REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 24 OF 2005

FREDRICK S. MBURUNG'A.....PLAINTIFF

VERSUS

GEORGE MUREA M'ITIBUA.....1ST RESPONDENT

CHARLES KIRIMI MUKUMBI.....2ND RESPONDENT

RULING

The application giving rise to this ruling is the notice of motion dated 6th October 2018 brought under section 1A, 1B and 3A civil procedure Act, section 3 of the ELC Act no. 19 of 2011 and article 159 (2) (d) of the constitution. The applicant is seeking to set aside the orders of this Hon. Court made on 18th May 2017 dismissing this suit for non-attendance and want of prosecution. The applicant is also seeking an order staying the ruling issued on 2nd November 2017 pending hearing and determination of this application. In his supporting affidavit sworn the same date, the applicant has deponed that he learned with shock and surprise that this suit was dismissed on 8th May 2018.

He stated that he had always asked his former lawyer to fix this case expeditiously but he failed to do so until he engaged the current law firm who upon perusal of the court file realized that this case had been dismissed on 18.5.2018.

The applicant further deponed that the mistakes of his erstwhile advocate should not be visited upon him. The respondent did not file any response in opposition to the said application.

I have carefully considered the said application and the affidavit evidence. The said facts in the supporting affidavit are not controverted as no replying affidavit was filed in opposition thereto. In paragraph 6 of the grounds shown on the face of the said application, the applicant admits that on 18th may, 2018 the court dismissed this suit for non-attendance and for want of prosecution with costs after his erstwhile advocates M/s. L. Kimathi Ikiara failed to attend court for the hearing on 18th May 2018.

This application is brought under section 1A, 1B and 3A civil procedure Act as read with section 3 ELCA act and article 159 (2) (d) of the constitution.

The affidavit of service filed in court shows that the hearing notice was served upon the firm of M/s L. Kimathi Ikiara & Co. Advocates who are the plaintiff's erstwhile advocates. At the time the said hearing notice was being effected the said firm of advocates were properly on record for the plaintiff. No explanation has been given why the said firm did not attend court or notify their client who is the plaintiff herein.

The plaintiff has decided to appoint another firm of advocates to appear for him. He has not even made any complaint to the law society of Kenya who is charged with disciplining advocates for their conduct in the course of their professional duties.

It is high time lawyers like professionals of all cadres are made to account for their commissions and omissions. Section 1A, 1B and 3A civil procedure act which this application is premised reads as follows:

> ***"1A (1) the overriding objective of this act and the rules made hereunder is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the act.***
>
> ***(2) the court shall in the exercise of the its powers under this act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).***

(3) 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.

"1B (1) for the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purposes of attaining the following aims:-

a. The just determination of the proceedings

b. The efficient disposal of the business of the court.

c. The efficient use of the available judicial and administrative resources.

d. The timely disposal of the proceedings and all other proceedings in the court, at a cost affordable by the respective parties……

3 Nothing in this act shall limit or otherwise effect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

My interpretation of the law as provided calls upon all parties including advocates who are officers of this Hon. Court to assist the court to further the overriding objective of this act.

The applicant in paragraph 5 of the grounds on the face of the application herein has admitted that this suit was dismissed for non-attendance and want of prosecution after his own lawyer failed to attend court for hearing. The applicant's former lawyer has not sworn an affidavit giving reasons why he failed to attend court during the hearing on 18/5/2018. Without any reasons being given this court cannot exercise its discretion in a vacuum.

In the case of ***Mradula Suresh Kantaria and Surech Nanillal Kapteria CA No. 277 of 2005*** (unreported the court held:-

"In this regard we believe one of the principal of the double "oo Principle" is to enable the court to take case management principles to the centre of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap".

Again in the case of **Caltex Oil Limited vs Evanson Wanjihia civil application no. 190 (Nairobi)** Unreported the court of appeal held as follows:-

"The powers of this court have recently been enhanced by the incorporation of an overriding objective in section 3A and #B of the appellate jurisdiction Act Cap 9 and section 1A and 1B of the Civil Procedure Act cap 21 following the amendment of the statute law (miscellaneous amendment act no. 6 of 2009). The overriding objective provides that the purpose of the two acts and the rule is to facilitate the just expeditious proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims the principal aim is for the court to act justly in every situation either when interpreting the law or exercising its power. The court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective".

The same superior court also had this to say in HUNKER TRADING COMPANY LTD VS ELF OIL KENYA LTD CIVIL APPLICATION NO. 6 OF 2010 (NAIROBI) reported in (2010) eKLR. ***"……..the advent of the "O_2 principle" in our opinion ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings, ensures efficient use of the available judicial and administrative resources of the courts and results in the timely disposal of the proceedings at a cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant acts must be "O_2" compliant because they exist for no other purpose. The o2 principle poses a great challenge to the courts in both the exercise of the powers conferred on then by the two act and rules and in interpreting then in a manner that best promotes good management practices in all the processes of the delivery of justice.***

In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met.

It may also entail our redesigning approaches to the management of the court process so that finality and justice are attained and decisions that ought to be made today are not postponed to another day".

The position previously taken by the courts that mistakes made by advocates cannot be visited upon litigants negates good management practices in the delivery of justice in the judiciary. Unless the lawyer who was properly on record swears an affidavit explaining why he failed to attend court together with his client on the hearing date, the appointment of a new advocate cannot make the court exercise discretion in favour of such applicant. A foundation for its application must be properly laid and the reasons for its application judicially ascertained.

In the upshot, the application dated 6th October 2018 lack merit and the same is hereby dismissed with costs.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT

MERU THIS 7TH DAY OF DECEMBER, 2018.

.....

In the presence of:

Mr. Muhtomi for plaintiff/applicant

CC: Janet