REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CIVIL SUIT NO. 265 OF 2012

HAMPTON IRERI MURAKARU……...PLAINTIFF

VERSUS

MERCY W KIRERA & 2 OTHERS……...DEFENDANTS

RULING

1. This is a ruling in respect of a Notice of Motion dated 7th December 2018 in which the 1st and 3rd Defendants seek to set aside the orders of this court made on 4th December 2018. On the 4th December 2018, the suit herein had been set down for hearing. On that day, counsel for the Plaintiff was present. Also present was counsel for the 2nd Defendant who applied for adjournment on the ground that they had not filed a defence to the Plaintiff's claim. The advocate for the 1st and 3rd Defendants were not present.

2. The application by the counsel for the 2nd Defendant was rejected on the ground that there was already a defence filed on behalf on the 2nd Defendant on 12th August 2013. The parties were then directed to file written submissions. The case was fixed for mention on 26th February 2016 to confirm compliance. Before the mention date which had been fixed, the Applicants filed the present application.

3. The Applicants contend through their lawyer that on the material day, they arrived in court late only to find that their case which was the first one on the day's list had been called out and the orders sought to be set aside had already been granted. The Applicants state that the reason why they arrived in court late is that at that time, the Nairobi City County had banned matatus from accessing the city centre and that the move had crippled the traffic flow for two consecutive days. It is on this basis that the Applicants seek the court's orders set aside so that they can have a chance to be heard.

4. The Applicants' application has been opposed by the Plaintiff/ Respondent through a replying affidavit sworn on 8th march 2019. The Respondent contends that the Applicants are not serious with the Court. The Respondent states that this case had been heard ex-parte after the Applicants failed to attend court. The Applicants later filed an application seeking to set aside the ex-parte proceedings. The application was compromised on the ground that the Applicants paid throw away costs of Kshs.10,000/=. The Respondent's counsel tried calling for the Kshs.10.000/= in vain.

5. The Respondent further argues that the 2nd Defendant had been granted time to file their documents but they have not done so and that to allow the application by the Applicants will amount to allowing them to abuse the court process for the second time. The Respondent further argues that he has incurred expenses in coming to court and that he should not be subjected to further expense.

6. The Respondent further argues that the witness who testified for him cannot be traced and that if the application was allowed, this will disadvantage him. The Respondent states that the Applicants are out to delay the conclusion of this case as they are enjoying as they are in possession. The Respondent further contends that the matatu problem had been solved as at the time the case came up for hearing.

7. I have considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the submissions by the parties herein. The only issue for determination is whether the Applicants have shown grounds for the Court to exercise its discretion. It has been long settled that whether to set aside a court's order or not is an exercise in the discretion of the court. **Harris J in Shah Vs Mbogo (1967) EA 116 at 123B** stated as follows:-

> ***"This discretion 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".***

8. In the instant case, the Applicants have explained the reason for failure to come to court. There is no contention that at that time, matatus

had been banned from accessing the city centre. This caused a traffic gridlock which affected motorists for days until the directive was shelved. This is clearly a reason which should make this court to exercise its discretion in favour of the Applicants.

9. It is true that the Applicants had been given a chance to be herd and when that chance came, it happened that there were other intervening circumstances which made them not to arrive in court in time. As was said in **Mbaki & Others Vs Macharia & Another (2005) 2 EA 206 at 210**, the right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

10. In the circumstances of this case, I find that this is a proper case where the court should exercise its discretion in favour of the Applicants. I therefore allow the Applicants' motion with the result that the orders of 4th December 2018 are hereby set aside on condition that the Applicants pay throw away costs of Kshs.15,000/=to the Respondent within 7 days of this Ruling failing which the position will revert to what it was on 4th December 2018.

It is so ordered.

Dated, Signed and delivered at Nairobi on this **19th** day of **December*, 2019***

E.O.OBAGA

JUDGE

In the presence of :-

Mr Gichohi for Mr Njugi for Applicant

Court Assistant: Hilda

E.O. OBAGA

JUDGE