



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 319 OF 2017**

**MARGARET WANGUI KANGETHE.....PLAINTIFF/RESPONDENT**

**VS**

**PAUL KANGETHE MAINA.....DEFENDANT/RESPONDENT**

**EQUITY BANK KENYA LIMITED.....INTERESTED PARTY/APPLICANT**

**RULING**

1. The Notice of Motion is brought under Article 159(2) of the Constitution of Kenya 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 12 rule 7 and Order 51 of the Civil Procedure Rules 2010. The Applicant is seeking for orders that the Honourable Court be pleased to set aside the orders dismissing the application dated the 27/2/15 and reinstate the same.
2. The application is supported by the grounds on the face of the application and the supporting affidavit of one, E Supeo Karei Advocate sworn on the 13<sup>th</sup> September 2017. The deponent has stated that when the application came up for hearing on the 21/3/17 the same was dismissed for non-attendance of the Applicant. That the failure of the Applicant to attend Court on the material date was occasioned by an inexcusable mistake on the part of the counsel. That there was a mix up at their Nairobi office as a result of which the file was not transmitted to Nyeri office for an Advocate to attend Court. That it was the Advocates inadvertent mistake which should not be visited on the Applicant. That the application has been brought without unreasonable delay and the order sought if granted will not prejudice the plaintiff and the defendant in any manner. That it is met and just that the orders sought are granted so that the Interested Part may proceed to prosecute its application for joinder as an Interested Party in this suit to enable the Court determine the real issues in dispute.
3. The Application is opposed by the Plaintiff vide a Replying affidavit sworn on the 21/11/2017. She contends that the order of dismissal should be upheld so that the suit is not subjected to more delay by the Applicants. That already the suit has suffered a delay of two years as a result. That the Applicant has not been attending Court to prosecute its application. That the application is meant to divert justice and deprive her of her right to matrimonial property which is the subject of the main suit. The Applicant has deponed to a large extent on matters not relating to the application for joinder by the Interested Party which I shall stay clear off in this instant application as it is a subject of an existing separate application. That the application is not brought in good faith. That it is misconceived and it amounts to an abuse of the process of the Court and should be dismissed.
4. The Defendant is not opposing the application.
5. When the matter came for hearing on the 27<sup>th</sup> November 2017, the Applicant and the Plaintiff

respondent agreed to rely on the affidavits as filed on record.

6. I have examined the record of the proceedings which shows that application dated the 28.2.15 was dismissed by the Honourable Court for non-attendance on the 10/11/16 and not 21/3/17 as stated by the Applicant. On 21/3/17 the matter came up for mention when the Honourable Judge made an order transferring the file from Nyeri to Muranga for hearing and determination, the subject matter of this suit being situate in Muranga and hence this Court is now seized with the territorial jurisdiction to entertain the same.

7. On the 10/11/2016 when the matter was called out for hearing both the Interested Party and the defendant were absent. The Judge noted that despite the Applicant fixing the date, it did not serve the defendant, was absent to prosecute the application and no explanation was tendered/availed to the Court for non attendance. The Court was not convinced that the Applicant exhibited seriousness in prosecuting the application which had been filed as stated above on the 3/3/2015 and hence the dismissal.

8. The Applicant has stated in the affidavit of its learned Counsel on record that on the material date the file was in Nairobi office and their staff forgot to send the said file to Nyeri office that had conduct of the matter. He termed it a slight oversight from their Nyeri who were unaware that the said matter was coming up for the hearing of the application. From the records the date for the 10/11/2016 was fixed both by one, Moses for Muriuki Ngunjiri Advocates for the 2<sup>nd</sup> defendant and another Moses for the Plaintiffs Advocates. The plaintiff's lawyers were to serve the Defendant with the hearing notice. The parties to this suit are as stated above. I fail to understand who the 2<sup>nd</sup> defendant is. It is assumed it relates to the Interested Party. If that assumption is correct then it is true that the Applicant was well aware of the date fixed for 10/11/2016. It would appear that the contention that they were unaware of the hearing date is not necessarily true.

9. The Plaintiff Respondent has pointed out to this Court the delay taken to bring this application and generally to attend Court. She raised the fact that the delay is going into 2 years. From the record the application dated the 28.2.15 had been pending for 1 year and nine months. The Applicant has beseeched the Court to set aside the order for dismissal issued on the 10/11/2016 under the discretionary powers of the Court provided under Order 10 rule 11 of the Civil Procedure Rules which empowers the Court to set aside any orders upon such terms as it thinks just.

10. Order 12 rule 7 states as follows; -

“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 or order upon such terms as may be just”.

Rule 7 above then allows the aggrieved party to apply for the setting aside of that order and reinstatement of the suit. What the court needs to determine is whether the failure to attend court by the Plaintiffs on 10/11/2016 constitutes an excusable mistake or error or it was meant to deliberately delay the cause of justice. This court in making this determination is guided by the decision in **Shah v. Mbogo [1967] EA 116**, where the Court of Appeal held that;

“Applying the principles that the court's 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 not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

11. I have considered the grounds of opposition proffered by the Plaintiff Respondent and I am persuaded that they are not sufficient to decline to grant the application. I have also considered the explanation of the Applicant, the apology tendered and am persuaded that the non-attendance of Court on the material day was an inexcusable mistake. There is no evidence that the action by the Applicant was deliberate to obstruct or delay the cause of justice.

In the Court of Appeal case of **Philip Chemwolo & Another vs. Augustine Kubede (1982-1988) KAR**

**1036** Apaloo, J A. stated that,

“Blunder 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.”

12. It has not been demonstrated to this Court how if any the Plaintiff would suffer any serious prejudice or miscarriage of justice if the interested Applicant’s application is allowed. I am of the opinion that the prejudice and loss likely to be suffered by the Plaintiff herein arising from the granting of the orders sought can be adequately compensated for by costs.

13. In the end I find and hold that the application is merited. The Interested Party to pay the costs of this suit to the Plaintiff Respondent.

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 25TH DAY OF JANUARY, 2018**

**J.G. KEMEI**

**JUDGE**