



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT AT ELDORET

ENVIRONMENT & LAND CASE NUMBER 60 OF 2013

ESTHER ATIENO ABABU.....PLAINTIFF

- V E R S U S -

SAMUEL GITHEGI KINYANJUI.....1ST DEFENDANT

HURUMA FARMERS COMPANY LIMITED.....2ND DEFENDANT

R U L I N G

The application is dated 23/5/2016 wherein the applicant prays for orders that the honourable court be pleased to set aside the orders made *ex parte* dismissing the Plaintiff's suit and all other consequential orders thereto and that the honourable court be pleased to reinstate the Plaintiff's suit, and order that same to proceed from where it had reached. The costs of this application be in the cause.

The application is based on grounds the plaintiff's case was dismissed for want of prosecution without her being notified. It was the mistake of her counsel A.G.A. Etyang who failed to serve her with an application to cease acting. The plaintiff's case relates to land and it is an arguable case with high chances of success and it is in the best interest of justice that this suit be reinstated so that it can be heard and determined on merit by the court.

The application is supported by the affidavit of Esther Atieno Ababu who states that she appointed the firm of A.G.A Etyang & Company Advocates to act for her interests in this matter and used to visit her advocates office several times to know the status of her case, and she was told that everything was in place, and that they were still waiting for a hearing date. She became impatient and visited the firm of Andambi and Company for advise who visited the registry on 18th May, 2016, and called for the court file, which upon perusing, he noted that her case was dismissed for want of prosecution by the Court without any notice to her, reason being that, on 19th October, 2015 Plaintiff's counsel was asked to serve the plaintiff with application to cease acting within 21 days. The Plaintiff was never served with the said application which was filed on 13th October, 2015, as per Court records. Mr. Andambi Advocates informed the Plaintiff that the matter was dismissed on 28th January, 2016, when no lawyer had appeared in Court. The Plaintiff's case relates to land and it is an arguable case with high chances of success, and it is in the best interest of justice that, this suit be reinstated so that it can be hear and determined on merit. The mistake of the Plaintiff's Advocate A.G.A. Etyang & Company Advocates, should not be visited upon her.

The 1st Defendant filed grounds of opposition stating that:-

The 1st Defendant filed grounds of opposition stating that:-

(i) The application is incompetent

(ii) The application has been brought after a long and inordinate delay.

(iii) The Plaintiff is guilty of laches and for failure to fix the matter for hearing.

(iv) No useful purpose will be gained in setting aside the dismissal order.

(v) Mistake of the Plaintiff's Advocate should not be visited upon the Defendants

I have considered the application supporting affidavit and grounds of opposition and do find that the applicant has satisfied me that the delay in prosecution of the suit was caused by his lawyer A.G. A. Etyang who failed to turn up in court on the date of dismissal. Moreover, it appears that there was an intention by the firm of A.G.A. Etyang to cease acting but did not serve the plaintiff with the application to cease acting which was filed on 13 October 2015. The suit was dismissed on 28/1/2016 and the application was made on 23/5/2016. Though there is inordinate delay, the same is explained by the Plaintiff who states that he was not aware until on the 18/5/2016 when his new Advocates visited the registry and confirmed that the suit had been dismissed for want of prosecution.

It is an established principle in our courts as set out in the *locus classicus* case of Mbogo & another v Shah, EALR 1968 page 13. where it was held that a Court of Appeal will not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.

The court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

In the case of Belinda Murai & others vs Amoi Wainaina, [1978] LLR 2782 (CALL) Madan, J.A. (as he then was) described what constitutes a mistake in the following words:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. 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. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

In the case of: Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apaloo, J.A. (as he then was), posited 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.”*

The firm of A.G.A. Etyang appears to have abandoned the Plaintiffs matter without obtaining the order to cease acting and therefore making a mistake that led to the dismissal of the suit. The dismissal of the suit was due to the plaintiff's advocates' mistake that ought not be visited on the plaintiff. In the circumstances of this case, I do exercise my discretion by setting aside the orders made *ex parte* dismissing the Plaintiff's suit and all other consequential orders thereto and that the honourable court be pleased to reinstate the Plaintiff's suit, and direct that same to proceed from where it had reached. Costs in the cause. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF AUGUST, 2016

ANTONY OMBWAYO

JUDGE