



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 82 OF 2017

JOSEPH NDINGURI MWANGI.....PLAINTIFF/APPLICANT

VS

JAMES KAMAU MURAGURI.....DEFENDANT /RESPONDENT

RULING

1. The Plaintiff filed a Notice of Motion on the 31/5/2018 seeking the reinstatement of the suit dismissed on the 19/3/18. The application is based on the grounds that the Plaintiff's Advocate inadvertently failed to attend Court. That no prejudice shall be occasioned to the Defendant if the suit is reinstated.
2. The application is supported by the supporting affidavit of Lameck J Mboha Advocate where he deponed that he is in conduct of the matter on behalf of the Plaintiff. That his office failed to update his diary and when the matter came up for NTSC on the 19/3/2018 he was absent. He has annexed a copy of his diary for that day to support his averments. Whilst stating that failure to attend Court was not deliberate, he urged the Court not to visit the mistakes of Counsel upon his hapless client who from his sentiments he is keen and desirous to have his matter heard in Court. He beseeched the Court to reinstate the suit so that his client can ventilate his case fully in Court.
3. In resisting the application, the Defendant through his Counsel on record namely Macharia James Oreste filed a replying affidavit on 31/8/2018 where he deponed that the Plaintiff and his Counsel are guilty of laches in the manner they had consistently failed to attend Court leading to the Court issuing a NTSC which notice they ignored after being duly served. That the Court should be alive to antics which are calculated to derail the conclusion of the suit.
4. Relying on the case of **Tana & Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakia & Anor CA No 41 of 2014**, the Defendant's Counsel the Courts discretion to excuse the mistakes of Counsel is not automatic. In this case the Court of Appeal ruled that mistakes of Counsel should be laid at the doorstep of the client. He implored the Court that this application is for dismissing with costs.
5. On the 26/7/18 the parties argued the application orally and relied on their pleadings as on record.
6. The power vested in the trial Court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 rule 7 of the Civil Procedure Rules. It is a discretionary power that is exercised by the Court judiciously. The exercise of judicial discretion is dependent upon the factual circumstances of the case.
7. In the case of **Mbogo & Another v Shah [1968] EA 93** the Court held that:-

“.....the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.
8. The Plaintiffs' Counsel has attributed his absence in Court to failure to diarize the matter in his diary hence missing altogether. In the interest of justice and given that the Court is satisfied that the conduct of the Plaintiff was not intended to delay or obstruct justice. The Defendant has not explained how he stands prejudiced if the orders are set aside to pave way for the matter to be heard on its merits. The Court is inclined to allow the application and set aside the dismissal orders.
9. The parties to fix this matter for hearing in the next 14 days, in default, the suit shall stand dismissed.
10. The Applicant shall pay the Defendants costs of the application in the sum of Kshs. 5,000/- payable before the next hearing date.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22ND NOVEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Applicant – Absent

Respondent/Defendant – Absent

Irene and Njeri, Court Assistants