



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISCELLANEOUS CAUSE NO.70 OF 2017

THE TRUSTEES OF THE MASAI

PLOT OWNERS WELFARE ASSOCIATION.....PLAINTIFF/APPLICANT

-VERSUS-

THE TRUSTEES OF MASAI

VILLAGE WOMEN SELF HELP GROUP.....DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant had on **12th October 2017**, filed a **Notice of Motion** application even dated and sought for orders that:-

- a) That this Honourable Court be pleased to grant leave to the Applicants to commence representative suit for and on behalf over one hundred plot owners within the land parcels known as Masai Village Women Self Help Group within Thika Municipality.***
- b) That the cost of this application be provided for.***

The said application is supported on the grounds stated on the face of the said application and the **Affidavit** of **David Wachira Kaira**, one the trustee of the Applicants herein. Among the grounds were:-

- i. That the Applicants having purchased land parcels being subdivision of land purportedly owned by the Respondents are being threatened with eviction and court process due to precipitate suits likely to be filed against them by third parties who are against claiming title to the same land parcel.***
- ii. That the Applicants stand to suffer loss of investments, profits and damage as a result of laches by the Respondents in processing titles in their favour.***
- iii. That it is only through a representative suit in which the purchaser and beneficiaries who have same interest in the suit may get reliefs to compel Respondents to act lawfully and complete the transaction of sale by issuing the Applicants with titles to their entitlements.***
- iv. That interest of justice require that complex legal issues with common reliefs be resorted to by way of representative suit to avoid duplicity of legal issues and variance of outcomes.***

On **12th October 2017**, the said **Notice of Motion** was placed before the court under **Certificate of Urgency** and was given a date for interparties hearing on **13th November 2017**.

However, on **13th November 2017**, though the matter was in the Cause List, and file was called three times in court, there was no appearance by any of the parties and not even the Plaintiff/Applicant. Consequently, the Court dismissed the entire application for **Non-attendance** of the parties and **Want of Prosecution**.

Further on **18th December 2017**, the Applicant filed the instant **Notice of Motion** dated **18th December 2017** and sought for orders that:-

- 1) That this Honourable Court be pleased to set aside the orders made on 13th November 2017 dismissing the Plaintiff's/Applicant's application dated 12th October 2017 and all other consequential orders thereto.***

2) *That the Honourable Court be pleased to reinstate the*

application dated 12th October 2017 herein.

3) *That costs of this application be in the cause.*

The said application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit** of **John Muturi Njoroge**, Advocate for the Applicant. These grounds are:-

i. The instant application was dismissed on 13th November 2017 for Want of Prosecution and Non-attendance by Counsel for the Applicant herein who was not present.

ii. That the lack of attendance was due to an administrative mix-up at the office of the Counsel for the Applicant herein in that the matter was not diarized.

iii. That Counsel's erroneous mistake ought not be visited on the client.

iv. That this application has been made without delay and it is only fair that the application be reinstated to allow the Applicant ventilate the matter to the logical conclusion.

In his **Supporting Affidavit**, the Applicants' Advocate stated that he is the advocate in conduct of the matter and he filed the **Notice of Motion** dated **12th October 2017** and which was slotted for hearing on **13th November 2017**. The said application was seeking leave to institute a representative suit on behalf of the Applicants. However, there was an administrative error on the part of the office of the Counsel for the Application as the matter was erroneously not diarized. Therefore on **13th November 2017**, the suit was dismissed for Non-prosecution and Non-attendance. However, the said error is highly regretted and that the mistake of a Counsel ought not to be visited on the Applicants who have an arguable case with high chance of success. He contended that it was in the interest of justice to allow the instant application.

The application was served upon the Defendant on **6th March 2018** as per the **Affidavit of Service** of **John Muturi Njoroge Advocate** sworn on **11th May 2018**. The application is therefore not contested.

The Applicant canvassed the application by way of written submissions which were filed on **6th July 2018**. The Applicant relied on various provisions of law specifically **Articles 50 & 159** of the **Constitution**. Further, the Applicant relied on the case of **John Nahashon Mwangi...Vs...Kenya Finance Bank Ltd (in liquidation) 2015 eKLR**, where the Court held that:-

“The overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties like when mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments top leadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs.”

The Applicant urged the Court to allow the said application and the consequential orders for the interest of justice.

The Court has now carefully considered the instant **Notice of Motion** dated **18th December 2017** which is anchored under **Order 12 Rule 7** which provides that:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

The above provisions of law grants the Court discretion to set aside or vary the Judgement or Order made under the provision of **Order 12** especially on **Non-attendance** of any party and the said Order should be made upon such terms as may be just.

Further, the application is anchored under **Sections 1A & 1B** of the **Civil Procedure Act** which deals with overriding objective of the Act which is to facilitate the **just, expeditious, proportionate** and **affordable** resolution of civil disputes governed by the Act. Again **Section 3A** of the same Act donates inherent power to the court to make such orders as necessary for the ends of justice or to prevent abuse of the court process.

It is not in doubt that the Applicant herein had filed an application dated **12th October 2017**, seeking for leave to be allowed to file a representative suit. The claim that the Applicant intends to lodge is a claim for land against the Respondent. The Applicant has alleged that the Applicant's members are being threatened with eviction by the Respondents and thus the need for a Representative Suit.

The Respondent did not oppose the said application. However on the date of the hearing, the Applicant and its advocate were absent with no explanation or reasons for their absence given.

As provided by **Order 12 Rule 1** and having called the matter thrice and neither party was in attendance, the Court used its discretion and dismissed the said application wholly for Non-attendance of the Applicant. However, the Applicant's advocate has averred that there was

an error on his part as he failed to diarize the matter. He urged the Court not to penalize the Applicant for the mistake of its Advocate.

Indeed its trite that a mistake of an Advocate or Counsel should never be visited on his/her clients. See the case of Murai...Vs...Wainaina (No.4) 1982 KLR 38, where the Court stated that:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by Senior Counsel though in the case of a junior Counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of Justice”.

Further, mistakes will always be made and the court should strive to administer substantive justice and should not be a captive of technicalities. If indeed the Advocate herein failed to diarize the matter, then that was a mistake on his part and that mistake should not be visited on the Applicant herein.

Further Section 1A & 1B behoves the Court to facilitate just determination of the matter. Dismissal of the matter for Non-attendance is a dismissal on technicality but not on merit.

For the above reasons, the Court finds that the necessary order that the Court is called upon to make as provided by Section 3A of the Civil Procedure Act is to allow the instant application dated **18th December 2018** with costs being in the cause.

However, the Applicant to ensure that the re-instated **Notice of Motion** application dated **12th October 2017** is prosecuted expeditiously without any further delay or Non-attendance. Therefore the **Notice of Motion** dated **18th December 2017** is **allowed entirely with costs being in the cause**.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of November 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Madegwa holding brief for Mr Muturi Njoroge for Plaintiff/Applicant

No appearance for Defendant/Respondent

Lucy - Court clerk

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

2/11/2018