



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 276 OF 2018

FRANCIS WAWERU MBOCHI.....PLAINTIFF/APPLICANT

VERSUS

GEORGE MURIAINI MUHORO.....1st DEFENDANT/RESPONDENT

FRANCIS JOHN NJUNG'E MATHERI.....2nd DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 8th January 2018 brought under *Order 12 Rule 2 and 7*, wherein the Applicant has prayed for orders that the orders made on the 5th December 2017 dismissing the Plaintiff/Applicant's suit be set aside and he be allowed to file a replying Affidavit and/or grounds of opposition to the Defendant/Applicant's application dismissing his suit(sic)
2. The Plaintiff/Applicant further prayed for the reinstatement of the suit so that it could be heard on merit.
3. The Application was premised on the grounds on the face of it as well as on the supporting affidavit sworn on the 8th January 2018 by Francis Waweru Mbochi the Plaintiff/Applicant.
4. This suit was instituted in the High Court of Nakuru vide a Plaint dated the 30th September 2016 and filed in court on the 4th October 2016.
5. That subsequent to the filing of the plaint herein, the Defendants filed a notice of Motion dated the 22nd November 2016 wherein they sought to have the Plaintiff's suit struck out on the grounds amongst others that it was not in conformity with Order 2 Rule 16 of the Civil Procedure Rules, was not accompanied by a demand letter, contrary to Order 3 Rule 2 (d) of the Civil Procedure Rules, and further that it was time barred by virtue of Section 4 of the Limitation of Acts.
6. Subsequently the said matter was transferred to this Court on the 24th January 2017 and notices issued to the respective counsel.
7. On the 4th May 2017 when the matter came before me for mention for directions, neither of the parties were present.
8. The matter was stood over generally wherein on the 18th July 2017 parties took dates in the registry to have the same set down for mention on the 4th October 2017. On the date in question, Counsel for the Defendant/Applicant was the only one present who then informed the court that despite service they had received no response from the Plaintiff/Respondent on their application dated the 22nd November 2016. They thus sought for a hearing date thereto.
9. A look at the affidavit of service filed on the 27th September 2017, the court was satisfied that indeed the Plaintiff/Respondent's counsel had been served and had received the notice and documents by affixing his stamp thereon. The court then proceeded to fix the matter, for hearing of the Defendant's application, for the 5th December 2017.
10. Come the 5th December 2017, there was neither the Plaintiff/ Respondent nor his counsel present in court despite service and receipt thereafter.
11. Again the court having been satisfied that notice was served and there having been no response from the Plaintiff/ Respondent, the court confirmed that the Defendant/Applicant's application dated the 22nd November was unopposed and went ahead to allow the same in entirety thereby striking out the plaintiff's suit.

12. The striking out of the Plaintiff's Suit has now given rise to the present application wherein he seeks for the same to be reinstated.
13. By Consent parties agreed that the Plaintiff's application dated the 8th January 2018 be disposed of by way of written submissions.
14. The Plaintiff/Applicant's submission while relying on his Notice of motion and affidavit thereto as well as the annexures is to the effect that he was initially represented by the firm of M/S Njiru Bonface and Company Advocates.
15. That on the 29th November 2017 he had filed his notice to act in person and had subsequently served the same upon the Defendants on the same date to the effect that when the defendants were serving his previous Counsel with the hearing notices of this matter they had knowledge that he had no counsel yet they proceeded to effect service upon his former Advocates.
16. That on the 4th December 2017, when he was informed by his former counsel that he was due to appear in court on the 5th December 2017, the notice was too short, secondly, that was the same day he was scheduled to attend Naivasha Town Clinic where he is undergoing treatment for a battalion of illnesses normally are associated with old age he being a man aged about 76 years old and who suffers from diabetes, prostate cancer, hypertension amongst others.
17. The Plaintiff submitted that the suit herein concerns the recovery of land parcel No. Nyandarua/Ol Aragwai/1691 and 1692 from the defendants. Land, had been obtained by the 1st Defendant herein who had been the plaintiff's counsel and who had irregularly transferred the land to himself after the Plaintiff had given him the title deed for safe keeping.
18. That the failure to attend court on the previous occasions was due to his former counsel's negligence. That he had a triable case and if the same was not heard, he stood to lose land measuring approximately 20 acres valued at approximately Ksh. 50 million shillings.
19. To buttress his submissions, the Plaintiff relied on the case of **CMC Holdings Limited vs. James Mumo Nzioki, Civil Appeal No. 329 of 2001 Nairobi court of Appeal** where the court had set down principles to be applied when exercising discretion to set aside an ex-parte judgment/order.
20. The Plaintiff relied on the treatment chits as well as the notice to act in person as his evidence.
21. The Application was opposed by the Defendant/Respondents who filed their grounds of opposition on the 8th March 2018 to the effect that the Plaintiff sought leave to argue an application that was unopposed which application did not address the merits of the their application. That the Plaintiff's application was further an abuse of the court process, was misconceived, mischievous and defective thereby lacking merit.
22. The Defendant gave a chronology of the of the events that led to the present situation and added that pursuant filing of their Application dated the 22nd November 2016, notices had been served upon the Plaintiff's counsel on the 24th July 2017 and on 10th October 2017 wherein on the 1st December 2017 4 days to the hearing of their application, the Plaintiff had served them with a notice to act in person.
23. That from the chronology of events the Plaintiff had sufficient time to file a response to their application but elected not to. That all though the defendants have been keen in prosecuting the matter but not the plaintiff.
24. That the breakdown between the Plaintiff and his Counsel were matters that did not concern them.
25. That although the court had wide discretion to set aside or vary orders that were issued ex-parte on such terms as it deemed just, yet the Plaintiff's suit was not dismissed for non-attendance but by the failure to respond to their application to have the suit struck out. That the suit in itself was dead on arrival as it was drawn in contravention of the provisions of order 2 Rule 16 of the Civil Procedure Rules.
26. Indeed the plaintiff's suit was dismissed when he failed to respond to and/ or prosecute the defendant's application dated the 22nd November 2016 which sought to have the said suit struck out for grounds amongst others that it was not in conformity with Order 2 Rule 16 of the Civil Procedure Rules, was not accompanied by a demand letter, contrary to Order 3 Rule 2 (d) of the Civil Procedure Rules, and further that it was time barred by virtue of Section 4 of the Limitation of Acts.
27. I have considered the application and supporting affidavits herewith as well as the grounds of opposition and the submission by both counsel thereto.
28. The issue for determination by this court is:
 - i. Whether the Plaintiff has established a case to enable this court set aside the orders issued on the 5th December 2017 dismissing his suit.
 - ii. Whether the Plaintiff should be allowed to file a replying Affidavit and/or grounds of opposition to the Defendant's application dated the 22nd November 2016.
29. At this point I need not look at the merits of the application dated the 22nd November 2016 but rather to consider whether the Plaintiff has satisfied the court that the suit herein should be reinstated to allow him file a replying Affidavit and/or grounds of opposition to the said application filed by the Defendant that sought for the dismissal of his suit.

30. I have carefully perused and considered the pleadings, and the written submissions filed. It is not in dispute that this matter was instituted in the High court of Nakuru vide a Plaint dated the 30th September 2016 which was filed in court on the 4th October 2016. It is also not in dispute that subsequent to the filing of the plaint, the Defendants filed a notice of Motion dated the 22nd November 2016 wherein they sought to have the Plaintiff's suit struck out. Further it is not in dispute that despite service, the Plaintiff herein neither filed a response to the said application nor appeared in court to prosecute it with the consequence that it was allowed and the Plaintiff's suit struck out.

31. A court's discretion to set aside an ex parte judgment or order, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

32. I have considered the reasons presented before me by the Plaintiff's counsel regarding the failure of his previous counsel to attend court and prosecute the Defendant's Application dated the 22nd November 2016 on the 5th December 2017. I have also considered the affidavits filed in support of the application and considered whether the failure to attend court on 5th December 2017 by both the Plaintiff and his counsel constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the application for setting aside orders made on the 5th December 2017, 1 month after the said order was made, constituted inordinate delay.

33. In the case of **Belinda Murai & Others – Vs – Amos Wainaina [1978] KLR 278** per **Madan JA** (as he then), cited with approval in the case of **Richard Ncharpi Leiyagu – Vs – IEBC and 2 Others, Nyeri CA 18 of 2013**, where he 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.”

34. His Lordship went further to state that:

“It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule...”

35. In the case of **Phillip Chemwolo & Another – Vs – Augustine Kubede [1982-88] KAR 103 AT 1040, Apaloo J** (as he then was) and cited with approval in the **Nyeri CA 18 of 2013** (supra), 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.”

36. In this case, the plaintiff acted with alacrity upon discovery of the mistake and sought to correct the mistake by filing the application with speed thereby securing a hearing date under certificate of urgency.

37. The overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases.

38. Accordingly, I allow the Plaintiff's application herein, set aside the ruling and order made on the 5th December 2017.

i. The Plaintiff/Applicant shall file and serve a replying Affidavit and/or grounds of opposition to the Defendant's application dated the 22nd November 2016 within the next 14 days upon the delivery of this ruling.

ii. That cost of this application abide by the outcome of the suit.

Dated and delivered at Nyahururu this 19th day of June 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE