



1. **KHALDUN MOHAMMED VAE**
2. **ESTHER TSUMA**
3. **KHAMIS MOHAMMED JAFU**
4. **OMAR MZEE**
5. **ABDALA SAID ABDUL** (suing on their own behalf and on behalf of the other residents and owners of houses without land within Bakarani Estate Mombasa Mainland North.....**PLAINTIFFS**

VERSUS

1. **SULEIMAN H.S HAMED**
2. **AHMED SALIMIN**
3. **THE MUNICIPAL COUNCIL OF MOMBASA.....**
DEFENDANTS

RULING

By chamber Summons Application dated 19th May 2010 the Plaintiffs pray for the following orders:

1. **That this Honourable Court be pleased to set aside the order made on the 9th of December 2009 dismissing the plaintiffs suit for non-attendance**
2. **That this Honourable court be pleased to issue an order reinstating the Plaintiffs suit.**
3. **That the costs be in the cause.**

There is an affidavit in support of the Application sworn by Paul Munyao an advocate dated 19th May 2010 which states that the reason for the non-attendance was due to his failure to diarize the hearing date.

There is no dispute that the hearing notice setting the matter for hearing on the 9th December 2009 was served as admitted in the supporting affidavit.

The 1st and 2nd Defendants filed 3 grounds in opposition to the application by the plaintiffs. They state that:

1. **The application is misconceived, bad in law and is an abuse of the court process.**
2. **The Applicants is guilty of inordinate delay.**

3. There is no reason adduced by the Applicants for failure to attend court.

The 3rd Defendant has also filed grounds of opposition on which are similar to the above ground filed by the 1st and 2nd Defendants.

The counsels for the parties made their oral submissions before me on the 14th July 2010.

In his submission Mr. Jumbale for the Applicants argued that the court has discretion to reinstate the suit. That the non-attendance was as a result of human error and in explaining the delay for making this application it was his submission that they needed to get instructions from the clients.

In reply to the above submission, Mr. Khatib for the 3rd Defendants argued that the applicants were aware of that the matter has been dismissed but waited for 5 months to make this application. He urged the court to dismiss the Application.

I have considered the submissions by the Counsels and it is my considered opinion that there was inordinate delay in bringing this application to reinstate the suit. The blame has been fully owned by the Counsel for the Applicants.

Under Order IXB of the Civil procedure Rules (the old civil procedure Rules) the court has discretion where a suit has been dismissed for non-attendance. It provided in Rule 8:

“Where under this order Judgment has been entered or the suit has been dismissed, the Court on application by summons, may set aside or vary the Judgment or order upon such term are just”.

The courts have in several authorities held that the mistake of advocate should not be visited upon an innocent litigant. I would exercise court’s discretion in favour of the Plaintiffs in reinstating the suit which ought to be decided on merits.

I therefore make the following orders:

- 1. THAT the order dated 9th December 2009 dismissing the Plaintiffs suit is hereby set aside.**
- 2. THAT the Suit is hereby reinstated.**
- 3. THAT the Plaintiff applicant shall pay the costs of this application to the Defendants.**

DATED AND SIGNED AT NAIROBI ON THIS 17TH DAY OF JULY 2012.

M.K IBRAHIM
JUDGE

DATED AND DELIVERED AT MOMBASA ON THIS 22ND DAY AUGUST OF 2012.

J.W. MWERA

.....
JUDGE

In the presence of: