



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 1657 OF 2007**

**JANE WAITHIRA KIHARA.....PLAINTIFF**

**=VERSUS=**

**NJIHIA MUCHEKE.....DEFENDANT**

**RULING**

1. On 16/3/2015, Gitumbi J dismissed this suit upon a notice to show cause issued under Order 17 rule 2(1) of the Civil Procedure Rules. Subsequently, on 24/11/2015, the plaintiff brought a notice of motion dated 31/8/2015 seeking an order setting aside the dismissal order. The notice of motion was filed on 24/11/2015 and was supported by an affidavit sworn on 31/8/2015 by Walter Owaga.
2. The plaintiff contends that she was unable to locate the court file in the court registry hence her inability to set down the suit for hearing. Secondly, she contends that she was never served with a notice to show cause prior to the dismissal order.
3. The defendant opposes the application through grounds of opposition dated 16/5/2018. He contends that the application is fatally defective because it has been brought under the wrong rules of procedure. Secondly, he contends that the application is fatally defective because the applicant has not exhibited a copy of the dismissal order.
4. I have considered the application together with the averments made in the supporting affidavit. I have also considered the defendant's grounds of opposition. Similarly, I have considered the relevant legal framework and the guiding principles relevant to the court's jurisdiction to set aside a dismissal order.
5. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte.
6. The guiding principle in the court's exercise of its judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908** at page 13. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.
7. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978)**, Madan J set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of a court of justice on account of 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. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”*

8. **Apaloo** JA outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**.

*“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”.*

9. In the present suit, notice to show cause was duly served and received by the firm of Owaga & Associates on 13/3/2015. The said Law Firm did not attend court on 16/3/2015 as required. The plaintiff’s contention that no notice was served is therefore incorrect.

10. Because of the nature of the dispute in this suit, I will exercise discretion and give the plaintiff a second chance to ventilate her claim in court. The suit will be reinstated conditionally. The first condition is that the plaintiff will pay the defendant throw-away costs of Kshs. 10,000 to be paid within ten (10) days from today. The second condition is that the plaintiff will file and serve a single, bound, paginated and indexed bundle of pleadings, witness statements/affidavits and documentary evidence within the same period of ten (10) days. In default of either of the two conditions, the reinstatement order herein shall stand vacated and the suit herein shall stand dismissed.

Lastly, the parties shall attend before the Deputy Registrar on 11/10/2018 to fix a hearing date during the service week.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

June Nafula - Court Clerk