



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT

ELC.NO.630 OF 2012

REUBEN MUHAVI MUSUNDI.....PLAINTIFF/RESPONDENT

VERSUS

URUTAGWO MWIRUTI WOMEN GROUP.....DEFENDANT/APPLICANT

RULING

The matter for determination the plaintiff's/Applicant's application dated 23rd May 2016. The applicant has sought for the following prayers:-

- 1. Spent.**
- 2. That the honourable court be pleased to grant leave for the matter to be reopened for further hearing of the defendant's case.**
- 3. That the cost be provided for.**

The application is supported by the grounds stated on the face of the application and on the annexed affidavit of **Muchangi Nduati Ngingo**.

These grounds are:-

- 1. That this matter came up for hearing on 4th May 2016 before the Honourable Lady Justice Gacheru.**
- 2. That the matter proceeded ex parte as the defendant and their advocates did not attend court by reason of error made by the court clerk who wrongly diarized the matter as coming for hearing the following day (ie 5th May 2016 instead of 4th May 2016)**
- 3. That the error was not intentional and was inadvertent due to human error and is excusable.**
- 4. That no prejudice would be visited on the plaintiff if the application is granted and it would be in interest of substantial justice that the defendant be accorded a hearing in the premises.**

In his Supporting affidavit **Muchangi Nduati Ngingo** reiterated the averments on the grounds in support of the application and averred that the matter came up for hearing on **4th May 2016** and proceeded ex parte due to no-attendance of the defendant and his advocates. The deponent deposed that failure to attend court

was due to error in the diarisation of the date where their court clerk indicated the matter was coming up for hearing on **5th May 2016** instead of **4th May 2016** as per annexure “**MNN1**”

The deponent further averred that they believe the confusion arose since the same clients had another matter coming on **4th May 2016** and was absolutely an indeliberate human error not intended to embarrass or delay the hearing of the matter and that it would be in the interest of substantial justice that the defendant be accorded a hearing of its case so that this matter being a land case can be determined on the merits.

The deponent further averred that the mistake/error is excusable in the circumstances and no feasible prejudice would be suffered on the plaintiff if the application is allowed.

The application is opposed and **Reuben Muhavi Musundi** swore a Replying Affidavit and averred that the application dated **23rd May 2016** seeks to assist an indolent advocate that intentionally failed to appear in court for the hearing of the case. The plaintiff/respondent averred that it is not true that the hearing notice of the matter was misdiazied as no affidavit has been sworn by the alleged clerk who is an employee of the applicant to confirm the same. The applicant further averred that the supposed pages of the diary attached thereof, nothing in the said pages indicate that the diary belong to the alleged Law Firm and that it could be a diary belonging to any other person. The deponent further deposed that the applicants have created an excuse that is intended to deter the respondent from getting justice out of the matter.

The application was canvassed by way of written submissions. The Law Firm of **Muchangi Nduati & Company Advocates** for the defendant filed their written submissions **25th October 2016**, and urged the court to allow the application as prayed . They relied on decided case of **Maina versus Muriuki HCC NO.1079 of 1980** read together with case of **Patel versus EA Cargo Handling Services Ltd (1974)EA at page 76** where the court held that:-

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.....”

It was submitted that it is trite law that mistake of an advocate should not be visited on the client especially where no prejudice would be visited on the other party as in this case.

Law Firm of **Mudeshi Muhanda & Co. Advocates** for the plaintiff filed their written submissions on **13th December 2016** and urged the court to disregard the said application and proceed to make determination on the matter.

It was submitted that he who comes to Equity must come with clean hands and not the indolent, the defendant was served with hearing notice but ignored the same and cannot come to the courts of Equity seeking for mercy when fully contributed to what has come of him.

This court has now considered the instant **Notice of Motion** and annexures thereto. The Court has also considered the relevant provisions of law and the **Written Submissions** and makes the following findings.

It is not in doubt that the Plaintiff filed this suit against the Defendant on **24th September 2012**. Subsequently the Defendant filed its statements of Defence on **25th October 2012**, and denied all the allegations made in the Plaint. Further the Defendant prayed for dismissal of the Plaintiff’s suit. The Defendant also filed a **Notice of Preliminary Objection** which was argued and a Ruling delivered on **23rd September 2014**. Thereafter the parties complied with Order 11 and the matter was certified ready for hearing on **7th October 2015**. The Court has noted that the Defendant did indeed comply with **Order 11** by filing the witness statements and bundle of documents. The matter was set down for hearing on **4th May 2016**, wherein the Defendant and their Advocate were absent in court. The court observed that there was a proper **Return of service** and allowed the matter to proceed for hearing exparte.

Subsequently, the Plaintiff gave evidence for himself and called no other witness. Further the court directed the Plaintiff to file **Written Submissions** within a period of **30 days** and matter was to be mentioned on **21st June 2016** for a Judgment date.

However, before the matter could be mentioned for a Judgment date, the Defendant filed the Instant **Notice of Motion** dated **23rd May 2016**, and sought to be granted leave for the matter to be re-opened for further hearing of the Defendants case. The Defendant/applicant alleged that the matter proceeded *ex parte* as their advocate had wrongly diarized the matter as coming for hearing on **5th May 2016**, instead of **4th May 2016**. A copy of the said diary was attached as **MNN1**. The applicant further averred that the error was not intentional and was inadvertent due to human error and therefore excusable.

The said application is contested and the Plaintiff filed a **Replying Affidavit** and averred that the Defendant was indolent and their advocate intentionally failed to appear in Court for hearing of the case. Further that the Defendant/Applicant who intentionally failed to appear in Court have created an excuse that is intended to delay the Respondent from getting Justice out of the matter.

The **Notice of Motion** was canvassed by way of **written Submissions** which this court has carefully considered. The application is anchored under Sections **1A, 1B and 3A** of the Civil Procedure Act which sections deals with the overriding objective of the Act which is to ensure and facilitate the **just, expeditious** and **proportionate** disposal of all Civil matters before the Court. The Court further has a duty to further the overriding objective and ensure that the same has been observed during the adjudication of all civil disputes. **Section 3A** of the said Act donates the inherent power to Court to make such Orders that are necessary for ensuring that end of justice is met and also prevent abuse of the Court process.

Further this Court is guided by the provisions, of **Article 159 (2)(d)** of the **Constitution of Kenya** which enjoins the Court to administer justice without undue regard to procedural technicalities. The duty of the Court is to ensure that substantive justice is done to both parties.

It is indeed true that the Defendant did not turn up in Court for hearing of the matter and the Return of Service showed that the Defendants advocate had been served with a Hearing Notice. The applicant has alleged that the Court Clerk of its advocate misdiarized the hearing date. If that is the case, the mistake of the advocate should not be visited on the party. Further, it is evident that the Defendant has participated in the preparation of this suit. The Court's main aim should be administration of substantive justice by ensuring that each party has been heard. There is indeed on record a defence filed by the defendant. As was held in the case of **Maina Vs Muriuki , HCCC No. 1079 of 1980** where **O. Kubasu J** quoted with approval the case of **Patel vs E.A Canjo Hanling Services Ltd (1974) E.A 75**, where **Sir William Duffus P** held that:

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules----“

Being guided by the cited provisions of the law and the decided cases, the Court finds that no prejudice would be occasioned to the Plaintiff/Respondent if the instant **Notice of Motion** is allowed. For the above reason, the Court finds that the Notice of Motion dated **23rd May 2016**, is merited. The same is allowed entirely in terms of prayer No. 2.

That the Honourable court be pleased to grant leave for the matter be

re-opened for further hearing of the defendant's case.

However, the Defendant/Applicant to pay a throw away costs of Kshs.10,000/= to the Plaintiff/Respondent.

The suit property is situate in Nairobi County. The matter is now re-opened and transferred back to Milimani ELC for further hearing and finalization.

It is so ordered.

Dated, Signed and Delivered this 24th May 2017.

L.GACHERU

JUDGE

In the presence of;

Court Clerk: Rachael

Plaintiff/Respondent: Absent

Defendant/Applicant: Absent

Court: *Ruling read in open Court in the absence of the parties and their Advocates though date taken in court in the presence of Advocate for the Plaintiff/Respondent. This matter to be mentioned on 14/6/2017 before any ELC Judge in Milimani for further directions on the hearing of the main suit.*

L.GACHERU

JUDGE