



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 73 OF 2016**

**JONATHAN MBAYA MKETTA**

**RAYMOND KARISA NGUMBAO**

**ABIBA SHABAN Suing as officials of NYANGORO FARMERS CBO.....PLAINTIFFS/ APPLICANTS**

**-VERSUS-**

**WITU NYANGORO RANCH (DA) CO. LTD**

**BETTER GLOBE FOREST LTD**

**NATIONAL LAND COMMISSION**

**COUNTY GOVERNMENT OF LAMU.....DEFENDANTS/ RESPONDENTS**

**RULING**

This ruling is in respect of a Notice of Motion dated 15<sup>th</sup> October, 2021 by the Plaintiff/Applicant seeking the following orders: -

***a) Spent***

***b) That the Honourable Court be pleased to review, vary and/or set aside its orders made on 13/10/2021 effectively allowing the Respondent's application for dismissal of suit for want of prosecution.***

***c) That this Honourable Court be please to reinstate the main suit and the application for both to be heard and determined on merit.***

***d) That costs of the Application be provided for.***

Counsel agreed to canvas the Application vied written submissions which were duly filed.

**PLAINTIFFS/APPLICANTS' SUBMISSIONS**

The Application was supported by the grounds on the face of the Application together with the Supporting Affidavit of Counsel for the Applicant sworn on the 15<sup>th</sup> October, 2021 who deponed that when the matter was called out, he was experiencing technical challenges with network connection and by the time he managed to successfully log in at 9.45 a.m the matter had proceeded ex-Parte and a ruling had been delivered.

It was Counsel's submission that the Honourable Court logged out from the virtual platform immediately after the Court was done with the call over hence he did not get an opportunity to recall the matter.

Counsel submitted that upon inquiry from the registry, he found out that the suit had already been dismissed and that his inability to attend to the matter was not intentional but was caused by unforeseen and/or unprecedented circumstances beyond his control.

Counsel further stated that the Plaintiff had opposed the Application for dismissal of the suit for want of prosecution vide a Repling

Affidavit and that the Plaintiff will suffer adverse consequences as they will lose their homes leaving them destitute.

It was Counsel's further submission that the court has discretionary powers to set aside ex parte orders and relied on the case of **Sammy Maina vs Stephen Muriuki** with approval of the leading case of **Patel...Vs....E.A Cargo Handling Services Ltd (1974) EA 75**, held that:-

*“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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 it by the Rules.”*

Counsel further cited the case of in **Elosy Murugi Nyaga- vs- Tharaka Nithi County Government and Another** cited with approval the leading case of **CMC Holdings Limited v Nzioki [2004] 1 KLR 173** to emphasize the issue of the court’s discretion and urged the court to allow the Application as prayed

The Defendant neither filed a response to the application nor submissions.

#### **ANALYSIS AND DETERMINATION.**

The issue for determination is whether there is a basis for the court to exercise its discretionary power to set aside the order of 13<sup>th</sup> October 2020 and reinstate the Plaintiff’s suit which was dismissed for want of prosecution.

Courts have inherent powers to make such orders as may be necessary for the ends of justice to be met as provided for under Section 3A of the **Civil Procedure Act**. Order 51 rule 15 of the **Civil Procedure Rules** gives the court power to set aside any order made ex parte.

In the case of **Ivita vs. Kyumbu (1984) KLR 441** the court laid down the principles to be considered in such a case. First, the court has to consider whether the delay is prolonged and inexcusable and secondly, whether justice can be done despite the delay.

The jurisdiction of the court to review or set aside its decisions is wide and unfettered. In **Shah v Mbogo and Another [1967] EA 116**, the Court of Appeal of East Africa held that: -

*“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”*

The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause to warrant the setting aside of the ex-parte decision or proceedings. In the case of **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that: -

*“Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application....”*

I have considered the explanation given by Counsel for the Plaintiff and the circumstances that made him not to appear in the virtual platform and convinced that sufficient cause has been established. There have been teething problems with the technology and shaky internet connectivity which the Court takes judicial notice of. Each case has to be considered individually and there can be no blanket excuse on the problems of the virtual platform.

In the case of **Richard Nchapai Leiyangu vs IEBC & 2 others (2016) eKLR** where the court expressed itself as follows: -

*“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”*

The Court must exercise discretion judiciously without causing injustice or hardship to any of the parties. I therefore exercise such discretion in favour of the Plaintiff/Applicant, set aside the Ex parte orders date 13<sup>th</sup> October 2021 and order that this suit be fixed for the main hearing. The Application for dismissal for want of prosecution is hereby spent.

Plaintiff to fix this suit for hearing within 30 days’ failure to which the suit stands dismissed. Each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF MARCH, 2022.**

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on**

*the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.*