REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 57 OF 2018

FRANCIS NJUGUNA.....PLAINTIFF

VERSUS

THE SECRETARY, ANGLICAN CHURCH, ELDORET.....1ST DEFENDANT

THE ANGLICAN CHURCH OF KENYA DIOCESE OF ELDORET.....2ND DEFENDANT

RULING

The application is dated 2.10.2018 wherein the applicant prays for orders that the honourable court do set aside and/or review and/or discharge the proceedings dated 26.9.2018 in relation to the preliminary objection dated 20.3.2018 and/or reopen the preliminary objection for purposes of hearing and determination. That the Honourable court allows the applicant to file its responses. That costs be awarded to the applicant.

The application is based on grounds that the applicant was not involved/heard on the 26.9.2018 when the matter came up for the hearing of the preliminary objection by the defendants and that the applicant did not adduce his response/evidence during the hearing of the preliminary objection hence there is need to arrest the ruling scheduled for delivery on 5th October, 2018, 2018 and/or stay of proceedings in the instant suit.

It is claimed that when the preliminary objection came up for hearing on the 26.9.2018, the applicant's counsel was engaged before the High Court attending to another matter. That it is a principle of law that the misgivings of an advocate should not be visited upon the client. The applicant's counsel absence in court during the hearing was not intentional/inadvertent but due to the several matters before different courts and therefore it is just and fair and in the interest of justice that the instant application be allowed. That the applicant stands to suffer prejudice against the right to fair hearing. That this application has been brought timeously and in good faith.

In the supporting affidavit, the plaintiff states that on the 26.9.2018, he was made aware by his advocates on record that the defendants' preliminary objection was coming up for hearing and he arrived in court to witness the proceedings however, the preliminary objection proceeded exparte without his input and/or response hence there is need to review and/or vary and/or discharge the proceedings and subsequent orders thereto of the 26th day of September, 2018 and/or any subsequent orders granted thereto. That there is need to stay/arrest the pending ruling scheduled for delivery on 5th September, 2018 and/or stay of proceedings and/or further proceedings until the instant application is heard and determined.

That his response and/or input were not adduced during the hearing of the preliminary objection. His input/response/evidence will actually assist the court in the final hearing and determination of this suit, give bearing and shed more light in the proceedings before court.

The applicant alleges that on the same day, his advocate on record Mr. Ayieko informed him that he was overwhelmed with several other matters before different courts in Eldoret and had actually requested her colleague Miss Lagat, counsel for the defendant while together before court five to place the matter aside so the he could address the matter. That his Advocate's absence from court was not intentional but due to the several matters he was attending to in different courts within Eldoret. He prays that the misgivings of his advocate should not be visited upon him as an innocent client. His advocate on record has shown him grounds of opposition/objection which they intend to be factored in/considered by the court before the matter is set down for delivery of the ruling. This being a land matter, he wishes the court would grant his prayers for the matter to be heard and determined on its own merits fortified by the principle of *audi alteram partem*. That he stands to suffer great prejudice, irreparable/substantial loss if the instant application is not allowed. The instant application is made in the utmost good faith and in the best interest of justice. He believes that no prejudice will be suffered by the Applicant if the prayers sought are granted.

Mr. R. M. Wafula learned counsel holding brief for Mr. Ayieko advocate for the applicant submits that the court should exercise the discretion in granting the orders prayed and argues that the court should give substantive justice.

M/s Lagat, learned counsel for the respondent argues that no good reasons have been given by the applicant to warrant the orders sought.

That the discretion of the court should be exercised judiciously and not capriciously.

The reason given by Mr. Ayieko for failing to attend court was that he was overwhelmed by many matters in different courts in Eldoret and had requested Miss Lagat, counsel for the defendant to place the matter aside but this did not happen.

Article 159 of the Constitution of Kenya that is relied upon by the applicant provides that:

> ***(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***
> ***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***
>
> > ***(a) justice shall be done to all, irrespective of status;***
> > ***(b) justice shall not be delayed;***
> > ***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***
> > ***(d) justice shall be administered without undue regard to procedural technicalities; and***
> > ***(e) the purpose and principles of this Constitution shall be protected and promoted.***
>
> ***(3) Traditional dispute resolution mechanisms shall not be used in a way that--***
>
> > ***(a) contravenes the Bill of Rights;***
> > ***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or***
> > ***(c) is inconsistent with this Constitution or any written law.***

The same Article also provides that ***justice shall not be delayed.***

There are well-established principles of setting aside interlocutory judgments laid out in the case of ***Patel vs East Africa Cargo Handling Service*** where **Duffus,V.P.** stated;

> ***"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

The application herein was fixed by counsel and therefore, the firm of Seneti & Oburu & Associates should have instructed a counsel to attend court. It is not enough for the applicant to claim that his advocate talked to M/s Lagat to place the matter aside and that it is not proper to inform the advocate for the adversary to hold brief as it places the court and the advocate in an embarrassing situation. Mr. Ayieko ought to have requested a counsel other than M/S Lagat to hold brief.

> **in the case of *Richard Ncharpi Leiyangu vs IEBC & 2 others where it was stated: -***
>
> ***"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice…***
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> ***…The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"***
>
> ***In CMC Holdings Ltd vs James Mumo Nzioka, the Court of Appeal held inter alia: -***
>
> ***"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"***

In this matter, no good ground has been given by the applicant for failure to attend court and the actions of the applicant are causing the delay of hearing of this matter.

However, since the applicant was in court in person on the hearing date, he cannot be punished due to the mistakes and inadvertence of his advocate.

> ***In the case of Philip Chemwolo & Anor. Vs Augustine Kubende (1982 – 88) KAR 103 Apaloo JA rendered himself thus,"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 merits …... 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 for the purpose of imposing discipline."

I do grant the orders that the proceedings of 26.9.2018 are hereby set aside. The preliminary objection dated 20.3.2018 to be heard de-novo.

Dated and delivered at Eldoret this 30th day of October, 2018.

A. OMBWAYO

JUDGE