REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1075 OF 2016

JANE MUCHIKU KIMEMIA…….....……PLAINTIFF/APPLICANT

VERSUS

JOHN MWENJA NGUMBA (Sued in his capacity as Executor of the Will of the late

ANDREW KIMANI NGUMBA…….....……. DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 3rd September 2016 in which he sought a temporary injunction against the Defendant/Respondent restraining him from selling, letting, leasing or in any manner interfering with Plot No. 17 comprised in LR No. 74/12. On 14th November 2016, the applicant obtained ex-parte interim orders and the application was fixed for inter-partes hearing on 28th November, 2016.

2. When the application was called out for hearing on 28th November 2016, the applicant's lawyer was not in court. The advocate for the respondent called for its dismissal with costs for non-attendance. The trial Judge dismissed the application with costs to the respondent for non-attendance. Later on the same day, the applicant's lawyer filed an application under certificate of urgency in which he sought interim orders of injunction and reinstatement of the application which had been dismissed.

3. The notice of motion dated 28th November 2016 was placed before Justice Okong'o on 29th November 2016. The Judge granted interim orders and directed that the application be placed before the Judge who was dealing with the application which had been dismissed. Interim orders were subsequently extended until the counsel for parties agreed to dispose of the application by way of written submissions.

4. The applicant contends that on the date of hearing of the application which had been fixed on 28th November 2016, Mr. Albert Murambi an advocate who was acting for the applicant had instructed his colleague Mr. Jusa Ambani to hold his brief and proceed to seek the court's leave to file a further affidavit. The advocate who had been asked to hold brief appeared before the court where the application was to be heard but stepped out to go and instruct an advocate to hold his brief in the Anti-Corruption Court. When the advocate came back, he found that the application had been called out and dismissed for non-attendance.

5. The applicant contends that non-attendance in court on 28th November 2016 was not deliberate and that it is excusable. The applicant further contends that mistakes of counsel should not be visited on the client.

6. The respondent has opposed the applicant's application on the grounds that no good explanation has been given as to why the applicant's advocates did not attend court on 28th November 2016. That the injunction orders which the applicant had been granted were granted ex-parte and that the same should not be granted and or reinstated.

7. I have carefully considered the applicant's ap0plciation as well as the opposition thereto by the respondent. The only issue for determination in this application is whether the applicant has demonstrated that his advocates had a reasonable ground for failure to attend court on 28th November 2016.

8. The applicant's counsel had written a letter to the respondent's lawyers on 16th November 2016 intimating their intention to seek leave of the court to file a further affidavit. The respondent's counsel had been served with a hearing notice for 28th November 2016 which hearing notice had been received under protest on the ground that the date was not convenient to them. This shows that the applicant's advocates were keen to proceed with the matter. They instructed an advocate who appeared in court on that day but stepped out briefly to go and instruct a counsel to hold his brief in the Anti-Corruption Court No. 2 only to come and find that the application had been dismissed at the instance of counsel for the respondent.

9. What happened on 28th November 2016 is excusable and has been adequately explained. Mistakes of counsel should not be visited on an innocent litigant. This is a clear case where the discretion of the court ought to be exercised in favour of the applicant. The upshot of this is that the applicant's notice of motion dated 28th November 2016 is allowed with the result that the notice of motion dated 3rd September 2016 which was dismissed on 28th November 2016 is hereby reinstated. The interim orders which had been given on 14th November 2016 are reinstated and shall remain in force until inter-partes hearing of notice of motion dated 3rd September 2016 which should be set down for hearing expeditiously. Costs of the application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Nairobi on this **15th** day of **June,** 2017

E. O. OBAGA

JUDGE

In the presence of:-

M/s Nyamai for Plaintiff/Applicant

M/s Kiamba for Defendant/Respondent

Court Assistant - Hilda