REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 183(B) OF 2014

JOYCE WARUTUI GICHOYA …….....……1ST PLAINTIFF

TERESIA NGIMA GICHOYA …….....2ND PLAINTIFF

VERSUS

LYDIA MICHERE GICHOYA …….…....1ST DEFENDANT

JAMES NYAGA …….....…..……..2ND DEFENDANT

RULING

Before me is the Notice of Motion dated 12th February 2016 seeking the substantive order that this Honourable Court be pleased to review and/or set aside its decree and judgment delivered on 29th January 2016 and the subsequent decree issued on 5th February 2016. The application is based on the grounds set out therein and supported by the affidavit of **JAMES IGATI MWAI** the applicants' advocate. The gist of the application is that on 27th January 2016, the applicant's advocate was involved in traffic accident along the **BARICHO–KAGIO** road at about 8 p.m. which was reported to the **SAGANA SUB-BASE** after he had spent the whole night in his wrecked car. He was subsequently taken to a private clinic where he was treated for minor injuries. That he had carried his official diary and his office staff did not know of his whereabouts. That the applicants should not suffer due to the mistake of their advocate as they have an arguable case which they should be allowed to prosecute. Annexed to that affidavit is a letter dated 2nd February 2016 from the Officer in charge of **SAGANA SUB-BASE** confirming that indeed the said advocate was involved in an accident along **BARICHO-KAGIO** road although the date of the accident is not indicated – see annexture **JIM 1.**

The application is opposed and the advocate for the respondent **Mr. LEE MAINA MUGO** filed a replying affidavit in which he has deponed, inter alia, that even if the advocate for the applicants was involved in an accident, it is not explained why he had to spend the entire night in the car. That the letter from the Police officer (annexture **JIM 1**) does not indicate the actual date of the alleged accident and there is also no Police abstract nor medical report to substantiate his claims. There is no explanation as to why the said advocate failed to communicate with his office in this era of mobile phones and in any case, the applicants themselves did not attend the Court for hearing of the suit and neither has their absence been explained. That this is not the first time the applicants have failed to attend Court as they also did not attend Court on 5th and 13th November 2014. That the applicants have demonstrated a lack of interest in this matter and therefore their application is misconceived and an abuse of the process of this Court and ought to be dismissed with costs.

When the matter was mentioned before me on 4th May 2016, it was agreed that the application be canvassed by way of written submissions with each party filing theirs within 14 days. However, only the applicants' advocate has filed submissions.

I have considered the application, the rival affidavits and the submissions by the applicants' advocate.

What is sought herein is the exercise of my discretion to set aside a judgment obtained in the absence of the other party. In ***PATEL VS E.A. CARGO HANDLING SERVICES LTD 1974 E.A 75***, the Court said:-

> ***"There are no limits or restrictions on a Judge's discretion except that if he does vary the judgment, he does so on terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself or fetter the wide discretion given to it by the rules"***

In ***SHAH VS MBOGO 1967 E.A 116,*** it was held as follows:-

> ***"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice"***

Finally, in ***SEBEI DISTRICT ADMINISTRATION VS GASYALI 1968 E.A 300,*** the Court said:-

> ***"The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a Court".***

See also ***MAINA VS MURIUKI 1984 K.L.R 407.***

The above are the well established principles that the Court will apply in an application of this nature. The Court should always consider that any judgment entered neither upon the merits nor by consent is subject to the Court's wide discretion to set aside. However, such discretion must be exercised judicially and not in an arbitrary manner.

What is the history of this case? The applicants filled this suit on 9th June 2014 seeking the cancellation of the title to land parcel No. INOI/KAMONDO/1883 on the basis that the respondents had fraudulently registered themselves as owners thereof through fraudulent means. The respondents denied that claim and filed a counter-claim in which they pleaded that they were registered owners of that land through transmission and sought the removal of the caution and other restrictions placed thereon by the applicants. The suit was listed for hearing on 28th January 2016 which date had been taken by consent but neither the applicants nor their advocate **Mr. MWAI** attended Court and so, on the application of **Mr. MAINA advocate** for the respondents, the applicants' claim was dismissed and the respondents testified in support of their counter-claim and obtained the judgment dated 29th January 2016 and subsequently a decree was issued on 5th February 2016 which the applicants now seek to set aside.

Although **Mr. MWAI** has annexed a letter from **SAGANA SUB-BASE** dated 2nd February showing that his vehicle **No. KBQ 298 F** was involved in an accident along the **BARICHO-KAGIO** road and he "***was injured and attended medication***", the letter does not indicate the date of the accident and neither has **Mr. MWAI** availed any evidence of the medication that he received for the injuries sustained. As **Mr. MAINA advocate** has also rightly observed in his replying affidavit, it is also rather strange that in this era of mobile phones, **Mr. MWAI** did not call his office to explain his predicament so that another advocate could hold his brief and inform the Court what had transpired. It is also rather strange that although the accident occurred at 8 p.m. **Mr. MWAI** spent the whole night in his wrecked vehicle.

Finally, the applicants themselves did not attend the Court on the hearing date and neither have they explained why they did not do so. Surely if they had attended Court, there is no doubt that the absence of their advocate would have been sufficient reason to adjourn the case given the fact that it was the first time the case was coming up for full hearing. Clearly therefore, taking into account the conduct of both the applicants and their advocate, the Court is not entirely persuaded that the reasons for their absence from the Court on the hearing date are reasonable.

Having said so, this appears to be a case where it may be said that there was a mistake of the part of the applicants' advocate and also negligence on the part of the applicants themselves. Even if the applicants' advocate was involved in an accident, and I am willing to believe that he was, there was still much more that he could have done in the circumstances of this case to bring to the Court's attention his predicament. Similarly, the applicants themselves ought to have been in the Court on the hearing date. Nonetheless, as was held in ***MURAI VS WAINAINA (NO.4) 1982 K.L.R 38,*** the door of justice should not be closed because a mistake has been made and while the Court may not condone such mistakes, it should certainly do whatever is necessary to rectify it if the interest of justice so dictate. I am also mindful of ***Article 50 (1) of the Constitution*** which provides that:

> "***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body".***

I must also bear in mind the need to do substantive justice to the parties and that requires that disputes, particularly those concerning an emotive subject such as land, should be interrogated and determined on their merits. As much as possible errors and lapses that can be excused should not deprive a party his right to pursue his claim in Court. Further, a Court of law should aim at facilitating litigants rather than hindering them in their quest to have cases determined through trial. But that does not take away the duty of parties to assist the Court in the furtherance of that objective.

Taking into account all the circumstances in this case, the nature of the dispute and the fact that the respondents can be compensated with an order for costs, I find that this is a proper case in which to exercise my wide discretion to set aside the judgment obtained herein and all the consequential orders flowing therefrom.

Ultimately therefore, the applicants' Notice of Motion dated 12th February 2016 is hereby allowed in the following terms:-

> ***1. The judgment dated 29th January 2016 and the subsequent decree issued on 5th February 2016 are hereby set aside.***
>
> ***2. The applicants will pay to the respondents thrown away costs which I assess at Ksh. 30,000 for the inconvenience caused to the respondents. Those costs to be paid within 30 days of this ruling and in default, execution to issue.***
>
> ***3. The applicants shall also meet the costs of this application***.

It is so ordered.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017

Ruling dated, delivered and signed in open Court this 1st day of February 2017

Mr. Mwai for the Applicants present

Mr. Lee Maina for the Respondents absent.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017