



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 543 OF 2013

DAVID MBURU GIBSONNELSON MWANGI

both t/a NEMKA COMMERCIAL AGENCIES..... PLAINTIFFS/APPLICANTS

=VERSUS=

NATIONAL SOCIAL SECURITY FUND (NSSF).....DEFENDANT/RESPONDENT

=AND=

NJOKI CHEGE.....1ST INTERESTED PARTY/RESPONDENT

DANSON N. MUKURURO.....2ND INTERESTED PARTY/RESPONDENT

RUTH KAREITHI.....3RD INTERESTED PARTY/RESPONDENT

ANTHONY MAINA MUHORO.....4TH INTERESTED PARTY/RESPONDENT

CHARLES MUHIA.....5TH INTERESTED PARTY/RESPONDENT

JOHN. N. WAITHAKA.....6TH INTERESTED PARTY/RESPONDENT

WHITE SKY INVESTMENT LIMITED....7TH INTERESTED PARTY/RESPONDENT

MAGI HOLDINGS LIMITED.....8TH INTERESTED PARTY/RESPONDENT

MICRO DOT ENGINEERING.....9TH INTERESTED PARTY/RESPONDENT

RULING

1. By a Notice of Motion dated 3rd November 2016, the plaintiff/applicant seeks orders:-

(1) That the order made on 3rd November 2016 dismissing the suit herein for non attendance be vacated and/or set aside and the suit therein reinstated.

(2) That the costs of this application be in cause.

2. The grounds are on the face of the application and are listed as in paragraph a to d.

3. The application is supported by the affidavit of Jeremy Njenga the advocate for the plaintiff/applicant sworn on the 3rd November 2016.

4. The application is opposed. There is a replying affidavit sworn by Daniel Ngaca Gacugia, advocate for the defendant/respondent on the 16th March 2017.

5. There is also a replying affidavit sworn by Anthony Maina Muhoro, the 4th interested party/respondent sworn on the 17th March 2017 on his own behalf and that of the other interested parties/respondents.

6. On 22nd March 2017, the court directed that the application be canvassed by way of written submissions. Only the submissions of the plaintiff/applicant are on record.

7. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit and the written submissions on record.

The issue for determination is whether this application is merited.

8. I have gone through the court file. It is true as stated in the supporting affidavit that the plaintiff/applicant's advocate arrived in court at 9.15 am. The Hon. Judge Gitumbi noted his presence but maintained that the earlier order dismissing the suit for non-attendance would remain in force. The plaintiff/applicant's advocate has also annexed to his supporting affidavit the day's cause list. The matter is listed as no. 3.

9. This clearly shows that the advocates failure to be in court on time was not deliberate but was occasioned by factors beyond his control.

10. I am guided by the holdings of J Nzioka wa Makau **ELRC Cause No 926 of 2013 Grace Wanjiku Ndegwa vs Highlands Mineral Water Company Limited** where he stated:-

“.....clearly the law is not meant to shut out a party who commits an inadvertent mistake or error and in the dicta of the Court of Appeal this is a matter I cannot ignore. A matter which might well amount to an excusable mistake visited upon the applicant by her advocate”.

I am also guided by the case of **Philip Chemwolo & Another Vs Augustine Kubende (1982-88) KAR 103** where at page 1040 Apaloo JA (as he then was) stated as follows;

“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”.

11. I am satisfied that the plaintiff/applicant's advocate's failure to attend court in time was not deliberate. I find that the plaintiff/applicant will suffer great prejudice if these orders are not granted. No prejudice will be occasioned to the defendants/respondents if this application is allowed.

12. I find merit in this application and grant the orders ought namely:-

(i) That the orders made on 3rd November 2016 dismissing the suit herein for non attendance is hereby vacated and/or set aside and the suit is reinstated.

(ii) The plaintiff/applicant do pay the defendants/respondents throw away cost of Kshs 10,000 within thirty (30) days from the date hereof.

(iii) The costs of this applicant be in the cause.

It is so ordered.

Dated, signed and delivered in Nairobi on this 7TH day of NOVEMBER 2018

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the 1st & 2nd Plaintiff

.....Advocate for the Defendant

.....Advocate interested parties

.....Court Assistant