

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 393 OF 2013

CHURCH COMMISSIONERS FOR KENYA.....PLAINTIFF

VERSUS

KISAJU DEVELOPMENT TRUST.....1ST DEFENDANT

OLKEJUADO COUNTY COUNCIL.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 5th July 2012 in which the Plaintiff/Applicant seeks that this court do set aside the orders dismissing this suit issued on 15th May 2012 and reinstate the suit for full hearing upon its merits on such terms as the court may deem just and expedient.

The Application is premised on the grounds appearing on the face of it together with 3 Supporting Affidavits. The first Supporting Affidavit is sworn by Christopher Kagoizi Kibisu, the Trust Management Officer of the Plaintiff, sworn on 5th July 2012 in which he averred that in March 2012, he attended the hearing of this matter before Lady Justice Khaminwa (deceased) and was prepared for the hearing as the Plaintiff's first witness. He further averred that due to pressure of work, the court adjourned the matter and the advocates took new dates. He averred that the Plaintiff's Advocate, Mr. S.K. Metto informed him subsequently that the matter would be heard on 16th, 17 and 18th May 2012 and he duly diarized these dates. He stated further that on 16th May 2012, he attended court and learnt that the same was not listed. He indicated that upon making enquiries at the court's civil registry, he was surprised when he was informed that the matter had come up in court on 14th and 15th May, 2012 and that it was dismissed with costs on 15th May 2012. He averred further that it was then that he realized that the date communicated to him by the Plaintiff's advocate was erroneous and his failure to attend court on 14th or 15th May 2012 was not deliberate but purely as a result of miscommunication from the Plaintiff's advocate which was inadvertent. He concluded by stating that failure to reinstate the suit would occasion the Plaintiff great loss as enumerated in the pleadings generally and in particular the application in respect of which injunctive orders had been issued by Justice J.B. Ojwang (as he then was) to last until the hearing and determination of the suit. The second Supporting Affidavit was sworn by Jeremiah Mutunkei Ole Ntayaia Sein, the Manager of the Plaintiff, on 5th July 2012 in which he made similar averments as Christopher Kagoizi Kibisu. The third Supporting Affidavit was sworn by Desmond Mtula, the Managing Director of the Plaintiff, on 5th July 2012 wherein he averred that the Plaintiff instituted these proceedings in their capacity as trustees of Anglican Church generally and in particular the Diocese of Kajiado and their programme known as Maasai Rural Training Institute and that the Plaintiff has actively been involved in having the matter set down for hearing. He further averred that upon learning of the dismissal orders, the former advocate of the Plaintiff lodged a Notice of Motion dated 16th May 2012 by which it sought to set aside the dismissal orders but that the Defendants filed a Preliminary Objection that the Plaintiff's Advocate may not have taken out a practicing certificate at the time of lodging the said application. He indicated further that being apprehensive of this position the Plaintiff instructed new advocates to file a fresh application being this Application. He added that the step taken by the Plaintiff to file a fresh

application and instruct new counsel will lead to the fulfillment of the overriding objection of civil procedure which is to facilitate a just, expeditious, proportionate and affordable resolution of civil disputes.

I have carefully considered the affidavits filed and submissions made by the Plaintiff, the 1st and 2nd defendants. The issue for determination is whether to set aside the orders dismissing this suit issued by the late Lady Justice Joyce Khaminwa on 15th May 2012 and thereby reinstate the suit as prayed by the Plaintiff. In the case of **Pithon Waweru Maina –vs- Thuka Mugiria (1982-1988) 1 KAR 171**, the court held that the power to set aside judgment entered in default of a party to attend a hearing like in the present case is discretionary save that the main concerns of the court should be to do justice to the parties and if the court exercises its discretion to set aside the judgment, it should do so on such terms as may be just. The Plaintiff has brought this application under **order 12 Rule 7 of the Civil Procedure Rules, 2010**. **Order 12 rule 3** allows a court to dismiss a suit for non-attendance. **Rule 7** then allows the aggrieved party to apply for the setting aside of that order and reinstatement of the suit. This court in making this determination is guided by the decision in **Shah v. Mbogo [1967] EA 116, where the Court of Appeal held that,**

“Applying the principles 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.”

What the court needs to determine is whether the failure to attend court by the Plaintiff on 14th and 15th May 2012 constitutes an excusable mistake or error or it was meant to deliberately delay the cause of justice. The explanation given by the Plaintiff as to why they did not attend court on 14th and 15th May 2012 seems to me quite plausible. Their Advocate at the time notified them of the wrong hearing dates of 16th, 17th and 18th May 2012 instead of 14th and 15th May 2012. Their assertion that they attended court on 16th May 2012 only to find that the suit had been dismissed the previous day is corroborated by the fact that they filed an application on the same date, 16th May 2012, seeking for the setting aside of the dismissal orders which application was later withdrawn and replaced with this Application. I am satisfied that the Plaintiff’s failure to attend court on 14th and 15th May 2012 for the hearing of this suit was inadvertent and as a result of an honest mistake or error on the part of their advocate. In the circumstances, I hereby allow this Application with costs to the Defendants. I also direct that this suit be set down for hearing within the next 3 months failing which it stands dismissed.

DELIVERED AND SIGNED IN NAIROBI THIS 29TH DAY OF MAY 2015.

MARY M. GITUMBI

JUDGE