



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 16 OF 2011**

**AGNES MASHA WANJA.....PLAINTIFF**

**VERSUS**

**KAZUNGU TANGAI.....1<sup>ST</sup> DEFENDANT**

**FRANCIS NDUNGU.....2<sup>ND</sup> DEFENDANT**

**KASSIM MBONA NDIFU.....3<sup>RD</sup> DEFENDANT**

**ROBERT MATANO.....4<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KILIFI.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. I have before me for determination a Notice of Motion application dated 13<sup>th</sup> February 2019. By the said Motion, Agnes Masha Wanja (the Plaintiff) prays for an order that the suit herein dismissed on 21<sup>st</sup> June 2018 be reinstated for hearing.

2. The application which is supported by an affidavit sworn by the Plaintiff's Advocate Robinson Onyango Malombo is based on the grounds inter alia that:-

***a) While the suit was filed in 2011, the parties herein have made frequent efforts to trace the file and take a hearing date but their efforts came to naught.***

***b) It is in the interest of justice that the Court sets aside the Judgment, and the suit be reinstated for it to be heard and/or decided on merit.***

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 4<sup>th</sup> March 2019, Kazungu Tangai (the 1<sup>st</sup> Defendant herein) avers that the Plaintiff has failed to prosecute her case and the Plaintiff's Advocate was in Court when the matter was dismissed and failed to satisfy the Court why the suit should not be dismissed.

4. The 1<sup>st</sup> Defendant further avers that there is no evidence that the Plaintiff ever took any action to reconstruct the file if indeed the Court file went missing and/or that she wrote a letter asking for retrieval of the Court file.

5. The 2<sup>nd</sup> Defendant-Francis Ndungu has equally sworn and filed a Replying Affidavit which is similar, word for word, to that sworn by the 1<sup>st</sup> Defendant in opposition to the Plaintiff's application.

6. On its part, the County Government of Kilifi (the 5<sup>th</sup> Defendant) has filed Grounds of Opposition objecting to the application on the grounds inter alia:-

***1. That it is not true that the suit was dismissed in the manner purported by the Plaintiff as such the application is misconceived, and misconceived and misled.***

***2. That there is no provision or wherewithal in law to reinstate the suit as proposed by the Plaintiff/Applicant.***

**3. That no reason have been canvassed or advanced to admit the applicant and or the application into purview of Order 12 Rule 7 of the Civil Procedure Rules.**

**4. That this Honourable Court's jurisdiction is not properly seized.**

7. I have perused and considered the application and the responses thereto. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

8. From the record, this suit was filed on 11<sup>th</sup> March 2011. Thereafter, there followed a series of applications filed by the parties. The last application to be filed before this present one was one dated 11<sup>th</sup> November 2014 wherein the 5<sup>th</sup> Defendant urged the Court to strike out the suit against itself and/or in the alternative to enter an order of summary Judgment in its favour.

9. After that application was dismissed by the Honourable Angote J on 11<sup>th</sup> September 2015, no action was taken by the parties herein for some three (3) years. Subsequently by a Notice to Show Cause dated 3<sup>rd</sup> April 2018, this Court asked the parties to attend Court on 21<sup>st</sup> June 2018 to Show Cause why the suit should not be dismissed for want of prosecution.

10. Upon being served with the Notice, the Plaintiff's Advocates filed an Affidavit purporting to explain why the suit should not be dismissed. In the Affidavit sworn by Francis Mwakireti Advocate, the Plaintiff alleged that they had been unable to fix the matter for hearing due to the fact that the Court file had been missing.

11. When the matter came up for hearing on 21<sup>st</sup> June 2018, this Court considered the Plaintiff's Affidavit in response and dismissed the same on the basis that there was nothing to demonstrate that the Court file had been missing and hence no sufficient cause had been shown why the suit should be dismissed.

12. Some seven (7) months later, the Plaintiff has filed this present application raising the very same issues and urging this Court to reinstate the suit for hearing. Having heard the Plaintiff on 21<sup>st</sup> June 2018 on the same issues, it was not open for the Plaintiff to file a similar application before me seeking the same orders.

13. As it were this Court has already delivered itself on those very issues. The application before me does not purport to ask the Court to review its earlier orders. Indeed there is no ground for review as nothing has been annexed thereto to show that indeed the Court file had been missing or that the Plaintiff had made efforts to look for the same and/or apply for its reconstruction.

14. Accordingly, I am in agreement with the Defendants that the application is totally misconceived and without merit. It is dismissed with costs.

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**