

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 63 OF 2008

IDOW TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

MOHAMED JIMALE.....1ST DEFENDANT

OSMAN ALI MOHAMED.....2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

RULING

The application for the court's determination is the Notice of Motion dated 10th March 2014 brought under **Section 1A, 1B, and 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule (1)** of the **Civil Procedure Rules** seeking for orders that the Honourable Court be pleased to set aside the orders dismissing this suit made on 17th February 2014 and to reinstate the plaintiffs suit.

This application is supported by the grounds stated on the face of the application and the supporting affidavit of Moses Munoko an advocate of the High Court of Kenya representing the Plaintiff in this matter. He averred that he delayed in attending court on 17th February 2014 due to a traffic snarl up that was caused by an accident and had blocked the road. He stated that even though he tried to avoid the traffic at that road the road he opted to use was also affected by the accident that had occurred earlier and he arrived in court at around 9:25am when the court was midway in the day's cause list yet his matter had been listed as the first in the cause list. He sought to peruse the court file and found out that his colleagues had been in court and one had asked the court to dismiss the suit for non attendance which the court granted. He further averred that his client was in court but when the judge began his duty for the day, the client stepped out to inquire his whereabouts and when he came back to court he found that the matter had already been called and orders of dismissal granted by the court. He pleaded that the mistake and or predicaments of counsel should not be visited upon the client and regretted the non attendance on time which he said was beyond his control. He now seeks that for the sake of justice and discretion of the court, the orders made on 17th February 2014 dismissing the suit be set aside and the suit reinstated. He further stated that the subject matter in the suit was substantial where the Plaintiff stood to incur great financial loss should the case not be reinstated and that the Defendants would not suffer any prejudice if this case is reinstated.

This application is opposed by the 2nd Defendant's advocate Jackson Omwega who swore a Replying Affidavit. He averred that the Plaintiff took the hearing date of 17th February 2014 and served them a hearing notice informing them of the scheduled date, that on the material day, Ms Moraa was present for the 2nd Defendant and Mr. Ilago was present for the 3rd Defendant but there was no attendance for the Plaintiff and the 1st Defendant, that the 2nd Defendant applied for the suit to be dismissed for non-attendance which application was granted by the court upon being satisfied that both the Plaintiff and the advocate were absent in court. He further averred that the absence of the Plaintiff was an indication that he had lost interest in the suit or was keen in delaying the hearing and determination of the suit, that the

Plaintiff delayed in filing this application after its dismissal having filed it a month and a half after its dismissal therefore the application should be dismissed and if the court is inclined to allow the application, they sought to be awarded the costs.

The 1 and 3rd Defendants did not file any reply to the Plaintiff's application.

Parties canvassed this application by way of written submissions. The Plaintiff in its submissions stated that it was unfair for the 2nd Defendant to ask the court to dismiss the suit when it had sought to adjourn the matter and further that this suit should be reinstated, heard and determined on merit and not be dismissed on a technicality. Counsel stated that non-attendance was not an incurable mistake and relied on the Court of Appeal case of **Richard Ncharpi Leiyagu-vs- Independent Electoral Boundaries Commission & 20 others CA No. 18 of 2013** where the court quoted the case of **Belinda Murai & Others -vs- - Amoi Wainaina (1975) LLR 2782 (ALL)** where Madan J described a mistake as pardonable and that the door of justice is not closed because a mistake has been made by a lawyer who ought to know better. Counsel beseeched the court to reinstate the suit.

The 2nd Defendant in his submissions stated that the mistake of an advocate can be visited on the client therefore the Plaintiff does not deserve the discretion of the court to set aside the dismissal order. He further stated that the advocate did not annex any document to show that there was an accident on the road and that the Plaintiff was in court on the material day. He further submitted that litigation must come to an end adding that the Plaintiff filed this suit in 2008 and had never been ready to prosecute the matter which has caused unnecessary anxiety to the 2nd Defendant. He further submitted that the Plaintiff cannot submit that since the 2nd Defendant was not ready to proceed it should be given time to prosecute the suit as it wished. Counsel concluded his submissions by stating that there was inordinate delay in filing this application and relied on the case of **Ivita - vs - Kyumbu (1984) KLR 411**. He urged the court to dismiss the Plaintiff's application.

I have carefully considered the affidavits filed and submissions made by the Plaintiff and the 2nd Defendant. The issue for determination is whether the Plaintiff has provided a plausible reason to have this suit reinstated for hearing. As was stated in the case of **Pithon Waweru Maina - vs- Thuka Mugiria (1982-1988) 1KAR 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**. **Order 12 rule 3** allows a court to dismiss a suit for non-attendance. **Rule 7** then allows the aggrieved party apply for the setting aside of that order and reinstatement of the suit. What the court needs to determine is whether the failure to attend court by the Plaintiffs on 17th February 2014 constitutes an excusable mistake or error or it was meant to deliberately delay the cause of justice. 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."**

The Plaintiff's advocate stated in his affidavit that on the material day of the hearing he was caught up in a traffic snarl up and when he tried to use an alternative route he found that the said road was also affected by the overflow from the road that experienced the accident. He alleges to have managed to be in court at around 9:25 but he was already too late to have his matter heard as it was listed the first in the cause list. He further stated that the Plaintiff having not seen him in court when the court commenced its business of the day walked out of the court to find out his whereabouts and when he came back the matter was already called out and dismissed. I am content that this is a suitable case in which this court should exercise its discretion in setting aside the order of dismissal of this suit made on 17th February 2014. I have considered the 2nd Defendant's opposition in his replying affidavit and I am of the opinion that the grounds stated in his affidavit would not justify the refusal of this application and in fact he has sought for costs of the application should the court allow this application. The 2nd Defendant has not indicated that

he would suffer any serious prejudice or miscarriage of justice if the Plaintiff's application is allowed. The Plaintiff's advocate made a mistake that caused his client the prosecution of this suit on merit. However, the courts on many occasions have emphasized the need to allow litigants have their day before the seat of justice to have matters determined on merit. In the Court of Appeal case of **Philip Chemwolo & Another vs. Augustine Kubede (1982-1988) KAR 1036** Apaloo, J A. stated that, "*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.*" I am of the opinion that the prejudice and loss likely to be suffered by the Defendants herein arising from the granting of the orders sought can be compensated for in costs. In the premises the orders made on 17th February 2014 dismissing the Plaintiff's suit be and are hereby set aside and an order reinstating the suit be and is hereby granted by this court. The Plaintiff should pay the 2nd Defendant the costs of the application.

DELIVERED AND DATED IN NAIROBI THIS 15TH

DAY OF MAY 2015.

MARY M. GITUMBI

JUDGE