



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 139 OF 2012**

**HARDY DEVELOPMENT COMPANY LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**HAMISI SHEED.....FENDANT/RESPONDENT**

**RULING**

The application is dated 2<sup>nd</sup> April 2019 and is brought under Article 159 (2) (e) and Article 48 of the Constitution of Kenya: Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya; Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;

1. THAT this Honourable Court be pleased to set aside and/or vary the Orders issued on 2<sup>nd</sup> November, 2018 dismissing this suit for want of prosecution and to fix the suit for hearing on a priority basis.
2. THAT the cost of this Application be in the cause.

It is based on the grounds that this suit was dismissed on 2<sup>nd</sup> November, 2018 for want of prosecution. That Counsel was unaware of the dismissal order until 28<sup>th</sup> March, 2019 when filing the Notice of Motion dated 21<sup>st</sup> March, 2019. That through a bonafide mistake Counsel omitted to diarize the hearing of Notice to show cause why the matter should not be dismissed. That this mistake of Counsel should not be visited upon the Plaintiff/Applicant. That it is in the interest of justice that this Application be allowed as no prejudice will be occasioned to the Defendant/Respondent if this Application is allowed. That this Application is merited and has been made without any undue delay.

The applicant submitted that upon perusal of the court file, they realized that a Notice to show cause dated 12<sup>th</sup> October, 2018 was served upon them on 18<sup>th</sup> October, 2018 for hearing on 2<sup>nd</sup> November, 2018. That through a bonafide mistake on their part they misplaced the said notice and thereby omitted to diarize the said date. That as such, they did not attend the said Notice to Show Cause on 2<sup>nd</sup> November, 2018 and hence the matter was dismissed. That failure to attend court for the hearing of the said Notice to Show Cause was not deliberate. That the Plaintiff is desirous of prosecuting this matter as evidenced by the filing of the Application dated 21<sup>st</sup> March, 2019. That the mistake of counsel should not be visited upon the Plaintiff. That it is in the interest of justice that this Application be allowed. That no prejudice will be occasioned to the Defendant/Respondent if this Application is allowed. That they pray that this Honourable Court reviews and set aside the dismissal orders issued by the Honourable Lady Justice L.N. Waitthaka on 2<sup>nd</sup> November, 2018 due to non-attendance as the Plaintiff/Applicant stands to be highly prejudiced. That this Application is merited and has been brought without any undue delay.

This court has considered the application and the supporting affidavit. The respondent was served but failed to file any response. Order 12 Rule 7 which is discretionary depending on the circumstances of the case states 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”.*

By virtue of Order 12 Rule 7 this Court has discretion to set aside any orders upon terms that it considers just. The principles that guide the Court in its exercise of discretion are set out in the case of **Patel vs East Africa Handling Services Limited (1974) E.A** where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties.

In the case of **Shah – v- Mbogo & Anor (1967) E.A 470** the Court of Appeal for Eastern African held;

*“applying the principle that the Court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.*

The applicant stated that a Notice to show cause dated 12<sup>th</sup> October, 2018 was served upon them on 18<sup>th</sup> October, 2018 for hearing on 2<sup>nd</sup> November, 2018. That through a bonafide mistake on their part they misplaced the said notice and thereby omitted to diarize the said date. That as such, they did not attend the said Notice to Show Cause on 2<sup>nd</sup> November, 2018 and hence the matter was dismissed. I find that the reason given by the applicant for failure to attend court is not sufficient. I have perused the court file and find that this matter was dismissed on 2<sup>nd</sup> November 2018 and it is not until 12<sup>th</sup> April 2019 that this application was filed. I find that there has been inordinate delay. This is a very old matter filed way back in 2012. I find that this application has no merit and I dismiss it with no orders as to costs as the application was not defended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> NOVEMBER 2021.**

**N.A. MATHEKA**

**JUDGE**