REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 235 OF 2015

PATRICK FREDRICK KIRUGU.....PLAINTIFF/APPLICANT

VERSUS

ALOISIUS IRIGA NDERI & JANE WANJIRU IRIGA *(Being sued in their capacity as the administrators of the estate of* IGNATIUS IRIGA NDERI).....DEFENDANTS/RESPONDENTS

RULING

1. The plaintiff filed an application dated **22nd June, 2016** seeking reinstatement of the Notice of Motion dated **8th September, 2015** and the interim orders. The motion was dismissed for non attendance on 30th May, 2016. He also prays that once reinstated, the court grants a hearing date for the Motion and that costs of the application be in the cause.

2. The application is premised on the grounds on its face and is supported by the affidavit of **Alex Mbue Ndegwa**, sworn on **22nd June, 2016.** He depones that he failed to attend the interparties hearing for the application because his clerk misdiarised the hearing date as **30th June, 2016** instead of **30th May, 2016.** He contends that the mistake was not deliberate and urges the court to exercise its discretion in his favour. He is of the view that the defendants will not suffer any prejudice if the application and the interim orders are reinstated.

3. The application is opposed. Counsel for the 1st defendant, **Duncan Waweru Macharia,** swore a replying affidavit on **29th September, 2016** in which he deponed that the application is an abuse of the court process as it was brought a whole month after the application was dismissed; that the hearing date was fixed by consent, therefore the mistake squarely lies with the advocate and the overriding objective (**Section 1A** of the Civil Procedure Act) works against the applicant in this case.

4. The 2nd defendant, **Jane Wanjiru Iriga,** swore a replying affidavit on **19th October, 2016.** She depones that her advocates never received any invitation from the plaintiffs counsel for either **30th June, 2016** or **30th May, 2016**. It is her contention that once the applicant obtained the injunctive orders, he went to sleep; that reinstating those orders was not necessary because the applicant had already lodged a caution against the title to the suit property and had failed to submit cogent evidence to warrant reinstatement of the orders earlier granted.

5. The applicant's advocate swore two further affidavits, on **7th December, 2016,** in response to each of the replying affidavits. In response to the replying affidavit sworn on **29th September, 2016,** he depones

that the delay was not inordinate as he filed the application immediately he became aware of its dismissal. In any case,the overriding objective as read with **Article 159** of the Constitution supports the application's reinstatement rather than its dismissal. Finally, he deponed that the mistake of the advocate ought not to be visited on the client.

6. In response to the replying affidavit sworn on **19th October, 2016** he depones that the applicant has been diligently pursuing the case and that he in fact invited the 2nd respondent's counsel to fix the hearing date. He further depones that the threat to sell the land is very real and the interim orders earlier granted were the only reason why the suit property has not yet been sold.

7. The application was urged before me on 15th December, 2016 with **Mr Ndegwa** appearing for the applicant, **Mr Macharia** for the 1st respondent and **Mr Mbugua** for the 2nd respondent.

8. **Mr Ndegwa** relied on the grounds of his application, his supporting affidavit of **22nd June, 2016** and the two further affidavits sworn of **7th December, 2016.** He took full responsibility for misdiarising the dates (**30th June, 2016** instead of **30th May, 2016**) and urged the court not to visit his mistake on his client. He prayed that the case be heard on its merits as the applicant is in possession and has carried out extensive developments on the suit property. He relied on the case of **Chemwolo & Another v Kubende (Civil Appeal No 103 of 1984).**

9. In reply, **Mr Macharia** submitted that it has been more than a year since the interim orders were granted. With regard to the reinstatement of the application, he sub- mitted that the land is under no danger of being sold. He argued that the applicant did not deserve the orders sought and the "O2 principle" should be applied against the applicant since one year had passed without the same being set down for hearing which clearly demonstrated that the plaintiff was not in a hurry to prosecute his case. He urged the court to dismiss the application.

10. In support, **Mr Mbugua** for the 2nd respondent, relied on his replying affidavit sworn on **19th October, 2016.** He submitted that the 2nd respondent was served with a hearing notice of a different application; that once the applicant obtained the interim injunction, he went to sleep and that the land was under no threat of being sold. He urged the court to examine the conduct of the applicant and prayed that the application be dismissed. He relied on the following authorities:- **Janet Osebe Gechuki v Commissioner of Customs and Excise & Another [2007] eKLR** and **Peter Bekyibei Langat v Recho Chepkurui Mosonik & Another [2014] eKLR.**

11. In a rejoinder, **Mr Ndegwa** argued that the delay could be explained by the fact that the court diary for the year 2015 was full and that is why he had set down the application for hearing in the year 2016. He argued that **Order 40 Rule 6** of the Civil Procedure Rules was not applicable as this was entirely a matter under the court's discretion. With regard to the applicant's conduct, he submitted that the applicant has been very proactive in prosecuting the matter and urged the court to reinstate the interim orders as they were the only reason why the suit property had not yet been sold.

12. From the court record, he application for injunction was filed on **8th September, 2015.** Whereas it is true that the Environment and Land court, Nyeri is very busy; that the court diary for the year 2015 filled up early and that is why the application was given a hearing date in 2016, this does not explain why Mr. Ndegwa was absent in court on 30th May, 2016 for interparties hearing of the application.

13. A party seeking reinstatement of an application or a suit dismissed for non attendance is required to explain his absence on the date of hearing and how he will suffer prejudice if the application and/or suit is not reinstated.This was clearly stated in the case of **Simion Waitim Kimani & 3 Others v Equity Building Society [2010] eKLR** where **Koome J** (as she then was) laid out the principles to be considered by the court when faced with such an application. She stated as follows:

> "**The courts have discretion generally to reinstate a suit which is dismissed for non-**

attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay."

14. In the instant case, Counsel for the applicant has taken personal responsibility for non attendance which led to the application been dismissed. He has also explained the circumstances leading to his failure to attend court on that day and also relied on the case of **Chemwolo & Another vs. Kubende (Civil Appeal No 103 of 1984)** where **Apaloo JA** (as he then was) observed:

> "…**Blunders 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 merits. 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 for the purpose of imposing discipline."**

15. I have considered his reasons and although I find some truth in his assertion that mistakes of the advocate should not be visited on the client, I have also taken into consideration the objective of this court. In making this decision I am *guided by the case of* ***Hunker Trading Company Ltd vs Elf Oil Kenya Limited [2010]eKLR*** *where t*he Court of Appeal stated:-

> ***"In conclusion, we wish to observe that "O2 principle" which must of necessity turn on the facts of each case is a double faced and for litigants to thrive under its shadow they must place themselves on the "right side". In the circumstances of this matter, the applicant is clearly on the "wrong side" and for this reason the principle must work against it."***

16. Applying the aforesaid holding to the circumstances of this case and there being no doubt in my mind that the applicant's counsel is on the wrong side, the O2 principle must work against him. I also do not see what prejudice the applicant will suffer if the application and interim orders are not reinstated considering that a caution is already lodged against the title therefore preventing interference with the suit property.

17. For the above reasons, I find the Notice of Motion unmerited and I dismiss the same with costs to the respondents.

Dated signed and delivered at Nyeri this 9th day of February 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Waweru Macharia for the 1st defendant and h/b for

Mr. Mbugua for 2nd respondent

Mr. Machira h/b for Mr. Ndegwa for the plaintiff/applicant

Court clerk - Esther