REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

CONSTITUTIONAL PETITION NO.849 OF 2017

IN THE MATTER OF : ARTICLES 3,10,20,22,162, 40(3) AND 47(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 13 RULES(1)&(2) OF THE ENVIRONMENT & LAND COURT ACT

NO.1934/2011

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE LAND ACQUISITION ACT (CAP 295)

BETWEEN

SPRINGDEW PROPERTIES LIMITED.....PETITIONER/APPLICANT

-VERSUS-

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

RULING

The Petition/Applicant filed its ***Petition*** dated ***29th November 2017***, and sought for various orders against the Respondents herein. Among the prayers sought are;-

> ***i) A declaration that your Humble Petitioner's rights as enshrined under Articles 40(3) and 47(1) of the Constitution of Kenya 2010, have been violated and infringed by the Respondents, jointly and severally in the manner pleaded herein above.***
>
> ***ii) An injunction directed at the Respondents, either by themselves, their servants, agents and/or person acting under their direction from carrying on any construction works, howsoever, on the suit property until the Petitioner herein is fully compensated as by law provided.***
>
> ***iii) Costs of the Petition be borne by the Respondents.***

Simultaneously, the Petitioner/Applicant filed a ***Notice of Motion*** application even dated and sought for injunctive orders against the Respondent herein to restrain them from interfering whatsoever with the suit property ***LR.No.12861/253***, pending the hearing and determination of the Petition.

The said ***Notice of Motion*** application was contested by the 2nd Respondent who filed a ***Replying Affidavit*** sworn by ***Daniel K. Mbuteti***, a

Surveyor working for the said 2nd Respondent.

The 1st Respondent entered appearance through one ***Masinde Cecilia Advocate,*** but it was yet to file a response to the said ***Notice Motion*** dated ***29th November 2017***. Directions were taken on ***18th December 2017***, wherein the Respondents were granted ***leave*** of ***14 days*** to file their Replying Affidavit with correspondence leave to the Applicant to file a further affidavit if there was need for that.

The ***Notice of Motion*** was slotted for hearing on ***7th February 2018***. However on ***7th February 2018***, the Respondents' Advocates were present but the Applicant and its Advocates were absent with no explanation. Given that the hearing date was taken in the presence of the Applicant's Advocate and he was absent together with his client on ***7th February 2018***, the said application was dismissed for want of prosecution with costs to the 2nd Respondent who had filed its ***Replying Affidavit.***

Soon thereafter, the Petitioner filed the instant ***Notice of Motion*** application dated ***9th February 2018***, and sought for the following orders:-

> ***1) That the orders issued on 7th February 2018 dismissing the Petitioner/Applicant's application dated 29th November 2017 be set aside and the said application reinstated for inter-parties hearing.***
>
> ***2) That the costs of this application do abide the outcome of the Petition.***

The application is premised on the following grounds:-

> ***a) The Petitioner/Applicant's Counsel inadvertently mis-diarized the next hearing date after the court attendance on 18th December 2017 and indicated 8th February 2018, instead of 7th February 2018.***
>
> ***b) That the mis-diarization only came to the Petitioner/Applicant's Counsel's knowledge on the morning of 8th February 2018 when he turned up in court only to find that the matter was not listed but on further enquiry, was advised by the court's registry that the matter was listed on 7th February 2018.***
>
> ***c) The failure to attend court on 7th February 2018, was therefore not deliberate but purely inadvertent and as a result of a mistake by Counsel, which mistake is not only excusable but ought not be visited on the innocent litigant.***
>
> ***d) The interests of justice and the very Constitution that the subject matter is hinged on dictate substantive justice as opposed to technicalities.***
>
> ***e) Unlike the Petitioner/Applicant, no other party is bound to suffer any prejudice that cannot otherwise be compensated by costs.***

The application is also supported by the ***affidavit*** of ***Jeremy Njenga***, ***Advocate*** who is in conduct of the matter. He reiterated the grounds in support of the application and stated that on ***18th December 2017***, he mis-diarized the hearing date given in court as ***8th February 2018*** instead of ***7th February 2018,*** and thus the reasons for his absence in court on ***7th February 2018***. He attached a ***copy of the diary*** as ***'J1'***. He further averred that failure to attend court on ***7th February 2018,*** was not deliberate but was a result of inadvertent mis-diarization by himself. He urged the Court not to visit the mistake of the Counsel on the innocent Petitioner. He urged the Court to exercise its discretionary power and grant the orders sought.

The ***application is opposed*** by the 2nd Respondent who filed ***Grounds of Opposition*** and urged the Court to strike out and/or dismiss the instant application with costs. These grounds are:-

> ***1) The Notice of Motion application dated 9th February 2018, as filed herein is frivolous, misconceived, vexatious and a flagrant abuse of the due process of this Honourable Court and that no valid reason has been advanced by the Petitioner as to why the Notice of Motion application dated 29th November 2017, should be reinstated.***
>
> ***2) It is trite that a case belongs to a litigant and not to their advocates and the failure by the Petitioner to attend court on the 7th January 2018, when the application was fixed for hearing does not constitute a valid reason for reinstatement of the application.***
>
> ***3) The Petitioner had a duty at all material times to pursue the prosecution of its case and had the Petitioner been diligent, the Notice of Motion application dated 29th November 2017, would not have been dismissed.***
>
> ***4) In the circumstances, the Honourable Court ought to safeguard its integrity by dismissing the Notice of Motion application dated 9th February 2018, with costs awarded to the 2nd Respondent.***

The application was canvassed by way of ***written submissions*** which this Court has carefully read and considered.

The Applicant relied on two decided cases. It specifically relied on the case of ***Philip Chemowolo & Another….Vs…Augustine Kubede (1982-1988) KAR 103***, where the Court 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 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 payments of costs. The court as is often said exist for the purpose of deciding the rights of the parties and not the purpose of imposing discipline".***

On its part, the 2nd Respondent relied on the case of ***Edney Adaka Ismail…Vs…Equity Bank Ltd (2014) eKLR***, where the Court held:-

> ***"…….. it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. In the present case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She has been indolent and taking into account her past conduct in the prosecution of the application to set aside the default Judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant".***

The Court has now carefully considered the instant ***Notice of Motion*** and the annextures thereto. The Court has also considered the court records and pleadings in general, together with the written submissions and the cited authorities and the Court renders itself as follows;-

Indeed, the Petitioner/Applicant filed the suit on ***30th November 2017***, wherein the ***Notice of Motion*** dated ***29th November 2017*** was given a hearing date for ***18th December 2017***. On this particular date, the Applicant's Advocate was present when directions were taken and hearing date was set for ***7th February 2018.*** However, on ***7th February 2018***, the Applicant and its Advocate were absent with no explanation. However, the Court did observe that date had been taken in the presence of the Applicant's Advocate and since he was absent together with the client, the said ***Notice of Motion*** dated ***29th November 2017*** was dismissed as provided by ***Order 12 Rule 3*** of the ***Civil Procedure Rules***.

The Applicant's Advocate has averred that failure to attend court was not deliberate but that he mis-diarized the same. He even attached a copy of his diary to confirm the mis-diarizing.

Order 12 Rule 7 of the ***Civil Procedure Rules*** provides that:-

> ***"Where under this order Judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the Judgement or Order upon such terms as may be just".***

From the above provisions of law, it is evident that the court has discretion to ***set aside*** an order of dismissal for non-attendance upon such terms. However, the said discretion must be exercised judicially. See the case of ***Sametract…Vs…Mags Motors Ltd, Kisumu HCCC No.45 of 1996***, where the Court held that:-

> ***"It is trite law that the court is vested with unfettered discretion in dealing with application for setting aside Judgement. It is also a well-known rule that the discretion must be exercised judicially".***

Further, in the case of ***CMC Holdings Ltd…Vs…Nzioki (2004) (CAK) 1 KLR 173***, the Court of Appeal held that:-

> ***"In an application for setting aside exparte Judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously".***

Therefore in deciding whether to grant or not to grant the orders sought, the Court will be guided by the following principles:-

> ***1) Whether sufficient reasons have been given for failure to attend.***
>
> ***2) Whether there was any inordinate delay in filing the instant application.***
>
> ***3) Whether there will be any prejudice occasioned to any party which cannot be compensated by an award of costs.***

On the first ground; The Applicant's Advocate has alleged that he is the one who ***mis-diarized his diary*** and thus failed to attend court on ***7th February 2018*** but he instead attended on ***8th February 2018***. The Court has seen a copy of the said diary and has no reasons to doubt the said explanation. Indeed the Applicant's Advocate has alleged that he attended court on ***8th February 2018*** and that is when he realized that the ***Notice of Motion*** dated ***29th November 2017*** had been dismissed on ***7th February 2018,*** when he failed to turn up in court. The explanation given by the Applicant's Advocate is sufficient and this Court will accept the same. In the case of ***Stallion Insurance Co. Ltd… Vs…Rosemary Olao, Civil Appeal No.85 of 1998***, the Court of Appeal held that:-

> ***"Mistake or misunderstanding of the Appellant's legal adviser even though negligent may be accepted as proper ground for granting relief".***

Equally in this matter, the mistake of the Applicant's Advocate in ***mis-diarizing his diary is a proper ground*** for granting the Applicant the relief sought.

On second ground of whether there was ***inordinate delay***, ***the Court finds that there is none***. The application was dismissed on ***7th February 2018,*** and the instant application was filed on ***9th February 2018***. That was within the shortest time and ***there was not inordinate delay at all***.

On whether there will be ***prejudice*** suffered which cannot be compensated by an award of damages, the Court finds that the 2nd Respondent ***will not suffer any prejudice***. However, ***the Applicant*** who had harboured expectations of securing conservatory orders ***will suffer prejudice*** as it will have to await the hearing of the main suit to know its fate. See the case of ***Credit Bank Ltd…Vs…Barclays Bank of Kenya Ltd, Civil Appeal No.178 of 1998***, where the Court of Appeal held that:-

> ***"In setting aside, prejudice is an important element as the overriding principle is that of justice".***

Having found that failure to set aside the orders issued on ***7th February 2018,*** will be more prejudicial to the Petitioner/Applicant than the 2nd Respondent, the Court finds that the ***Applicant has advanced sufficient reasons*** to warrant this Court exercise its discretion in its favour. For the above reasons, ***the Court allows the Petitioner/Applicant's Notice of Motion dated 9th February 2018 entirely with costs being in the cause***.

Consequently, the ***Notice of Motion*** application dated ***29th November 2017*** is ***hereby reinstated and will now be set down for interparties hearing.***

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this **9th** day of ***April*** **2018**.

L. GACHERU

JUDGE

In the presence of

M/S Wachanga holding brief for Mr. Njenga for Petitioner/Applicant

No appearance for 1st Respondent

Mr. Karuga holding brief for Mr. Ochieng for 2nd Respondent

Esther - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

9/4/2018