Case Number:	Environment & Land Case 478 of 2017 (Formerly Nairobi Elc Case No.574 of 2016)
Date Delivered:	13 Apr 2018
Case Class:	Civil
Court:	High Court at Thika
Case Action:	Ruling
Judge:	Lucy Nyambura Gacheru
Citation:	Florence Nyaguthii Muchemi v Attorney General & another [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Kiambu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC CASE NO.478 OF 2017

(FORMERLY NAIROBI ELC CASE NO.574 OF 2016)

FLORENCE NYAGUTHII MUCHEMI…..…… PLAINTIFF/RESPONDENT

-VERSUS-

THE HON. ATTORNEY GENERAL…….....1ST DEFENDANT/APPLICANT

THE COMMISSIONER OF PRISONS……2ND DEFENDANT/APPLICANT

RULING

The 1st Defendant/Applicant brought this ***Notice of Motion*** application dated ***11th December 2017***, which is premised under various provisions of the law and sought for various orders. Among the orders sought are;-

1) Spent.

2) Spent.

3) That this Honourable Court be pleased to stay any further hearing of this suit pending the hearing and determination of this application.

4) That this Honourable Court be pleased to set aside the proceedings before this Honourable Court of 2nd November 2017.

5) That this Honourable Court be pleased to order that the matter herein starts denovo

6) That this Honourable Court be pleased to allow the Defendants to tender evidence in support of the defence and counter-claim filed herein dated 12th August 2016.

7) That the costs of this application be in cause.

This application is premised upon the following grounds;-

1) That the matter proceeded for hearing and the Plaintiff tendered her evidence and closed her case in the absence of the Defendants.

2) That it came to the notice of the Counsel handling the suit that the matter proceeded on 2nd November 2017, through the Plaintiff's submissions dated 23rd November 2017 and served on the Defendants on 29th November 2017.

3) That the State Counsel on record made a phone call to the Plaintiff's Counsel to inquire how the matter proceeded without a hearing notice served upon him and was informed by Messrs Wanjama of Wanjama & Co. Advocates, the Counsel on record for the Plaintiff that the hearing Notice was served upon the Defendants hence the hearing scheduled for 2nd November 2017 proceeded accordingly.

4) That this hearing Notice was not brought to the attention of the Counsel handling the matter and appears to have been misplaced at the registry hence non-attendance by the Counsel on the hearing date.

5) That the non-attendance was not intentional and the suit land is public land hence the need to allow the instant application to afford the Defendant an opportunity to defend the suit vide the Defence and Counter-claim filed.

6) That there are triable issues in the suit herein and it will be fair and just that the Defendants be allowed to tender their evidence and the mistake of non-attendance by the Counsel should not be mete against the 2nd Defendant in occupation of the suit land.

7) That due to the public interest of the Defendants' claim as the suit land is claimed to be within Thika Prisons and as confirmed by the Plaintiff in her pleadings as being denied access by the 2nd Defendant demonstrates an admission of a contested issue that the suit land is within Thika Prisons.

8) That no undue prejudice will be caused if the application is allowed and the proceedings of 2nd November 2017 set aside, the matter begins de novo and all the parties will have opportunity to test the authenticity of each other's evidence.

9) That it is just and mete in the circumstances of the case for orders sought to be granted.

The application is also premised upon the ***Supporting Affidavit*** of ***Motari Matunda***, a ***State Counsel*** in the office of the ***Attorney General*** who has the conduct of the matter. He reiterated most of the grounds in support of the application and further averred that though he was the one handling the matter, the ***Hearing Notice*** was never brought to his attention as it appears that the same was misplaced in their Registry and thus his non-attendance. He further averred that his non-attendance was not intentional and since the land is public land, he should be allowed to test the authenticity of the Plaintiff's evidence and also be granted an opportunity to advance the Defendants' defence. He also reiterated that no prejudice will be caused to the Plaintiff if the application is allowed. He urged the Court to allow the instant application.

The application is contested by the Plaintiff herein. ***Ezekiel N. K. Wanjama***, Advocate for the Applicant swore a ***Replying Affidavit*** and averred that all along the Defendants and their advocates have exhibited all signs of disinterested parties as they failed to comply with Order 11 of the Civil Procedure Rules and it was not a surprise that there was no attendance on the part of the Defendants on the hearing date. That the said failure to attend was consistent with the Defendants previous conduct in the suit herein. He further averred that the instant application is not brought in good faith and further contended that the Defendants are not deserving of the discretionary reliefs sought herein. Further that the Plaintiff will be prejudiced if the matter is heard *denovo* as the Defendants will have an unfair advantage of preparing their evidence long after they have read and studied the Plaintiff's evidence. He urged the Court to disallow the Defendants' instant application and dismiss it with costs.

The application was canvassed by way of ***written submissions*** which this Court has carefully read and considered. The Court has also considered the court records and the relevant provisions of law.

The application is premised under Article 50 of the Constitution which gives guidelines on the fair hearing of all the matters before the court. ***Article 50(1) of the Constitution*** provides:-

50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Further this application is also anchored under ***Article 159 (2)(d) of the Constitution*** which also provides that:-

"In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

a) …

b) …

c) …

d) Justice shall be administered without undue regard to procedural technicalities.

e) …

Therefore as the Court embarks on determining whether to allow or disallow this application, it will take into account that it has a duty to ensure that matters before it are resolved fairly and as provided by the law. Further, the Court will also be guided by the principle of ensuring that justice is administered without undue technicalities.

It is evident that the Plaintiff filed this suit on ***30th May 2016*** against the Defendants and sought for various orders among them;-

a) A declaratory order that the 2nd Defendant and/or Kenya Prisons Service have no right or interest in or over all that piece of land known as Title No.Thika Municipality/Block 9/256, and that therefore the 2nd Defendant's actions of fencing off the said piece of land and denying the Plaintiff access thereto is illegal.

The Defendants filed a ***Defence*** and a ***Counter-claim***. The matter proceeded for ***Pre-trial directions*** on ***8th March 2017*** in the absence of the Defendants. The matter was certified ready for hearing and the

Plaintiff was directed to take a hearing date in the Registry. A hearing date was taken in the absence of the Defendants and the Court noted that the Defendants had not shown any interest as they failed to comply with Order 11 Civil Procedure Rules.

It is also evident that when matter came up for hearing on ***2nd November 2017***, the Defendants were also absent though served with a Hearing Notice. The Court after been satisfied that the Affidavit of Service was proper, allowed the matter to proceed exparte as provided by ***Order 12 Rule 2(a)*** of the ***Civil Procedure Rules*** which provides that:-

"If on the date fixed for hearing after the suit has been called on for hearing outside the court, only the Plaintiff attend, if the court is satisfied;

a) That Notice of Hearing was duly served, it may proceed exparte.

The Court was indeed satisfied with the service of the hearing Notice and allowed the Plaintiff to proceed with her evidence exparte.

However, the Defendants' Advocate has now alleged that he was not aware of the hearing Notice as it was never brought to his attention by their Registry and thus the filing of this instant application.

Order 12, Rule 7 of the ***Civil Procedure Rules*** grants the court discretion to set aside any exparte proceedings upon such terms. It provides as follows:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

Therefore from the above provision of law, it is clear that court has discretion to set aside any exparte proceedings or orders but as usual the said discretion must be exercised judicially. See the case of ***CMC Holdings Ltd…Vs…Nzioki (2004) (CAK) 1 KLR 173***, where the Court of Appeal held that:-

"In an application for setting aside exparte Judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously".

Further in the case of ***Sametract…Vs…Maqs Motors Ltd, Kisumu HCCC No.45 of 1996***, the Court held that:-

"It is trite law that the court is vested with unfettered discretion in dealing with application for setting aside Judgement. It is also a well-known rule that the discretion must be exercised judicially".

Though the above decided cases deals with setting aside exparte Judgements, the rationale is similar to the instant application where the court is called upon to set aside exparte proceedings.

In considering whether to set aside the said proceedings or not, the Court will be guided by the following principles.

1) Whether there is sufficient reasons or explanation for non-attendance.

2) Whether there was unreasonable delay in filing the application

3) Whether there will be any prejudice.

The Applicants have alleged that failure to attend court was not intentional but was occasioned by the mistake on the part of the Attorney General's Registry which failed to bring to the attention of the State Counsel handling this matter the service of the hearing Notice. It was further explained that the suit herein involves a public property and that the Defendants should not be penalized due to the mistake of their advocate. The Applicants relied on the case of ***Murai…Vs…Wainaina (No.4) 1982 KLR 38***, where the Court stated that:-

"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 interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of Justice".

The Court has considered the explanation given by the Defendants/Applicants and finds that though Defendants had not complied with Order 11, failure by the Attorney General's Registry to bring to the attention of the State Counsel the service of the hearing Notice is sufficient reasons or explanation for non-attendance of the Defendants on the date of the hearing. The Court will take into account that mistakes of an advocate should not be visited on his client. See the case of ***Ahmed…Vs…Highway Carriers (1986) LLR 258 (CAK)***, where the Court

of Appeal held that:

"…a litigant should not suffer for his advocate's mistakes; if the court should be inclined to punish the advocate, it should state so and choose the appropriate punishment without injuring the litigant's rights".

Therefore the Court finds that the explanation given herein by the Defendants/Applicants is sufficient to warrant the court exercise its discretion in their favour.

On whether the application was filed without unreasonable delay, the Applicants alleged that the matter was brought to the attention of the State Counsel who is in conduct of this matter on ***8th December 2017***, when he was served with written submissions for the Plaintiff. The instant application was filed on ***11th December 2017***. Though the exparte hearing was done on ***2nd November 2017***, the Applicants filed the instant application within a reasonable time after it was brought to their attention.

On whether there will be any prejudice that will be occasioned, the Court finds that the Applicants have alleged that the suit property is a public land and they have also filed a Counter-claim. If the orders sought

are not allowed, then the Defendants/Applicants will miss an opportunity to explain their position over the dispute herein. This will occasion prejudice on the Defendants as they will be condemned unheard. The courts duty is to do justice and that should be the guiding factor in deciding this application. See the case of ***Muthaiga Road Trust Company Ltd…Vs…Five Continents Stationers Ltd & 25 Others (2003) KLR 714***, where the Court of Appeal held that:-

"In an application for setting aside, the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules".

The Applicants have explained that the non-attendance of their advocate was due to the mistake in the Attorney General's Registry and that mistake should not be allowed to cause prejudice on the

Applicants part. See the case of ***Remco Ltd…Vs…Mistry Jadua Parbat & Co. Ltd & Others, Nairobi Milimani HCC No.171 of 2001 (1EA 233),*** where the Court held that:-

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, the party should suffer the penalty of not having his case heard on merit. The broad approach is that unless there is fraud or intention to overreach, there is not error or default that cannot be put right by payment of costs. The court is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline".

Having now carefully considered the available evidence and the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and also taking into account that the court has discretion to make such orders that are necessary for ensuring that end of justice is met and that there is no abuse of the court process, the court finds that the Defendants/

Applicants application is merited and is consequently allowed on the following terms:-

a) The Court will stay any further mention for confirmation of filing of submissions and setting of a Judgement date.

b) The Court will set aside the Order of close of the case and will allow the Defendants to cross-examine the Plaintiffs on her evidence already adduced in court.

c) Consequently, the Court declines to order that the matter do start denovo but allows the recall of the Plaintiff for examination by the defence.

d) The Defendants are hereby allowed to tender their evidence in support of their Defence and Counter-claim.

e) The Defendants are granted leave of 15 days from the date hereof to file and serve their witness statements and list of documents to the Plaintiff.

f) The Defendants to pay a throw away cost of Kshs.20,000/= to the Plaintiff herein.

g) Costs of the application shall be in the cause.

It is so ordered.

Dated, Signed and ***Delivered*** at ***Thika*** this **13th** day of ***April*** **2018**.

L. GACHERU

JUDGE

In the presence of

Mr. Biviu holding brief for Mr. Wanjama for Plaintiff/Respondent

Mr. Emaka holding brief for Mr. Motari for Defendants/Applicants

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

13/4/2018