Ndung'u v Githiora & Njuguna (Suing as the Registered Trustees of Christian Fellowship Church) & another (Environment and Land Miscellaneous Application E006 of 2023) [2024] KEELC 1314 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1314 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023

LN GACHERU, J

MARCH 7, 2024

BETWEEN

KABUTI NDUNG'U ALIAS FRANCIS KABUTI NDUNG'U ..... APPELLANT

AND

PATRICK NGIGI GITHIORA & FRANCIS KINUTHIA NJUGUNA (SUING AS THE REGISTERED TRUSTEES OF CHRISTIAN FELLOWSHIP CHURCH) ..... 1ST RESPONDENT

GRACE COMMISSION GLOBAL CHURCH ..... 2ND RESPONDENT

RULING

1. The Appellant/Applicant herein Kabuti Ndungu alias Francis Kabuti Ndungu, filed this Chamber Summons Application dated 7th August 2023, brought under the High Court (Practice & Procedure Rules (Part 1 Rule 3) and the *Judicature Act*, wherein, he sought for the following orders: -

    I. That the Order made on the 26th of July 2023, by this court, dismissing the Applicant's applications filed herein on the 9th of January 2023, and 6th July 2023, together with all other consequential Orders be reviewed, varied and/or set aside.

    II. That the two applications filed herein, dated 9th January 2023, and 6th July 2023, be reinstated for hearing on an urgent and priority basis.

    III. That the costs of this application be provided for.

2. This Chamber Summons Application is supported by the grounds stated on the face of it, and the Supporting Affidavit of Jackline Wanjiru Mwangi , Advocate sworn on 7th August 2023.

3. The Applicant seeks for setting aside of this Court's Order issued on 26th July 2023, which dismissed his two applications dated 9th January 2023, and 6th July 2023 respectively for non-attendance of the court.

4. Further, the Applicant seeks for the reinstatement of his two applications dated 9th January 2023 and 6th July 2023, which were dismissed by the Court on 26th July 2023, due to non-attendance by the Applicant or his Counsel. The Applicant explained that the failure to attend Court was due to the non-admission of his advocate onto the virtual Court during the hearing on 26th July 2023.

5. The Application is supported by Jackline Wanjiru Mwangi, (Advocate), vide her Supporting Affidavit sworn on 7th August 2023, wherein she averred that there was no wrongdoing on her part regarding the non-appearance in Court on 26th July 2023.

6. It was her allegations that she appeared very early in court on 26th July 2023, ready to prosecute the two Applications. However, she was informed that the Applications would be heard online, and she logged in the virtual court using the link on the cause list.

7. She averred that she remained in the lobby from 9.00am till 10.30am, when she went back to court room to inquire about the virtual court. That to her shock, the Court Assistant told her that the two Applications had been dismissed for no-attendance.

8. It was her further allegations that when the two applications were dismissed, she was still waiting at the lobby, since she had not been admitted, though the Court Assistant insisted that he had admitted everyone who was waiting in the Lobby

9. She further averred that she wrote a complaint letter, since it is the Court that failed to admit her into the virtual Platform on 26th July 2023, leading to her non-appearance in the Court, which resulted in dismissal of the two Applications dated 9th January 2023 and 6th July 2023.

10. It was the Applicant's contention that the delay occasioned in lodging the instant Application is not so inordinate as to be thought of as inexcusable and further, in the interests of justice, the Orders issued by this Court on 26th July 2023, should to be reviewed and the Application seeking leave to Appeal out of time be reinstated for hearing on merits.

11. The Respondent herein Patrick Ngigi Githiora, opposed the instant Application through his Replying Affidavit dated 28th July 2023, wherein he averred that the instant Application is misconceived, scandalous and an abuse of the Court process.

12. It was his further averments that the Application has been brought with inordinate delay, having been filed 2 weeks after the dismissal Orders were made, which delay has not been explained at all.

13. He further averred that there is nothing to reinstate, as the matter had been heard at Kandara Principal Magistrates Court as MCL&E NO. 4 OF 2021, and concluded way back on 6th September 2022.

    That a decree in favour of the Respondent was issued as is evident from annexture PNG.

14. It was also averred that once the decree was issued, the applicant herein filed an application before the trial court, which application was for review, and the same was unsuccessful as is evident from annexture PNG2.

15. It was his contention that what was dismissed was a Misc Application seeking for injunction, which application was procedurally wrong, was an abuse of the court process, since the matter in Kandara Law Courts had been heard by a court of competent jurisdiction. It was further contended that there was nothing to reinstate as the dismissed application having been a non-starter, in the first place.

16. The Respondent also averred that litigation must come to an end, and being the successful party, the Respondent should be allowed to enjoy the fruits of their judgement.

17. The instant application was canvassed by way of written submissions. All parties herein filed their written submissions which the court has considered. The Applicant filed his submissions on 26th October 2023, through Wanjiru Mwangi & Co Advocates, wherein, it was submitted that the absence of the Applicant's advocate on the date of the hearing and then dismissal of the two Applications was not in any way caused by the Applicant and/or his advocate, but fault of the court. However, it was submitted that even if the counsel was at fault, the said mistake should not be visited upon the Applicant.

18. Reliance was placed in the case of Belinda Murai & Others –vs- Amos Wainaina (1978) LLR where the court stated;

> "A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a 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 person of experience who ought to have known better. The court may not forgive or condone it, but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

20. Further reliance was placed in the case of CMC Holdings Ltd vs Nzioki (2004) 1 KLR 173, where the Court held;

> "In law, the discretion that a court of law has, in deciding whether or not to set aside an exparte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would..... not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here..... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate..."

19. It was the Applicant further submissions that the decision to reinstate a suit is discretionary, and this court has powers to reinstate the suit and accord the applicant a hearing. Further, that the reinstatement will not prejudice the Respondent herein.

20. On his part, the Respondent filed his submissions on 5th February 2024, through Kanyi Kiruchi & Co Advocates, wherein he raised one. Issues for determination being; - whether the Applications dated 9th January 2023, and 6th July 2023, should be reinstated;

21. On whether the Applications should be reinstated, the Respondent relied on the case of Ivita vs Kyumbu(1984) KLR 441, where the court set out the test to be considered in an application for reinstatement, wherein it was held; -' the test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant."

22. The Respondent further submitted that there was inordinate delay in bringing the instant application as it was brought two weeks after the dismissal of the two applications. It was his further submissions that since the Applicant was seeking justice, he ought to have moved swiftly to file the instant application after dismissal.

23. Further, he submitted that he is successful party before the trial court, and he should be allowed to enjoy the fruits of his judgement, and litigation must come to an end, and there is no valid reasons for reinstatement. He urged the court to dismiss the instant application with costs to the Respondent.

24. On the issue of costs, reliance was placed in the case of Levben Products vs Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR) at 227, where it was stated:

> " It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is the matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

25. The above are the pleadings herein in support and against the instant Application, the rival written submissions and the cited authorities, which this court has carefully read and considered too. The court has considered the relevant provisions of law, especially sections 1A,1B, and 3A of the *Civil Procedure Act*, and finds the single issue for determination is; - whether the instant application is merited?

26. There is no doubt that on 26th July 2023, the two Applications filed by the Applicant herein were set for hearing, wherein even after the file was called out, the Applicant and his advocate were absent. The court proceeded to dismiss the two Applications for want of prosecution.

27. It is also evident that after the dismissal, the counsel for the Applicant wrote a letter dated 31st July 2023, wherein she tried to accuse the Court Assistant of this Court for failing to admit her due to ulterior motives or unexplained reasons.

28. However, this court should put the record straight, admission of parties to the virtual Platform is done by the Court Assistant and also the court itself. The trial judge has admission rights, and the proceedings are done through a big screen. The Court ordinarily see all parties waiting at the Lobby, and admits them as the proceedings move along. The counsel for the Applicant, was indeed not waiting at the lobby. If she logged in, as alleged by herself, she must have logged in long after the virtual platform session had ended.

29. Further, after going through the Cause list of the day, this court normally asks whether there is a party remaining unattended, and if there is, the court always give the party/advocate the directions issued, dismissals included. On this particular day, there was no one waiting at the Lobby by the time the court concluded going through the cause list.

30. Therefore, the Applicant's counsel should be candid, own up to her mistake, and stop blaming the Court Assistant. The Court Assistant could not have failed to know that the Applications had been dismissed, because he was present during the virtual court, and by giving the Applicant's counsel the position of the file without referring to anywhere else was not evidence of having interest in the matter. These allegations by the Applicant's Counsel are misguided and unfounded.

31. Be that as it may, it is evident that the Applicant and his counsel were not present in virtual Court/ Platform, when the file was called out. As provided by Order 12 Rule 3(1) of the Civil Procedure Rules, the Applications were dismissed for nonattendance of the Applicant.

32. The said Order 12 Rule 3(1) provides;

"(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

33. However, Order 12 Rule 7, of the Civil Procedure Rules, provides where under the said Order, judgement has been entered or suit dismissed, the court on application may set aside or vary the Judgement or Order upon such terms as may be just. Therefore, the Applicant herein who was aggrieved by the Order of dismissal of the Applications ought to have filed his application under this provision of law.

34. This Court has noted that the Applicant filed the instant application under the wrong provisions of the law. But being guided by Article 159(2)(d) of *the Constitution*, and Order 51 rule 10(2), of Civil Procedure Rules, which provides that no Application shall be defeated on a technicality or for want of form that does not affect the substance of the Application, the court finds that the said omission does not affect the substance of this Application, and will proceed to determine it on its substance and merit,

35. The Applicant has sought for setting aside of the dismissal order and or varying the said order. It is trite that order 12 Rule 7 of Civil Procedure Rules, grants court discretion to set aside exparte order issued under this order. This court has discretion to grant the orders sought herein, but the said discretion has to be exercised judiciously. See the case of Kenya Pipeline Co. Ltd vs Maguta Production Ltd (2014) eKLR, where the Court held;

> " .... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit."

36. It is trite that reinstatement of a suit is at the discretion of the Court, which discretion ought to be exercised in a just manner. This was held so in the case of Bilha Ngonyo Isaac vs Kembu Farm Ltd & Another (2018) e KLR, where the Court reiterated the decision in Shah vs Mbogo 7 another (1967), E.A 116, wherein the Court held;

> " This discretion to set aside as exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it's not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice... "However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.

37. The Applicant has alleged that his two applications were dismissed on 26th July 2023, not because of his fault or his advocate's fault, but because the court failed to admit his counsel to the virtual platform. This court has found this excuse to be far-fetched, since the court is very clear that by the time the virtual Court/Platform session was terminated or ended, there was no one or party waiting at the lobby. Thus, the counsel for the Applicant cannot be heard to blame the Court Assistant for failing to admit her.

38. This is a case wherein the court finds that there was indeed a mistake or blunder on the part of counsel for the Applicant. However, it is trite that mistakes of a counsel must not be visited on a party. See the case of Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR, where the court stated as follows;

> "It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by costs .... However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court."
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> See also the case of Patriotic Guards Ltd v. James Kipchirchir Sambu (2018) Eklr, in which the court held that;
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> "The appellant has also argued that mistakes of counsel should not be visited on an innocent litigant. In the Tana case (supra), the Court observed as follows, from past decisions that courts will readily excuse a misstate of counsel if it affords justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

39. Further, it is evident that mistakes will continue to be made, but such mistakes should not be allowed to cause hardships on any party. See the case of Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009 where it was held that:

> "It is widely accepted principle of law that a litigant should not suffer because of his Advocate's oversight."

40. This Court has read, analyzed and reviewed the pleadings, documents and evidence tendered by the parties in the instant application. The court too has considered the provisions of Section 3A of the *Civil Procedure Act*, which donates the power to this Court to issue orders that are necessary for the end of justice to be met, and to prevent abuse of the Court process. Similarly, Order 12 Rule 7 of the Civil Procedure Rules, grants the Court discretion to set aside orders of the court on such terms that it deems just to do so.

41. Though the Applicant did not invoke this Court's mandate using the correct provisions of the law, the court will refer to them, and will be guided by them in determining this Application.

42. It is not in doubt that this Court has a constitutional obligation to render substantive justice to litigants who appear before it. Article 159(2)(d) of *the Constitution* of Kenya provides as follows:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> d) justice shall be administered without undue regard to procedural technicalities."

43. In the case of Kenya Ports Authority V Kenya Power & Lighting Co. Limited (2012) eKLR, the court defined a procedural technicality in the following terms:

> "... "procedural technicalities" may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all -encompassing definition, but I think

people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended."

44. Further, in the case of James Muriithi Ngotho & 4 Others vs Judicial Service Commission (2012) eKLR, the court too defined a "procedural technicality" to mean a lapse in form that does not go to the root of the suit.

45. On the question of how the Court ought to treat procedural technicalities, reliance will be placed in the case of Anchor Limited v Sports Kenya [2017] eKLR, where the court held as follows:

> " I can think of no better example of a technicality than citing a wrong provision of the law being used as a basis to dismiss a suit or application".

46. It is trite that it is the duty of the Court, litigants as well as their counsels to ensure that matters are concluded expeditiously and without delay. Sections 1A &1B, of *Civil Procedure Act* implore Courts to facilitate expeditious disposal of matters, before them.

47. In line with the above objective, when the Applicant and/or his counsel failed to turn up in Court on 26th July 2023, to prosecute his two Applications without explanation, the Court had no option but to dismiss the Applications dated 9th January 2023 and 6th July 2023, bearing in mind that there is a judgment in place, and the Respondent is entitled to enjoy the fruits of his judgement.

48. However, the Applicants has come back to Court to seek reinstatement of the two applications, which this court has found were dismissed due to the blunders or mistakes of the Applicant's counsel. This blunder should not cause the Applicant here to be prejudiced or be punished for them.

49. The Applicant has attached a letter of complaint to the Administrator of this Court alleging that the non-admission of his counsel onto the Virtual Platform during the hearing on 26th July 2023, when both of his Applications were dismissed by the Court, was caused by the Court Assistant. This court has found the explanation therein not plausible and is just a blame game.

    However, the court still insist that mistake of a counsel should not be visited upon a party. The aim of the court is to do justice, and no party should arbitrary be removed from the seat of justice.

50. Though the instant application is opposed by the Respondent, this Court finds and holds that Section 3A of the *Civil Procedure Act*, gives this Court discretion over matters that are before it, including questions of whether or not to reinstate a dismissed suit/Application, which had been dismissed for non- attendance by the Applicants.

51. Further, Order 12 Rule 7, gives Court discretion to set aside its exparte order upon an application, by and aggrieved party. The Court finds that the Applicant's has not given a convincing explanation as to why his advocate or himself in person failed to attend Court on 26th July 2023, wherein their Applications dated 9th January 2023 and 6th July 2023, were dismissed for non-attendance. However, that was a blunder of his advocate, and he should not be made to suffer for the mistake of his counsel.

52. For the above reasons, the Court allows the Applicant's applications dated 7th August 2023, and proceeds to reinstate the two Application dated 9th January 2023, and 6th July 2023, for hearing, and the two be heard and be determined on merit. However, the Court directs that the two Post-judgement applications should be prosecuted expeditiously without any further delay. The Applicant is ordered to pay to the Respondent's a throw away costs of 5000/= payable before the next hearing date.

53. Consequently, the Applicant's Application dated 7th August 2023, is allowed, on condition that Applicant's pay throw away costs of 5000/= to the Respondent before the two applications proceed for hearing.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7TH DAY OF MARCH 2024.

L. GACHERU

JUDGE.

Delivered online in the presence of:

M/s Wanjiru Mwangi for the Applicant.

Mr Wachira H/B for Kanyi Kiruchi for Respondent

Joel Njonjo – Court Assistant.