REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 100 OF 2002

M'MWIRICHIA M'ANGARE.....PLAINTIFF

VERSUS

M'IBIRI M'BOGORI & OTHERS.....DEFENDANTS

AND

STANDARD CHARTERED BANK OF KENYA LTD.....INTERESTED PARTY

RULING

1. This ruling is in respect of the application dated 3.5.2018 whereby 1st defendant is seeking for an order to re-open defence case which was closed on 25.4.2018. He is also seeking for an order to be allowed to tender his defence.

2. The main grounds in support of this application is that 1st defendant was let down by his advocate who failed to turn up in court on 25.4.2018.

3. 1st defendant has also sworn an affidavit where he avers that the mistakes of his advocate should not be visited upon him. He has also taken steps to get another advocate.

4. Plaintiff has filed a replying affidavit in opposition to the application. He avers that the matter has been pending in court for a long time and that the initial plaintiff who has since died closed case in 2017.

5. The application was argued orally on 16.10.2018. It has been submitted by the applicant that he is a diligent litigant as he was even in court on 25.4.2018. It is also argued that this was his first application for adjournment. It is also stated that the subject matter is a commercial building worth millions of shillings and it would be prejudicial and against the Kenyan Constitution for him to be deprived of his property without being heard. The court has been urged to invoke the principle that mistakes of an advocate should not be visited upon his client. For those reasons the court has been urged to allow applicant to have his day in court.

6. On the other hand it has been submitted for plaintiff that litigation must come to an end as this is a case where by plaintiff's case was closed in 2007.

7. Plaintiff urges the court to invoke the oxygen principle which enjoins the court to facilitate the just, expeditious and affordable resolution of disputes. It is further averred that the oxygen principles are a double edged sword, cutting both ways. He poses the question ***"where are the rights of the man who closed his case 11 years ago?,*** What **kind of justice is he getting before this court when his case remains unfinalized a decade after his death?.**

8. Plaintiff also avers that applicant has not come to court with clean hands he was asked by the court to testify but he declined.

9. The application was not opposed by 2nd and 4th defendants.

10. I have considered the record of the court as well as the arguments advanced by the rival parties.

11. Firstly, I find that this is a very old case filed in 2002. It is 16 years old. The initial plaintiff testified way back on 21.9.2007 and his case was apparently closed. From 2008 to April 2018, the case has been awaiting defence hearing and at some point on 24.11.2011, the court stated that ***"I give last and final adjournment to the defendants"***. That order was never complied with.

12. Justice delayed is indeed justice denied. It is not lost to this court that the original plaintiff did not live to see the finalization of the suit. He died. These kind of cases which mark time in the corridors of justice for decades not only erode public confidence in the judiciary but they also become part of the backlog of cases, a menace which judiciary is trying to eradicate. The courts in the Republic have made a commitment to complete cases promptly and to clear the backlog, a process which is anchored under article 159 2 (b) ***"Justice shall not be delayed".***

13. As regards the proceedings of 25.4.2018, applicant had stated that he did not know the whereabouts of his advocate. When the court declined to adjourn the matter it gave 1st defendant an opportunity to tender his evidence. His response was that: ***"I will not give any evidence".***

14. Courts have previously held that a case belongs to a party and not to his advocate.

15. In **Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) Eklr.** Kimaru J stated thus;

> **"This court has unfettered discretion to set aside any order which was entered exparte. This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. ……In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant.";**

Also see- **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 .**

16. In the case of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR)** (*unreported)* **Waki J.A**, held that;

> " **With respect, l think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation….".**

17. In the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR** , it was stated thus;

> **"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."**

18. I wholly associate myself with the holding in these decisions. What is clear is that the court's discretion is not automatically exercised in favour of a litigant who has been let down by his advocate.

19. The oxygen principle enshrined under section 1 A and 1 B of the civil procedure Act are indeed double edged sword. They cut both ways. Applicant did not attempt to mitigate his situation by tendering evidence when his advocate apparently failed him.

20. Section **1 A (3) of the civil procedure Act** provides that:

> **"A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".**

21. In the case of **Hunker Trading Co. Ltd vs Elf Oil Kenya Ltd court of appeal civil appeal case no. 6/2010,** it was stated that; ***"Perhaps it is appropriate for us to observe that litigants and their advocates should note that in the O2 principle, they have a powerful ally where they are advancing its aims and a powerful adversary where they are bent on subverting its aims…… the interpretation of any provision in the act and in the rules has to be O_2 compliant".***

22. In **John Maina Mburu T/A John Mburu & co, advocates vs George Gitau Manene and 3 others, Nairobi , Milimani Civil C. No. 265 of 2011** Odunga J, held that **"The overriding objective overshadows all technicalities, precedents, rules, actions which are in conflict with it and whatever is in conflict with it must give way……".** The judge further stated that;

> **"A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsels that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in civil process and to weed out as far as practicable the scourge of the civil process starting with UNACCEPTABLE LEVELS OF DELAY……. If the often talked**

of back log of cases is littered with similar matters, the challenge to the courts is to use the new broom of overriding objective to bring cases to finality……"

23. The oxygen principle was meant to breathe life into civil cases so as to have them concluded expeditiously. Allowing the application goes against this principle.

24. I conclude that the application is **NOT** meritorious. The same is dismissed with costs to respondent.

25. Parties are directed to file their submissions forth with.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28TH NOVEMBER, 2018 IN THE PRESENCE OF:-

C/A: Kananu

Ashaba hodling brief for Muthomi for 1st defendant

HON. LUCY. N. MBUGUA

ELC JUDGE