REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 167 OF 2011

GIDEON GILBERT OCHIEL...PLAINTIFF

VERSUS

JANE AKUMU MIGWAMBO…...DEFENDANT

RULING

This suit was filed on 23rd August 2011. The defendant entered appearance and filed a statement of defence on 8th September 2011. On 1st July, 2013, the matter was certified as ready for hearing. On 11th June 2014, the defendant's advocates fixed the suit for hearing on 27th November, 2014. When the suit came up for hearing on that day, only the defendant and her advocate appeared in court. Neither the plaintiff nor his advocate appeared for the hearing. After the court satisfied itself that the plaintiff's advocates were duly served with a hearing notice, the suit was dismissed for non-attendance with costs to the defendant.

The plaintiff has now brought an application by way of Notice of Motion dated 15th May 2015 seeking to set aside the dismissal order and the reinstatement of the suit. The application is premised on grounds that although the plaintiff's advocates were served with a notice for the hearing that was scheduled for 27th November 2014, the date was mistakenly not entered in the said advocates court diary and as such they were not aware that the matter was coming up on that day. That explains why they did not appear in court resulting in the matter being dismissed.

Joy Akinyi, advocate who swore the affidavit in support of the application stated that failure to enter the said hearing date in their diary was not intentional. She stated that, that was a mistake by the plaintiff's advocate which should not be visited upon the plaintiff. She stated that the plaintiff has a good case against the defendant and he would stand condemned unheard if the orders sought are not granted. Counsel stated that it would serve the interest of justice if the orders sought are granted and the parties given an opportunity to be heard on their dispute before a determination is made in the matter. She stated that the plaintiff is ready and willing to pay thrown away costs to the defendant.

The application was opposed by the defendant through grounds of opposition dated 23rd June 2015. The defendant contended that the application is pre-mature, misconceived and bad in law. The defendant contended further that the plaintiff had failed to exhibit due diligence and that allowing the application would amount to sanctioning laxity on the part of the plaintiff who has never taken any step to prosecute the suit. The defendant stated that the plaintiff is guilty of laches as there had been unreasonable and

inordinate delay in bringing the application which has not been sufficiently explained. The defendant contended that the plaintiff's conduct prior to and during these proceedings demonstrated a deliberate and calculated effort to delay, defeat and or obstruct the cause of justice and that the plaintiff is in the circumstances undeserving of the exercise of the court's discretion in his favour.

The application was argued on 8th July 2015. Ms. Akinyi advocate appeared for the plaintiff while Mr. Ochwangi advocate appeared for the defendant. In her submission, Ms. Akinyi reiterated the contents of her affidavit in support of the application which I have highlighted herein above. She submitted that a mistake on the part of the plaintiff's advocates should not be visited upon the plaintiff who has a constitutional right to be heard. Mr.Ochwangi in his submissions in response also relied on the defendant’s grounds of opposition. He submitted that the plaintiff's advocates had exhibited laxity in the matter. He pointed out that it is the defendant's advocates who had fixed the suit for hearing on 27th November 2014 when the same was dismissed for non-attendance. He submitted further that the plaintiff’s application was filed 7 months after the dismissal. He submitted that the application was brought after inordinate delay which has not been explained.

What I need to determine in the present application is whether I should exercise my discretion to set aside the orders issued herein on 27th November 2014. This court has unfettered discretion under Order 12 Rule 7 of the Civil Procedure Rules to set aside or vary an order dismissing a suit for non-attendance upon such terms as it deems just. Order 51 rule 15 of the Civil Procedure Rules also gives the court power to set aside any order made ex parte. Section 3A of the Civil Procedure Act on the other hand gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. The court's discretionary powers must however be exercised judicially. The principles that guide the court in setting aside an ex parte judgement or order were laid out in the case of **Shah –vs- Mbogo & Another (1967) EA 116** as follows:-

> **"...the court’s discretion to set aside an exparte 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”.**

I am of the opinion that the plaintiff’s advocates have offered reasonable excuse for their failure to attend court on 27th November 2014 and for the delay in bringing the present application. The plaintiff’s advocates have admitted that a hearing notice was duly served upon them. They have stated that due to a mistake on their part, the hearing date was not entered in their court diary. They exhibited in support of the application a copy of their court diary for 27th November, 2014 to show that indeed, this suit was not among the cases that they had on that day. On the issue of delay, the plaintiff’s advocates stated that they only came to know that this suit was dismissed on 27th November, 2014 when the defendant’s advocates served them with a notice of taxation on 5th May, 2015. The application herein was filed on 19th May, 2015 just about two weeks from the date when they had notice of the dismissal of the suit. I am of the view that the mistake on the part of the plaintiff's advocates which has been admitted is excusable. There is no evidence that the plaintiff and his advocates failed to appear in court on 27th November 2014 with the aim of obstructing the cause of justice.

Considering that this is a matter involving land, I am of the view that the ends of justice would be better served by allowing the application to pave way for hearing of the dispute on merits. The defendant has not demonstrated that he will suffer prejudice which cannot be compensated by costs if the orders sought are granted. In the case of **Philip Chemwolo & Another –vs- Augustine Kubede (1982-88) KAR 103** Apaloo JA stated as follows:-

> **“Blunder 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 merit. 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 the purpose of imposing discipline".

For the foregoing reasons, I am satisfied that the plaintiff's application dated 15th May 2015 has merit. The application is allowed. The order made herein on 27th November, 2014 is set a side and the suit reinstated for hearing on merit. The plaintiff shall pay to the defendant thrown away costs assesssed at Ksh.10,000 within 14 days from the date hereof in default of which the defendant shall be at liberty to execute for the recovery thereof.

Signed at Nairobi this…….. day of……………….2016.

S.OKONG'O

JUDGE

Delivered and Signed at Kisii this 8th day of April 2016

J.M.MUTUNGI

JUDGE

In the presence of

……………………………......for the Plaintiff

………………………………..for the Defendant