**REPUBLIC OF KENYA**

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

**LAND CASE NO. 143 OF 2016**

**NELLY AYANAE……..... PLAINTIFF**

**VERSUS**

**MARKLEVIS EKUTAN…….…….. 1ST DEFENDANT**

**JENNIFER NANGOK ..... 2ND DEFENDANT**

**R U L I N G**

**1.** The application dated 24/11/2017 seeks that the orders made by this court on 3/4/2017 dismissing the application dated 19/5/2016 for non-attendance, and all other consequential orders be set aside and that the application dated 19/5/2016 be reinstated for hearing.

**2.** The applicant's grounds are that counsel then appearing for the applicant had confirmed to the applicant that he would attend the hearing and the applicant had facilitated his travel to Kitale for the purpose. The applicant avers that the counsel never informed her that he never attended or that the application was dismissed, and she only learnt of such dismissal upon perusal of the court file in October, 2017 after counsel failed to update her on the matter on request.

**3.** The plea, as I understand is, is that it was not by any mistake on her part, but on her Advocate's part that the application was dismissed for default of appearance. Copies of receipts showing that some payments may have been made to her former advocate are exhibited in the applicant's supporting affidavit dated 24/11/2017.

**4.** Grounds of opposition were filed by the defendant who opposes the application principally on major grounds as follows: that it is the 2nd defendant who has resided on the land since the year 1966 and the 1st defendant does not hence the application has no merit, that there has been in ordinate delay in bringing the application, that no sufficient reasons for failure to attend court on the part of the applicant have been given, and that the applicant has not proved that she is the registered owner of the suit land. The grounds state that the applicant would not be prejudiced if the orders are not granted. These grounds are further set out at length in the 1st defendant's replying affidavit dated 22/1/2018.

**5.** However, I find that the grounds go into the merits of the application intended to be reinstated rather than the instant application. The only issue the court must deal with at the moment is the question as to whether sufficient reasons have been laid before this court to warrant setting aside of the dismissal orders of 3/4/2017. It is quite unnecessary at the moment to try an application within another application. The instant application must be considered first if the dictates of justice and fairness are to be seen as having been observed in this matter. I therefore disregard any grounds challenging the merits of the dismissed application and I focus on the instant plea.

**6.** The counsel for the applicant failed to attend court. That is not in doubt. He had filed a plaint, documents as required by the Rules and the notice of motion now dismissed. There is evidence that some fee had been paid to him by the plaintiff. It is a possibility that the counsel had confirmed that he would attend court as stated by the plaintiff. It is trite that usually in the prosecution of application of the kind that was dismissed the court does not normally need the parties to be present unless for a good reason, and no requirement had been made that the parties attend the hearing on 3/4/2017.

**7.** This left the task of attending court to the counsel for the parties. The two counsel on opposing sides did not appear, with the effect that the applicant suffered greater detriment than the respondent suffered by that default. The plaintiff/applicant may be thus excused for having not attended the hearing on 3/4/2017. But can the consequences of the non-attendance by her counsel be avoided by the plea that it was the mistake of the counsel and not hers that occasioned the default?

**8.** From time to time counsel have committed themselves to their clients, promising to offer services which they failed to deliver leading to situations such as the plaintiff finds herself in. The courts have on various occasions treated the victims of those circumstances with some sympathy thus granting the party so affected, a second chance to put forth his or her case.

**9.** In the case of ***Mweteri M'Igweta*** the court stated as follows:-

> **"True Mr. M'Inoti has pointed out that so far the applicant has committed a "litany of blunders". For that reason he submitted I ought not exercise my discretion in favour of the applicant. He further urged that enough is enough and the applicant must bear the burden of his advocates' many blunders. Here I must bear in mind the fact that the applicant is not the architect of the "litany of blunders'. Do I punish him by dismissing the application?..."**

The court in that case further observed as follows:

> **"If I were to dismiss this application there would be one bona fide litigant who will blame the system for relying on procedural technicalities to deny him justice in our courts. Whilst I do not condone errors on the part of counsel, I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearings of appeals take. He has no other forum to go to if he is shut out here".**

**10.** In the case of ***Belinda Murai & Others -vs- Amos Wainaina 1978 KLR 278***, the court stated as follows:-

> **"A mistake is a mistake. It is not less a mistake because it is an unfortunate slip. It is not less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might fell compassionate more readily. A blunder on a point of law can be a mistake. The foot of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate".**

**11.** I also quote from the case of ***Philip Chewolowo & Another -vs- Augustine Kubedde [1982-1988] KAR 103*** at ***1040*** cited by the applicant herein where the court stated as follows:-

> **"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 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.** I find that to condemn the plaintiff for the sins of her advocate in this matter would be unfair. The issue of delay may also be excused. It is the plaintiff's statement that her counsel failed to update her on

the suit, including on the dismissal of her application and this fact by itself, if taken to be true, may be the reason for the delay in filing the application.

**13.** Consequently, I hereby exercise my discretion and grant the application dated **24/11/2017** in terms of **Prayers No**.**1** and **2** of that application. The costs of the said application shall be in the cause.

**Dated, signed and delivered at Kitale on this 27th day of February, 2018.**

**MWANGI NJOROGE**

**JUDGE**

**27/2/2018**

Before - Mwangi Njoroge, Judge

Court Assistant - Collins/Picoty

Mr. Assa for the plaintiff/applicant

Mr. Teti for defendant/respondent

**COURT**

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGE**

**JUDGE**

**27/2/2018**