



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 55 OF 2017

ALLAN KAMAU GICHUHI.....PLAINTIFF/APPLICANT

VS

SAMUEL GICHUHI KIMANI

alias SAMUEL MAINA GICHUHI.....1ST DEFENDANT/RESPONDENT

ARTHUR KIMANI GICHUHI.....2ND DEFENDANT/RESPONDENT

SAMSON NGAHU GICHUHI.....3RD DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 14th August 2017 made under order 12 Rule 2,3,6 and 7 and Order 17 of the Civil Procedure Rules and Section 1A,1B and 3A of the Civil Procedure Act the Applicant seeks orders that:

a. That the Honourable Court be pleased to set aside the orders made on 20/07/2017 dismissing the plaintiff's suit and reinstate it for hearing.

b. That the costs be provided for.

2. The application is grounded on the grounds set out on the face of the application namely: -

a. The plaintiff was present in Court.

b. The plaintiff Counsel was involved before the High Court in Nyeri in a certificate of Urgency in case Number HCA 60/16.

c. That it is in the best interest of justice that the orders sought be granted.

3. The application is supported by the affidavits Allan Kamau Gichuhi, the Plaintiff and his learned Counsel Charles Muchemi Karweru. The applicant invoked the Court's inherent jurisdiction and overriding objectives under Sections 1A, 1B and 3 and 3A of the Civil Procedure Act and the powers of the Court under Order 12 rule 7 of the Civil Procedure Rules to set aside orders dismissing the suit for non-attendance. The plaintiff deponed that he was present in Court the same day when the matter was called out. That he was aware that his Counsel was running late as he had another matter in Nyeri High Court. That the absence of his Advocate in Court should not have resulted in his case being dismissed. He pleaded that his case be reinstated.

4. The Learned Counsel deponed in his affidavit and in his submissions, that he was held up in Nyeri High Court aforesaid (attached is a copy of his Court diary) and that though he asked a colleague Mr. Ndegwa to apply for the file to be set aside, he arrived when the matter had been dismissed. That he apologizes to the Court and prays that his mistakes should not be visited on his client with the consequence that he is denied the opportunity to be heard. That the respondents will not suffer any prejudice that cannot be assuaged by an award of costs. That the plaintiff's case raises triable issues to be addressed by this Court and pleads with the Court to exercise its discretion to reinstate the case so that the plaintiff can prosecute his claims in Court. He did admit that he should have organized his diary better and that the delay was unintentional.

5. As expected, the application is opposed by the defendants through a replying affidavit sworn by the 1st defendant. He avers that the file was called three times before the orders were given. The defendant admits that the plaintiff was in Court and addressed the Court and insisted that he would not proceed with his case in the absence of his Advocate leaving the Court with no option but to dismiss the case for want for prosecution after having accommodated the plaintiff's Advocate. Further he prayed for the dismissal of the plaintiff's claim as it lacks merit and is not legitimate.

6. The Court record discloses that Mr. Ndegwa held brief for the plaintiff's Counsel the first time the file was called out and indicated that he was ready to proceed. On his request, the Court indulged him and placed the file aside until 10.30 am when the Counsel was expected to be in Court. At 10.45 am the file was called out again and the Defendants Counsel informed the Court that he had talked to the plaintiff's Counsel and was on his way to Court and that he had requested that the file be put aside till 11.20 am. Later at 11.25 am the case was called again for the third time and the plaintiff's Advocate was not in Court. Though the plaintiff was not recorded as being present in Court, at some point the plaintiff rose and did inform the Court that his lawyer was on the way. It is on the third time that the Court dismissed the suit.

7. The Court is empowered under Order 12 rule 3(1) to dismiss a case as follows; -

"If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court".

Though the plaintiff was in Court (albeit his presence was not recorded because his Advocate's brief was being held by Mr Ndegwa Advocate), he did not indicate to the Court that he was ready to proceed with the hearing of his case in the absence of his Advocate but instead gave the impression that he wanted his lawyer to be present in Court for the hearing of his case. It is not true that he was ignored and or he informed the Court expressly that he was ready to prosecute his case and that he was denied the opportunity to do so.

8. The decision to set aside or vary a judgment or order is guided by the provisions of Order 12 rule 7 which is discretionary depending on the circumstances of the case. It states as follows; -

"Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just".

9. By dint of order 12 rule 7 aforesaid this Court has discretion to set aside any orders upon terms that it considers just. The principles that guide the Court in its exercise of discretion are set out in the case of **Patel Vs East Africa Handling Services Limited (1974) E.A** where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties. That the Court must satisfy itself that there is a defense on merits that is to say that there must be a triable issue which raises a prima facie case which should go to trial for adjudication. I have looked at the claims in the plaint and I note that the suit relates to subdivision, registration and ownership of inheritance of land among the parties herein who are members of one family. I hold and find that these are issues that should be afforded a hearing at the trial so that justice may be done to the parties.

10. In the case of **Shah – v- Mbogo & Anor (1967) E.A 470** the Court of Appeal for Eastern African held:-

“applying the principle that the Court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.

11. This application was brought on 14/8/17 soon after the order of dismissal of the suit which means without much delay. The Advocate profusely apologized to the Court for delay, seeking indulgence that his mistakes should not be visited upon his innocent client and that his client’s interests not to be jeopardized for his mistake. Indeed, he admitted that he ought to have planned his diary better. In the case of **Belinda Murai & Others – Vs – Amos Wainaina [1978] KLR 278** per Madan JA (as he then), cited with approval in the Nyeri CA 18/2013 (supra), that the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.” In this case it is the delay of the Advocate to attend Court that led to the dismissal of the suit for want of prosecution.

I am also satisfied that the conduct of the party and his Advocate were not intended to obstruct or delay the cause of justice. That notwithstanding, the learned Advocate of the Plaintiff admitted that he should have planned his diary better to enable him handle his client cases instead of having cases in two superior Courts (Nyeri & Muranga) approximately 80 kilometers apart the same day which do not allow him much time to move from one Court to another. That being the case the conduct of the Advocate is unacceptable and cannot be tolerated by the Court as it slows the administration of justice.

12. Cognizant of the provisions of fair hearing in the Constitution of Kenya, 2010 which states that every person’s right to have any dispute determined be decided fairly, coupled with Art 159 (2) (d) of the said constitution, which obliges the Court to do justice to all without undue regard to technicalities, in addition, the Civil Procedure Act under Section 1A and 1B of the Civil Procedure Act which mandates this Court to do substantive justice and not to dwell on technicalities, and adopting the dicta of the Court of Appeal observed in **Richard Ncharpi – Vs – IEBC & 2 Others [2013] EKLK** as follows;

“Nowadays pendulums have swung and the Courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities.”

I am satisfied that the respondents will not suffer prejudice that cannot be met by an award of costs. I find and hold that this is an application that has merit.

13. The final orders are as follows; -

- a). The application dated 2/4/16 is merited and is hereby allowed with the consequence that the suit filed on the 28/7/2016 is hereby reinstated.
- b). That the parties take steps to list the matter for hearing within the next 30 days.
- c). Costs to the Respondent.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 18TH DAY OF OCTOBER 2017.

J.G. KEMEI

JUDGE