



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 41 OF 2017**

**AGRICULTURAL DEVELOPMENT CORPORATION.....1<sup>ST</sup> PLAINTIFF**

**LANDS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RAPHAEL MLEWA MKARE & 515 OTHERS.....DEFENDANTS**

**RULING**

1. By this Notice of Motion dated 16<sup>th</sup> October 2019 the Agricultural Development Corporation and Lands Limited (the Plaintiffs) pray for an order that this Court be pleased to reinstate the suit. The application which is supported by an affidavit sworn by the Plaintiffs' Advocate on record Joyce Chesaro is premised on the grounds: -

***i) That the suit was coming up for hearing on 15.10.2019 and was dismissed for non-attendance;***

***ii) That the Advocate for the Plaintiff was attending a Civil Appeal No. 54 of 2018 at Malindi High Court No. 1 when this case was called out;***

***iii) That none of the parties will be prejudiced in any way whatsoever by reason of the application being granted as the case was only coming up for formal proof; and***

***iv) That the application has been brought without undue delay.***

2. The application is opposed. By a Replying Affidavit sworn on their behalf by their Advocate Omagwa Angima, the five Defendants aver that there is no convincing reason why the Court should exercise its discretion to allow the application.

3. The Defendants aver that the Plaintiffs' Counsel has not annexed the mention notice for the case she was allegedly attending in order to enable the Court to consider the veracity of her claim. The Defendants further aver that this is a serious matter which the Plaintiffs appear to be taking lightly as the Advocate who was allegedly instructed has not filed an affidavit to corroborate the averments made in the Supporting Affidavit.

4. I have perused and considered the application and the response thereto. I have equally perused and considered the submissions placed before me by the Learned Counsel for the Plaintiffs. I was unable to find any submissions by the Defendants.

5. The decision whether to reinstate a suit and the legal test has been discussed in *Wanjiku Kamau –vs- Tabitha Kamau & 3 Others (2014) eKLR* where it was observed that: -

***“The Court has the discretion to set aside Judgment or order and there are no limitations and restrictions on the discretion of the Judge except that where it is done it must be done on terms that are just.”***

6. That was the same position in *Lochab Bros Ltd –vs- Peter Karuma T/A Lumumba, Lumumba Advocates (2003) eKLR* where the Court observed that: -

***“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 by the rules.”***

7. The Plaintiffs' suit herein was coming up for hearing on 15<sup>th</sup> October 2019 when the same was dismissed for want of prosecution. The Plaintiffs' Counsel on record avers that on the date fixed for hearing, she had also been served with a Mention Notice to appear before the Court of Appeal in **Malindi Civil Appeal No. 54 of 2018**.

8. Accordingly, Counsel avers that on the appointed date, she proceeded at 9.00 O'clock to the Court of Appeal after requesting another Advocate to hold her brief and to place the matter aside. Counsel further states that by the time she finished with the Court of Appeal, she came to find that her case had been dismissed for non-attendance. When she inquired from the Advocate she had briefed, the Advocate told her that he had stepped out briefly to answer an urgent phone call and that the matter was subsequently called out in his absence.

9. I have considered the reasons given for failure to attend Court. I note that Counsel has indeed attached notice issued to her law firm in regard to the Service Week which was scheduled at the High Court on 15<sup>th</sup> October starting from 9.00 a.m. In this respect I am prepared to give the Plaintiffs the benefit of the doubt.

10. As was stated in **Philip Chemwolo & Another –vs- Augustine Kubende (1982-88) KLR 103: -**

***“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I find the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”***

11. From my perusal of the record herein I was unable to find any evidence of dilatory conduct on the part of the Plaintiffs and accordingly I think it is only in order that they be given a chance to canvass their suit on merit.

12. In the premises, I hereby allow the application but on condition that the Plaintiffs pay the Defendants thrown away costs assessed at Kshs 20,000/- within 30 days from the date hereof. In default, the application shall stand dismissed with costs.

13. Otherwise, the costs of this application shall be in the cause.

**Dated, signed and delivered at Malindi this 23<sup>RD</sup> day of March, 2021.**

**J.O. OLOLA**

**JUDGE**