



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 18 OF 2014**

**KENYA AFRICAN NATIONAL TRADERS & FARMERS UNION (KANTAFU).....PLAINTIFF**

**VERSUS**

**1. KOMAROCK RANCHING & FARMING CO-OPERATIVE LTD.....1<sup>ST</sup> DEFENDANT**

**2. OPTIVEN LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before me is the Application by the Plaintiff dated 18<sup>th</sup> April, 2018 in which the Plaintiff is seeking for the following orders;-

***a. That the order made on 17<sup>th</sup> April, 2018 dismissing the Plaintiff's suit for want of prosecution be set aside and the suit be reinstated for hearing on merit.***

***b. That the ex proceedings for 17<sup>th</sup> April, 2018 touching on the Defendants' Counter-claim be set aside and the matter do commence afresh.***

***c. That the cost of this application be cost in the cause.***

2. The Application is premised on the grounds that the Plaintiff's suit was dismissed on account of an honest mistake on the part of his advocate; that the Plaintiff's counsel had diarized the hearing for 17<sup>th</sup> May, 2018 and notified the Plaintiff as much and that no prejudice will be occasioned to the Defendants if the Application is allowed.

3. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that this suit was dismissed on 17<sup>th</sup> April, 2018 for want of prosecution that he received a letter from his advocate notifying him that the suit had been slated for hearing on 17<sup>th</sup> May, 2018 and that his advocate informed him that he had diarized the 17<sup>th</sup> May, 2018 for hearing of this suit and not 17<sup>th</sup> April, 2018 when the matter came up for hearing. The said director deponed that their advocate made a lamest mistake which is excusable and that the Plaintiff has immense interest in the suit.

4. The Plaintiff's director finally deponed that the court should not visit the counsel's mistake on an innocent litigant who genuinely and honestly behaved that the suit had been scheduled for hearing on 17<sup>th</sup> May, 2018 and not 17<sup>th</sup> April, 2018.

5. In response, the 1<sup>st</sup> Defendant's Chairman deponed that the 1<sup>st</sup> Defendant is the one who has been prompting the fixing of this matter for hearing; that has adjourned this matter on numerous occasions for failure by the Plaintiff to comply with Order 11 of the Civil Procedure Rules and than the hearing date of 17<sup>th</sup> April, 2018 was fixed in the presence of the Plaintiff's directors.

6. The 1<sup>st</sup> Defendant's director finally deponed that there is no proof to show that the advocate had not diarized the matter for hearing on 17<sup>th</sup> April, 2018 and that if the application is allowed, they will suffer prejudice because the Plaintiff is enjoying interim orders of injunction.

7. The 2<sup>nd</sup> Defendant's director deponed that the Application by the Plaintiff is another ploy by the Plaintiff to stall the disposal of this suit; that he was present when the suit was fixed for hearing for 17<sup>th</sup> April, 2018 by consent and that the Plaintiff's directors were in court when the hearing date of 17<sup>th</sup> April, 2018 was taken.

8. The said director finally deponed that the Plaintiff's inclination has always been to delay the hearing and disposal of this suit and that the Application should be dismissed.

9. The advocate for the parties appeared before me and made oral submissions. In the submissions all the advocates repeated the averments contained in their respective client's Affidavits, which I have summarized above. I have considered the oral submissions and the list of authorities which were filed by the Plaintiff's advocate on 19<sup>th</sup> April, 2018.

10. The record shows that this matter came up for mention on 31<sup>st</sup> January, 2018, all the advocates were in court. On that day, the matter was fixed for hearing on 17<sup>th</sup> April, 2018. When the matter came up for hearing on 17<sup>th</sup> April, 2018, neither the Plaintiff nor the advocate was in court. The court dismissed the suit for non-attendance and the counter-claim proceeded for hearing. The Plaintiff's Counsel has deponed that instead of diarizing the hearing on 17<sup>th</sup> April, 2018 appropriately, he indicated in his diary that this matter was to be heard on 17<sup>th</sup> May, 2018. He has exhibited the page of his diary for 17<sup>th</sup> May, 2018. The Plaintiff's director has further confirmed that they received from their advocate a letter informing them that the matter is to be heard on 17<sup>th</sup> May, 2018. That the letter was annexed on the Supporting Affidavit.

11. The evidence before shows that indeed the Plaintiff's advocate informed his client that the matter was secluded for hearing on 17<sup>th</sup> May, 2018 and not 17<sup>th</sup> April, 2018 and not 17<sup>th</sup> April, 2018. Indeed, whom the Plaintiff learnt that the matter had proceeded for hearing on 17<sup>th</sup> April, 2018, he promptly filed the current Application.

12. As was held by the Court of Appeal in the case of Belinde Murai & Others Vs Amos Wainaina(1978) LLR 2782, the door of justice is not closed because a mistake has been made by a lawyer. The court stated as follows:-

***“A mistake is a mistake. It is no less a mistake because it is unfortunate slip”***

13. In the case of Phillip Chemowolo & Another Vs Augustine Kubado(1982-88) KAR 103, Apollo J.A held as follows:

***“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.”***

14. On the basis of the evidence placed before me, I am satisfied that the Plaintiff's counsel inadvertently misdiarized the hearing date of 17<sup>th</sup> April, 2018. Indeed, there is no evidence before me to show that in committing the said mistake, the Plaintiff's Counsel overreached himself or intentionally committed the mistake with a view of delaying the matter or obstructing justice. The inconvenience caused to the Defendants who attended court and testified can be compensated by way of damages.

15. In the circumstances, I allow the Plaintiff's Application dated 18<sup>th</sup> April, 2018 as follows:-

***a. The order made of 17<sup>th</sup> April, 2018 dismissing the Plaintiff's suit for want of prosecution be and is hereby set aside. The Plaintiff's suit is hereby reinstated for hearing on merit.***

***b. The ex-parte proceedings of 17<sup>th</sup> April, 2018 be and are hereby set aside and the matter to commence de novo.***

***c. The costs of attendant to the hearing of the suit on 17<sup>th</sup> April, 2018 to be paid by the Plaintiff.***

***d. The costs of this Application to be in the cause.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21<sup>st</sup> DAY OF MAY, 2018.**

**O.A. ANGOTE**

**JUDGE**