



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**ELC CASE NO.121 OF 2009**

RAPHAEL MITAU KING'ALYA )

RICHARD MUEMA ) ..... PLAINTIFFS

VERSUS

KILONZO KING'ALYA )

MUSILI KING'ALYA ) ..... DEFENDANTS

AND

MBUSI MULANGA ..... INTERESTED PARTY

**RULING**

1. The Application for **ruling** is dated **31.7.09** seeking orders to set aside orders of dismissal of an Application dated 23.11.07 issued on 21.7.09 and dismissed application be reinstated for hearing on merit. The Application is based on orders IXC Rule 8 Civil Procedure Rules and Section 3A Civil Procedure Act and all enabling provisions of the Law.
2. The Application is supported by the Affidavit of Eric Mutua sworn on 3.7.09. The Defendant has not filed a replying affidavit to oppose it and thus is deemed to concede. The Plaintiffs have filed a replying Affidavit sworn by Julius Oenge on 21.4.2010. The Applicant case is that the matter herein was transferred to Machakos from Nairobi on 24.3.09 and was fixed for hearing on 21.7.09. The Applicant's advocate telephoned Plaintiff's Advocate and informed him that he was unwell and thus was to seek for an adjournment. He thus sent advocate Ogotti to hold brief and adjourn. Mr. Ogotti attended court but the matter was not listed as he was inadvertently looking for original matter No.473/1985.
3. The court had not communicated the new number upon transfer of suit from Nairobi. Later it turned out that the matter was listed under the new number and thus it was dismissed for non-attendance. The Applicants thus seek court to exercise discretion in his favour and reinstate the dismissed application. The Respondents/Plaintiffs oppose the application and submit that, the instant suit was filed long time ago and judgment was entered in their favour on 25.4.1990.
4. The Interested Party never sought to be enjoined all the time the suit proceeded up to conclusion nor seek to set aside the judgment since 1990 (over 20 years). The suit land was decreed to be shared between Plaintiffs and defendants. The Respondent avers that the right advocate to swear affidavit is the one who attended court in Machakos when application was dismissed but not Erick Mutua.
5. The Respondent submits that the Applicants are deemed to have known the new number allocated

- to the matter since they are the ones who fixed application for hearing on 21.7.09. The Respondent submits that the Applicant is concealing material facts. The suit land was transferred to the Plaintiffs of which the Interested Party is not challenging. In view of the circumstances and age of the instant case it would not serve any purpose in allowing application herein as this will be giving a widow for revisiting of a judgment given 1990. Litigations have to come to an end.
6. The court has gone through the averments by the parties and the submissions. Order 10 Rule 11 Civil Procedure Rules, 2010 order IXB of the old civil procedure rules mandate court to set aside judgment or order upon such terms as are just. In the case of **Sameer African Ltd vs. Aggarwal & Sons Ltd.(2013) eKLR** the court held that;

***“while the court would exercise its discretion to avoid injustice or hardships resulting from inadvertence or excusable mistakes or errors, it would not assist a person who has deliberately sought to obstruct or delay the course of justice”***

7. The Applicant has shown that the matter was transferred to Machakos from Nairobi and the number of the case changed. The advocate sent informed the deponent of the supporting Affidavit that he made honest mistake to look for old number on the cause-list and as it was not appearing he thus thought that the matter was not listed. The Respondents/Plaintiffs concentrate their energy in arguing on the merit of the dismissed application by demonstrating the age of the case and the fact that the judgment is over 20 years old, without the Applicant impugning it or even seeking to be enjoined as a party thereto.
8. The court guided by the **SAMEER CASE *supra***; finds that the Respondent has not demonstrated that the Applicant is trying to obstruct course of justice or delay the same. The Applicant was not heard on his application which was dismissed due to an honest mistake. The court finds that there is no prejudice to be occasioned to the Plaintiffs in reinstating the application dismissed on 21.7.09.
9. The Respondent will have the occasion to raise all the issues as pertains to delay and prejudice in re-opening the impugned judgment. The court therefore makes the following orders:
1. The orders issued on 21.7.09 are set aside.
  2. The Application dated 23.7.07 is reinstated for hearing on a date to be fixed on priority basis.
  3. The Costs to the Plaintiffs assessed at KShs.5000/- to be paid before the next hearing date.

**Dated and Delivered at Machakos, this 27<sup>th</sup> day of February, 2015.**

**CHARLES KARIUKI**

**JUDGE**