



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 11 OF 2018

HANSON MUIDI MUTULA.....1ST PLAINTIFF/APPLICANT
TITUS MUTETI MUTISO.....2ND PLAINTIFF/APPLICANT
JONATHAN MWARE MULI.....3RD PLAINTIFF/APPLICANT
ELIJA MAINGA KAMOSU.....4TH PLAINTIFF/APPLICANT
PATRICIA NDUKU MJUINDI.....5TH PLAINTIFF/APPLICANT
STEPHEN S.K. KISILI.....6TH PLAINTIFF/APPLICANT
ROSE MUTETE MUTISO.....7TH PLAINTIFF/APPLICANT
ROSE MUKENE MUNYWOKI.....8TH PLAINTIFF/APPLICANT
MONICA NDUNGE KIATINI.....9TH PLAINTIFF/APPLICANT

VERSUS

KENNEDY MUTUA NGUNU.....1ST DEFEDANT/RESPONDENT
MBILO MALONZA.....2ND DEFEDANT/RESPONDENT
THE CHIEF LAND REGISTRAR.....3RD DEFEDANT/RESPONDENT
THE MAKUENI COUNTY LAND REGISRTRAR.....4TH DEFEDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 22nd of July 2021 brought under Order 17 Rule 2 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Article 47 of the Constitution and all other enabling provisions of the law, the Applicants are seeking for the following orders;

1) Spent.

2) That this Honourable Court be pleased to set aside and/or vary the orders made on 14th July 2021 dismissing the Plaintiffs suit and reinstate the same.

3) That the cost of this application be provided for.

2. The application is premised on the grounds on the face of the application and on the supporting affidavit of Hanson Muindi sworn on 22nd July 2021.

3. A summary of the grounds and the averments is that the Plaintiffs' suit was dismissed on 14th of July 2021 for want of prosecution. The Applicants averred that on 14th of July 2021 when this matter was scheduled for hearing, they arrived in court early in the morning in readiness for the hearing. They annexed a copy of the court attendance register (Annexure HMM-3) in the supporting affidavit. That on the same day, their Advocate called and informed them that she had instructed her representative one Francis Mutia to have the file placed aside to 11.30 a.m. as she was running late. The Applicants argued that the dismissal of their suit had caused them extreme hardship as they have no other forum to air their grievances. The Applicants contend that the mistake of their Counsel should not be visited upon them. That in any event the counsel is very remorseful for the inconvenience caused.

4. The application was opposed by the 1st Respondent vide the replying affidavit of Alfonse Muema Mbindyo Advocate sworn on 17th of August 2021. Counsel averred that the Plaintiffs have never been ready to proceed with their case.

5. The application was canvassed by way of written submissions. By the time of writing this ruling the 1st Respondent had not filed its submissions. The 2nd Respondent informed the court that it was not opposed to the application.

6. The Plaintiffs' written submissions were filed on 2nd December 2021 which I have considered.

ANALYSIS AND DETERMINATION

7. I have considered the application, the affidavits and the submissions by the Applicants and I find that, the issue for determination is whether the Applicants are entitled to the orders sought.

8. Reinstatement of a suit dismissed for want of prosecution is discretionary. The discretion is couched under **Order 12 rule 7 of the Civil Procedure Rules** which 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.”

9. With regards to setting aside ex parte orders, the **Court of Appeal in CMC Holdings Ltd Vs James Mumo Nzioki (2004) eKLR** observed as follows;

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside an ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our minds not be a proper use of such discretion if the court turns it back to a litigant who clearly demonstrates such an excusable mistake, inadvertance, accident or error. Such exercise of discretion would in our mind be wrong in principle.”

10. In the case of **Simon Waitim Kimani & Three Others Vs Equity Building Society (2010) eKLR** the court held that;

“The courts have discretion generally to reinstate a suit which is dismissed for non-attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and the law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay.”

11. The record shows that when the matter came for hearing on 14th of July 2021 the Applicants and their Counsel were absent. Counsel for the Applicants submitted that she had delegated her assistant to instruct a Counsel to hold her brief as she was attending to a matter before the Machakos Law Courts. Counsel further submitted that due to the Covid 19 protocols, the Applicants were outside the court room waiting for their matter to be called out. I have looked at the court attendance register (annexure HMM-3). It is evident from the court attendance register that the Applicants were first people to enter into the court premises. The Applicants averred that they were desirous to have their matter heard. To this end they filed an affidavit of service (annexure MM-2) on the same day to demonstrate that they had served the Defendants with the hearing notice. I am convinced that the Applicants explanation is plausible.

12. It is evident that the instant application was filed without delay.

13. By disallowing the present application, it will be tantamount to driving away the Applicants from the seat of justice. Article 50(1) of the constitution of Kenya, 2010 entitles every person to a fair hearing. It provides as follows;

“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.”

14. I find that allowing the application will not prejudice the 1st Defendant in any way.

15. In light of the foregoing, the application dated 22nd of July 2021 is allowed in the following terms: -

1) The order dated 14th of July, 2021 dismissing the Plaintiff suit is hereby set aside.

2) The suit herein is hereby reinstated.

3) Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

Ruling signed, dated and delivered in open court this **9th March, 2022.**

IN THE PRESENCE OF: -

Ms Ong'ong'a for the Applicant

Court Assistant – Mr. Kwemboi