



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**HCCC NO. 138 OF 2010**

**HARUN RASHID KHATOR - Suing As The Representative Of The Deceased**

**RASHID KHATOR (DECEASED).....PLAINTIFF/RESPONDENT**

**=VERSUS=**

- 1. SUDI HAMISI**
- 2. ALI SOMEO BWANA**
- 3. OMAR MOHAMED**
- 4. KHAMISI KHAMISI**
- 5. ZENA KHAMISI**
- 6. AMANI HAMISI**
- 7. ALI HAMISI**
- 8. ABDALLAHI SWALEH**
- 9. RIZIKI HAMISI**
- 10. STEPHEN BAYA KAINGU**
- 11. KHAMISI OMRA**
- 12. ATHMAN SWALEHE.....DEFENDANTS/APPLICANTS**

**R U L I N G**

**Introduction:**

1. What is before me is the Defendants' Application dated 23<sup>rd</sup> June, 2014 seeking for the following orders;

**(a) THAT the Honorable court be pleased to vary and or set aside the judgment delivered on the 20<sup>th</sup> day of June, 2014.**

**(b) THAT costs of this application be provided for**

**The Defendants'/Applicants' case**

2. The Application is supported by the 1<sup>st</sup> Defendant's Affidavit in which he has deponed that he has the authority of his co-defendants to swear the affidavit.
3. According to the Defendants, they appointed the firm of Okuto & Company Advocates to represent them in this matter. Having filed the Memorandum of Appearance, it was deponed that the said advocate did not inform them about the position of the suit until when they realised the matter had been slated for hearing on 8<sup>th</sup> April 2014.
4. It is the Defendants' case that the matter proceeded for hearing *ex-parte* because of the negligence of their previous advocate on record and that they are in physical occupation and possession of the disputed land.

**The Plaintiff's/Respondent's case:**

5. According to the Plaintiff's Replying Affidavit and Grounds of Opposition, the hearing of this case *ex parte* was consequential upon the failure by the Defendants to file a Defence after appearance and not upon failure to attend court; that the Defendants' counsel was invited and was granted leave to file a defence out of time and that the hearing date was fixed by the consent of the parties.
6. It is the Plaintiff's deposition that the Defendants were not interested in the case and that at all time the Defendants knew that they were not prosecuting the case.
7. The Plaintiff has further deponed that the issue of ownership of the suit property was decided by this court in Malindi HCCC NO. 19 of 2008 (OS) when their claim was dismissed and that they have never filed an appeal against the said decision.

**Submissions:**

8. The Defendants'/Applicants' advocate submitted that it is a general principle that a litigant should not be punished for the "sins" of his counsel; that the court must guard against undue hardship or irreparable loss being caused to a litigant due to his counsel's negligence and that the Defendants had no role to play in matters leading to their advocate's omission.
9. The Defendants' counsel further submitted that the Defendants have a good case considering that they are the ones who started the village and named it Makadara and that they have been in physical possession of the suit property since the 1940's.
10. Counsel relied on the case of **Patel Vs East Africa Cargo Handling Services Ltd (1974) EA 75 and Baraka Apparel EPZ (K) Ltd Vs Rose Ojway t/a Faida 2002 Caterer (2007) eKLR** where it was held that where there is a Defence which raises bona fide triable issues, or even a solitary bone fide issue, the same ought to be allowed to proceed to hearing.
11. On the other hand, the Plaintiff's/Respondent's counsel submitted that even after the Defendants' advocate was allowed by Meoli J to peruse the file on 25<sup>th</sup> June 2012, he never showed up again; that there was inaction on the part of the Defendants' advocate and that this is not a case of an advocate's mistake but a client who was not interested in the case. Counsel relied on the case of **Ketemen & Others Vs Hansel properties Ltd (1998) I ALL ER 38 and Mbogo Vs Shah (1967) E.A 116** to buttress his arguments.
12. While exercising its discretion to set aside an *ex parte* judgment, it was submitted, the court ought to look at the nature of the Defence.
13. Counsel submitted that if the Defendants are alluding the defence of adverse possession, then they are legally barred because their case was heard and dismissed.

**Analysis and findings:**

14. It is not in dispute that the Defendants were served with Summons to Enter Appearance. Indeed,

- the Defendants entered appearance through the firm of Okuto & Co. Advocates on 17<sup>th</sup> December 2010. However, a Defence was never filed.
15. The record shows that on 25<sup>th</sup> June, 2012, Mr. Okuto, counsel for the Defendants/Applicants, informed the court that he was not aware that the matter was coming up for hearing on that day. The Defendants' counsel was given time to file the relevant pleadings in the matter. The matter was then slated for hearing for 30<sup>th</sup> August, 2012.
  16. None of the parties was in court when the matter came up for hearing on 30<sup>th</sup> August 2012.
  17. The matter went into a lull until 13<sup>th</sup> February 2014 when it came up for formal proof and it proceeded in the absence of the Defendants and their advocate.
  18. The Defendants are now blaming their previous advocate for failure to file a Defence or attend court on 13<sup>th</sup> February, 2014 when PW1 testified.
  19. A suit always belongs to a litigant and not an advocate. It is the responsibility of a litigant to find out the position of a suit especially in a situation when the matter has taken inordinately long to be prosecuted.
  20. Where a litigant does not show the efforts he made to find out the status of his suit, the court shall be slow in exercising its discretion to set aside a regular ex parte judgment on the grounds that it is the advocate who should be blamed for non filing of a defence or non-attendance. In the case of **Kettman & Others Vs Hansel properties (1998) 1ALL 38 At 62, Lords Griffins held as follows:**

**“We can no longer afford to show the same indulgence towards the negligent conduct of a litigant as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of negligence of the lawyer to fall on their own heads.....Another factor a judge must weigh in the balance is: the pressure on the courts caused by the great increase in litigation and the consequent necessity. That in the interest of the whole community, legal business should be conducted efficiently.”**

21. Having failed to file a Defence even after the court allowed them to do so, the Defendants cannot now blame their advocates with a view of seeking to have the ex parte judgment set aside when this matter has pending for the last four years.
22. In the case of **Bi-Mach Engineers Ltd Vs James Kahoro Mwangi (2011) e KLR Waki J A** held as follows:

**“The Applicant had a duty to pursue his advocate to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.....there must be an end of litigation and the 12 years delay in concluding the litigation is sufficiently prejudicial to the respondent.”**

23. Even if I am to exercise my discretion in favour of the Defendants to set aside a regular ex parte judgment, I am required to look at the draft defence to ascertain if the Defence raises any triable issues -**See Patel V East Africa Cargo Handling Services LTD (1974) EA 75 and Mbogo Vs Shah (1968) EA 93.**
24. The Defendants did not annex a draft Defence on their Application seeking to set aside the ex-parte judgment. They however annexed the statement of the 1<sup>st</sup> Defendant in which he claims that he has been living on the suit property since 1950.
25. The failure to annex a draft Defence on an application to set aside a regular ex-parte judgment is fatal to such an Application. In the circumstances, I find and hold that the Application is a non-starter on that ground alone.
26. Even if the annexed statement of the 1<sup>st</sup> Defendant is to be taken as the draft Defence, the same cannot be said to have raised any triable issue. I say so because the Defendants' claim over the suit

property is by virtue of the doctrine of adverse possession, which claim was dismissed by Omondi J in Malindi HCCC No. 19 of 2008 (OS). That defence is therefore not available to the Defendants. 27. In the circumstances, and for the reasons I have given, I find and hold that the Defendants' Application dated 23<sup>rd</sup> June, 2014 is unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this **26<sup>th</sup>** day of **September**, 2014.

**O. A. Angote**

**Judge**