



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 410 OF 2017

PATRICK MWAURA GICHUIYA.....PLAINTIFF/APPLICANT

VS

MARY MUIRIGO WAINAINA.....DEFENDANT/RESPONDENT

RULING

1. The application seeks to reinstate the Applicant's application dated the 27/8/19 which was dismissed on the 18/11/19 for non-attendance.

2. The grounds of the application are stated as thus; the Advocate who had conduct of the matter arrived Court late. That the non-attendance was non intentional and inexcusable error occasioned by the road diversion as one approaches Muranga Town. That the mistake of Counsel should not be visited on the client the Applicant in this case. He urged the Court to grant the application in the interests of justice.

3. Victor Ngechu Maina deponed in his Supporting Affidavit that on the material date of 18/11/2019 he came to Court with instructions to appear in 4 matters which were cause listed for the day, the current case being one of them. On arrival he depones that he found that the application had been dismissed for non attendance. That he encountered a diversion of the road leading to the Court which delayed him in reaching the Court in time. That failure to be in Court in time was a blunder on his part and mistake of Counsel which should not be visited upon the client.

4. The deponent urged the Court to administer justice in accordance with Article 159 of the Constitution read together with Section 3 of the ELC Act to grant the application. He placed reliance on the case of **Philip & Anor Vs Augustine Kibede (19982 -88) KLR 103** where the Court held 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 mind the broad equity approach to this matter is that unless there is fraud foe intention to overact, there is no error or default that cannot be put right by payment of costs. The Court exists as is often said for deciding the rights of the parties and not imposing discipline.”

5. Further that the Respondent stands to suffer no prejudice if the prayers sought are granted.

6. On the 18/11/19 when the matter came up for hearing the Applicant and his Counsel were absent in Court. The Respondents Counsel urged the Court to dismiss the application for non-attendance of the Applicant and his Counsel. The Counsel rightly noted

that the hearing date was taken by the consent of both parties.

7. The power vested in the trial Court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 Rule 7 of the Civil Procedure Rules. It is a discretionary power that is exercised by the Court.

8. The application though served was not opposed by the Respondents. I see no prejudice that the Respondents will suffer if the application is heard on its merits. The application has been brought without any delay.

9. Going by the explanations given by the Applicant and his Counsel on record, and guided by Article 159 of the Constitution to do substantive justice, I grant the application on condition that the Notice of Motion dated the 27/8/19 be listed for hearing within the next 30 days from the date hereof in default of which it stands dismissed with no further orders of this honourable Court.

10. Costs shall be met by the Applicant in favour of the Respondent.

11. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Jessee Kariuki for the Plaintiff/Applicant

Mr Wahome Gikonyo HB for Ms Mwangangi for the Defendant/Respondent

Irene and Kuiyaki, Court Assistants



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