REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L MISC. NO. 28 OF 2016

TERESA CHEBICHII RUTO.....APPLICANT

VERSUS

TALALEI KIPTENAI.....RESPONDENT

RULING

The applicant has come to this court for an order that the court be pleased to set aside its order issued on 3.6.2016 dismissing the application dated 28.5.2016. He prays that the application dated 28.5.2016 be set down for hearing inter-parte on merit. The application is based on grounds that when the application dated 28th May, 2016 came for hearing as scheduled on 3rd June, 2016, counsel for the Applicant had an accident in the bathroom while taking a shower on the morning of 3rd June, 2016 injuring her abdomen hence had to seek urgent medical attention before attending court. That the counsel for the Applicant while rushing to hospital inadvertently forgot her phone in the house hence could not get someone to hold her brief in the matter. That it was difficult for the counsel to agree by consent to reinstate the said application hence rendering the instant application necessary. The counsel for the applicant states that mistakes of counsel should not be visited upon an innocent litigant, in this case the Applicant and that the accident by the Applicant's counsel was not foreseeable. According to counsel, ends of justice will be met by affording each party an opportunity to ventilate his/her case rather than focusing on technicalities. That this application has been filed promptly in utmost good faith. Last but not least, the respondent will not suffer any prejudice as he will have a right of response.

Which application is supported by the affidavit of ***Laureen M. Isiaho learned counsel for the applicant'*** who states that she is an advocate of the High Court of Kenya having the conduct of this matter on behalf of the Applicant hence competent and legally authorized to swear this affidavit. The trial court in Environment and Land Case No. 515 of 2013 delivered its ruling on 27th May, 2016 in which the Applicant and her siblings were granted access and/or utilization of 36 acres comprised in all that parcel of land known as L.R. N. Eldoret Municipality Block 21 (King'ong'o) 2382-2466 for purposes of utilization pending appeal. There was need to have the said portion demarcated to ascertain the acreage for purposes of utilization. However, after delivery of the said ruling in the presence of both counsel for both the Applicant and the respondent, the Applicant informed her that the respondent and/or his children threatened her and her siblings with dire consequences should they utilize the aforesaid portion as ordered by court.

That the Applicant then instructed her to file the application dated 28th May, 2016 for purposes of demarcating the said portion which application she filed under certificate of urgency on the said date. The court then ordered the application be served before close of business for inter parte hearing on 3rd June, 2016 and that service was effected upon the respondent as ordered.

Unfortunately, the applicant's lawyer had an accident in the bathroom while taking a shower on

the morning of 3rd June, 2016 injuring her abdomen hence had to seek urgent medical attention before attending court. While rushing to hospital, she inadvertently forgot her phone in the house hence could not get someone to hold her brief in the matter. That after examination, she rushed to court only to find the honourable Judge making the order of dismissal of the application dated 28.05.2016 for non-attendance. That it was difficult for the counsels to agree by consent to reinstate the said application hence rendering the instant application necessary.

According to M/s Isiaho, representation by the firm of M/s Gicheru & Company Advocates is also in question as they have not filed and/or served any notice of appointment in the miscellaneous application and should the representation be challenged, then the dismissal of the application dated 28.05.2016 would therefore be irregular. She believes that this application has been filed promptly in utmost good faith and that the respondent will not suffer any prejudice as he will have a right of reply.

The application is opposed by the respondent who is informed by his counsel on record that application is bad in law, fatally defective and it cannot be cured by reliance on Article 159(2)(d) of Constitution of Kenya, 2010. That application is an abuse of the court process meant to serve personal interest at the expense of justice. That he is being advised by his counsel on record whose advice he believe to be true that the application by the Applicant has been brought on wrong provisions of the law. That no reason has been given why the Applicant was not before court yet the Applicant knew that her application was scheduled for hearing on the 3rd of June, 2016. That he is being further advised by his counsel on record that filing of Notice of Appointment is a procedure that does not go to the merit of the case as long as counsel has confirmed to the court that they are on record. That the court cannot use its inherent powers where there are specific provisions of the law.

M/s Isiaho learned counsel for the applicant argues that the mistake of counsel should not be visited upon an innocent litigant in this case the applicant. Moreover, that the accident was unforeseeable and that ends of justice will be met by affording each party an opportunity to ventilate their case rather than focusing on technicalities. Moreover, the applicant argues that the Notice of Appointment was filed 6 days after dismissal of the application and that the firm of Gicheru is not properly on record.

Mr. Mathai learned counsel for the respondent argues that the application is bad in law as it has been brought under the wrong provisions of the law. According to Mr. Maathai, a party cannot invoke inherent powers of the court where there are clear provisions of law. He further argues that ***Article 159 (2) d of the Constitution of Kenya envisages*** where procedure can cause injustice and where the application has merit, this particular application lacks merit according to Mr. Maathai. He argues that the applicant ought to have been personally in court to ensure that her agents conducted her matter diligently. On the issue of Notice of Appointment being filed after dismissal of the application, it is argued by Mr. Maathai that it does not affect the merits of the case and that the applicant did not suffer any prejudice.

I have considered the application and do find that the allegations that counsel for the applicant fell in the bathroom and was injured are not controverted. The respondent did not file any affidavit to challenge the allegations but relied on technical arguments such as the application being an abuse of court process. On this issue I do find that the application is not an abuse of court process as it was filed timeously and that the same is not frivolous as it raises issues recognized in law. What was frivolous and vexatious was defined by Ringera J in the case of Trust Bank Limited v Amin Company Ltd & Another(2000) KLR 164 as:

> *"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action"*

On the issue of the application being brought on the wrong provisions of the law, I do find that the omission to state the provisions under which the application is brought or quote the wrong provision does

not prejudice the respondent and that dismissing the application under such technicalities would amount to going against the overriding objective of the Environment and Land Court Act which is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act.

On the argument that no reason has been given why the applicant was not in court on the scheduled date, I do hold that having appointed counsel to act on her behalf the applicant could not be blamed for her counsel's absence as no innocent litigant can be punished for counsel's mistake.

In Phillip Chemowolo & Another -v-Augustine Kubede (1892-88) KAR 103 at 104, Apalloo, JA observed that it does not follow that "because a mistake has been made a party should suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline."

In Belinda Murai & Others - v- Amos Wainaina (1978) LLR 2782 (CALL) Madan, JA stated that "the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.

In *Raila Odinga v. I.E.B.C & others (2013) eKLR,* the Supreme Court of Kenya observed that *Article 159(2) (d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.*

*Both parties seek to rely on **Article 159 (2) d of the Constitution of Kenya** to correct their procedural mistakes. The applicant' seeks to apply the article to rectify his failure to refer to the right provision of law whilst the respondent seeks to rely on the said article to cure his failure to file the notice of appointment before the dismissal of the suit. I do find that in both circumstances, the facts and the circumstances of the case are suitable for the application of **Article 159 (2) d of the Constitution of Kenya**. In the applicant's case, the procedural defects are not prejudicial to the respondent as the matter has been fully determined on merits in view of the judgment of court and the ruling in the application for stay of execution while in the respondents case the firm of Gicheru has been appearing for the respondent and in any case the firm of Keter & co has not objected to the firm of Gicheru representing the respondent.*

*As stated earlier, the respondent has not controverted the reasons given by counsel for the applicant for her failure to attend court thus she had an accident in her bathroom as a result of which she got injured and had to go to hospital for treatment instead of coming to court. This is not the first time the court is being asked to exercise it's discretion. **As was stated by Duffus P in Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E:***

> **"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such 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 to fetter the wide discretion given it by the rules." Secondly, as Harris J said in Shah v Mbogo [1967] EA 116 at 123B: "This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice." That judgment was approved by the Court of Appeal in Mbogo v Shah [1968] EA 93. And in Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA said at 51: "I consider that under order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."**

In the instant case, I do find that the applicant is entitled to the orders sought as her advocate was involved in an accident before she left for court and had to rush to hospital. Moreover, there was no delay in filing this application. Consequently I do allow the application with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF JUNE, 2016.

ANTONY OMBWAYO

JUDGE