the defendants witnesses and their costs including Court adjournment fees.

LEGAL ANALYSIS

I have considered the affidavit evidence and the submissions by the counsels. I have also considered the applicable law. The applicant in his case is seeking to set aside the proceedings which were conducted on 18th March 2019 in his absence and that of his counsel. He stated that his advocate made a mistake in diarizing a different date from that which was given by the Court and wants this Court to set aside those proceedings and recall the witnesses. The issue of whether a mistake of counsel should be visited upon a client was discussed in numerous decisions of this Court and the superior Courts. In the case of ***Tana and Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 others (2015) e K.L.R,*** the Court of Appeal cited with approval the case of ***Ketteman & others Vs Hausel Properties Ltd (1988) 1 All E.R. 38*** in which **Lord Griffith Stated** that:

> ***"Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequence of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings".***
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> ***…….. To our mind, this is the most proximate way to balance out the competing interests of both parties to the suit. That the conduct complained of in this case was committed by a clerk is immaterial, for it is the law of agency that the principal should be bound by the acts of his agents". (See Ahmed Vs Highway Carriers (1986) LLR 258 (CAK) and also Nyeri Vs Elmau (1939) 4 All ER 484) as stated by Viscount Maughau in the Nyeri case,***
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> ***"…… the jurisdiction may be exercised where the solicitor is merely negligent, it would seem to follow that he cannot shelter himself behind a clerk for whose actions within the scope of his authority he is liable ……. my conclusion is that Elman (Solicitor) cannot dissociate himself from the acts and defaults of osborn (the clerk) and in what follows, I shall generally omit any reference to him and shall treat his acts as being those of his principal".***

The Court therefore concluded and held that "hence, the mistake of Mr. Mouko's clerk became the mistakes of Mr. Mouko …."

In the instant case, the applicant was present in Court on 11th February 2019 when the three defence witnesses were called and the matter adjourned to 18th March 2019. If indeed the advocate who was holding brief diarized the date incorrectly, the applicant himself should have informed him the correct date. I find the reasons given by the applicant and his advocate are not sufficient cause to warrant this Court to grant the orders sought.

In the case of ***Three Ways Shipping Services (Group) Ltd Vs Mitchell Cotts Freighters (K) Ltd (2005) e K.L.R***, the Court held as follows:

> ***"The question of advocate's mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R. in "The Due Process of Law" London Butterworths at page 93 said:***
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> > ***"Whenever a solicitor, by his inexcusable delay deprives a client of his cause of action, the client can claim damages against him, as for instances when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen, I regret to say, several such cases lately. Not a few are legally aided. In all of them, the solicitors have, I believe, been quick to compensate the suffering client, or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done".***

The impression created by the applicant is that the mistakes committed by his advocate should not be visited upon him. That in my view should not be the case. Mistakes should fall on the heads of his counsel who do not conduct his professional duty with professional decorum. In the result therefore, I find that no reasonable cause has been shown to warrant the exercise of the Court's discretion in favour of the applicant. ***Section 1A of the CPA*** which the applicant has invoked requires that both the applicant and his advocate are enjoined to assist this Court to further the overriding objective of the ***Civil Procedure Act*** and to pay attention to the orders and directions given during all Court sittings. In the final analysis, the Notice of Motion dated 4th April 2019 lack merit and the same is hereby dismissed. The costs of the application shall be borne by the applicant in any event.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th day of November, 2019.

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E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019

In the presence of:

1. Mr. Asiimwe holding brief for Ms Koranje for 1st and 3rd Defendants
2. Plaintiff/Advocate – absent

MR. ASIIMWE

We seek a judgment date.

COURT

Judgment on 24th January 2020. Judgment notice to issue.

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E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019