



**REPUBLIC OF KENYA**

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

**ELC NO. 203 OF 2017**

**PETER MAINA KIMANI.....PLAINTIFF**

**ELIJAH MWANGI KIMANI.....PLAINTIFF**

**VS**

**SAFARICOM LIMITED.....DEFENDANT**

**RULING**

1. This ruling refers to the Notice of Motion dated 12.4.18 filed by the Plaintiff/Applicant under section 1A, 1B and 3B Civil Procedure Act and Order 12, Rule 7 of the Civil Procedure Rules against the Respondent seeking the following orders:-

- a) The Honourable Court be pleased to set aside the dismissal orders issued on the 9/4/18 and reinstate this matter for hearing.
- b) The costs herein be in the cause.

2. The Application is brought on the grounds that:

- a) When the matter came up for pretrial directions on 9/4/18 Counsel for the plaintiffs had briefly stepped out to handle a plea before the Chief Magistrate Court in Muranga.
- b) That counsel had left instructions to a colleague who did not respond when the matter was called out.
- c) That there was a confusion with the dates in the Court file and office file with the former indicating 9/4/18 and the latter 7/4/18 respectively.
- d) That the Plaintiffs are keen on prosecuting the case and the inconvenience caused is highly regretted.

3. The Learned Counsel Mr. Mwangi Ben deponed in the affidavit in support of the application and reiterated the grounds on the face of the application and attached a copy of the pre-trial notice served on the Defendant dated 15.3.18 to show that indeed there was confusion with the dates and apologized for the error and inconvenience.

4. The application was duly served on the Respondent on 30.4.18 and a return of service filed in that regard. The application is unopposed as no documents were filed by the Respondent in reply.

5. The power vested in the trial Court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 rule 7 of the Civil Procedure Rules. It is a discretionary power that is exercised by the Court.

6. Counsel for the applicant has attributed his failure to attend Court to an inadvertent mistake in diarizing for the matter and that on the material day he left instructions to a colleague who did not respond when the matter came up for hearing. He has apologized for the error and inconvenience.

7. In the case of **Belinda Murai & Others – Vs – Amos Wainaina [1978] KLR 278** as per **Madan JA** (as he then), cited with approval the Court of appeal decision in the **Richard Ncharpi Leiyagu – Vs – IEBC and 2 Others, Nyeri CA 18/2013** the Court described what constitutes a mistake in the following terms:

*“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the Court might feel compassionate more readily. A blunder on a point of law*

*can be a mistake. The door 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.”*

8. Similarly the Court of Appeal in the case of **Phillip Chemwolo & Another – Vs – Augustine Kubede [1982-88] KAR 103 AT 1040, Apaloo J** (as he then was) cited with approval the case of **Richard Ncharpi Leiyagu** (supra), the Learned Judge of Appeal posited 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.”*

9. I have considered the oral submissions by the Learned Counsel for the Plaintiff and in particular that there was no inordinate delay in filing the present application. I am satisfied that the failure to attend Court on the 9.4.18 by counsel and confusion with the dates was inadvertent and was not intended to delay or obstruct the course of justice.

10. The application is allowed and the Applicant is directed to take steps to set down the matter for hearing within the next 45 days from the date hereof.

11. The Applicant is condemned to pay costs for the application.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>ST</sup> DAY OF MAY 2018**

**J.G. KEMEI**

**JUDGE**