



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 80 OF 2017**

**LAZARUS MUVUVA SYANO.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**SUSAN KIMENZE SYANO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**BONIFACE NZYOKA SYANO.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. What is before this Court for ruling is the Plaintiffs'/Applicant' Notice of Motion Application dated 31<sup>st</sup> July, 2018 and filed in court on 01<sup>st</sup> August, 2018. It is expressed to be brought under Sections 1A, 1B of the Civil Procedure Act Cap 21 of the Laws of Kenya, Section 3 and 13(7) of the Environment and Land Court Act, No.19 of 2011 Article 159 of the Constitution of Kenya, 2010, Paragraph 28(I) of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts and other enabling provisions of the law.

2. The application seeks the following orders:-

**(1) THAT the honourable court be pleased to set aside the orders of 20.11.2017 in which this case was dismissed for want of prosecution and allow the case to be heard and determined on its merits.**

**(2) THAT the costs of this application be in the cause.**

It is predicated on the grounds that:-

**(1) That there was a challenge of communication between the Applicant and his advocates at the time this case came up for hearing.**

**(2) That upon knowing about the dismissal the 1<sup>st</sup> Plaintiff/Applicant took time consulting with other brothers and sisters who have interest in the case.**

**(3) That it is in the interest of justice and fairness for this case to be heard and determined on merits.**

**(4) That no prejudice will be suffered by the Defendant by having the case determined on merit.**

It is also supported by the affidavit of Lazarus Muvuva Syano, the 1<sup>st</sup> Plaintiff/Applicant herein, the same was sworn at Machakos on 31<sup>st</sup> July, 2018.

3. Boniface Nzyoka Syano, the Defendant/Respondent has opposed the application vide his replying affidavit sworn at Machakos on the 28<sup>th</sup> August, 2018 and filed in court on 12<sup>th</sup> September, 2018.

4. Parties filed their submissions pursuant to the court's direction that the application be disposed off by way of written submissions.

5. The 1<sup>st</sup> Plaintiff/Applicant has deposed in paragraphs 2, 3, 4, 5, 6 and 7 of his supporting affidavit that he and his co-applicant filed this case at Machakos High Court on 23<sup>rd</sup> May, 2011, that the case was lastly handled by Judge at Machakos on 06<sup>th</sup> March, 2014 when his application for injunction was allowed, that in the intervening period between 06<sup>th</sup> March, 2014 and 06<sup>th</sup> March, 2017 there was challenge in court due to lack of an Environment and Land Court Judge at Machakos until 06<sup>th</sup> March, 2017 when the matter was mentioned before the Deputy Registrar at Machakos and was subsequently transferred to this Court, that after 06<sup>th</sup> March, 2017 he had a challenge of

communication as his phone had issues and he was unable to communicate with his advocates on record for some time, that in the month of November, 2017 while he was at home, he had left his phone in Nairobi and that late in the month of December, 2017, he went to his advocate's offices where he was informed that his case had been dismissed for want of prosecution for failure to attend court on 20<sup>th</sup> November, 2017.

6. The Defendant/Respondent has deposed in paragraph 3 of his affidavit that the application is made in bad faith and is founded on deceit and mischief thus it ought to be dismissed with costs. In paragraph 4 of the same affidavit, the Defendant/Respondent confirms that the matter had stalled due to lack of an Environment and Land Court Judge at Machakos. The Defendant/Respondent has deposed in paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 14 that he is informed by his advocate on record which information he verily believes to be true that by a consent of parties on 06<sup>th</sup> March, 2017, it was agreed that this matter be transferred to Environment and Land Court Makueni, that he is further informed that the Plaintiffs/Applicants have all along after the matter was transferred to Makueni been represented in court, that he is further informed that on 04<sup>th</sup> May, 2017 Counsel appearing for the Plaintiffs/Applicants confirmed compliance with Order 11 of the Civil Procedure Rules, and even fixed a hearing date of the main suit by consent, that the Plaintiffs'/Applicants' Counsel had ample time to reach his clients, that the alleged "challenge of communication" should have been brought to the immediate attention of the court, that if indeed there was no communication between the Plaintiffs/Applicants and their Counsel, then the latter should not have persisted on fixing a hearing date without him knowing his clients' whereabouts, that both Plaintiffs/Applicants are represented by the same advocate and no attempt has been shown of efforts made to reach either and that had the Plaintiffs/Applicants been interested in this suit, they would have physically visited their advocate' chamber and not limited communication to calling via phone.

7. The Plaintiffs'/Applicants' correctly submitted that in deciding this application, the court is called upon to exercise its discretion and cited the case of **Mbogo & Another vs. Shah [1968] EA** which sets out the principles upon which the discretion is to be exercised. The Counsel further cited the cases of **Burhani Decorators & Contractors vs. Morning Foods Ltd. & Another [2014] eKLR** and **Paul Asin T/A Asin Supermarket vs. Peter Mukembi [2013] eKLR**.

8. On the other hand, the Counsel for the Defendant/Respondent submitted that the Plaintiffs/Applicants are very well aware of the location of their advocates' chambers and thus they ought to have paid him a visit the moment communication became a problem or even sent a representative. The Counsel termed the failure to act in any manner so as to know the progress of the suit portrays indolence on the part of the Plaintiffs/Applicants. The Counsel termed the "challenge of communication due to phone issues" as one that is meant to sway this court into allowing the application. The Counsel added that parties to a suit ought to take steps to progress their case to logical conclusion as it is a requirement of dispensing justice and also an overriding objective in assisting the court to attain expeditious and just disposal of cases. In support of this proposition, the Counsel referred to the case of **Utalii Transport Company Ltd & 3 others vs. NIC Bank & Another [2014] eKLR**.

9. From the affidavit evidence, it is clear that the 1<sup>st</sup> Plaintiff/Applicant has primarily premised his application on the fact that his phone had problems which prevented him from communicating with his advocate. He is silent on whether or not his co-Applicant owns a phone which he could have used to reach out to his advocate. The 1<sup>st</sup> Plaintiff/Applicant knew where his advocates' chambers are located.

10. On the 20<sup>th</sup> September, 2017, hearing of the main suit was fixed for 20<sup>th</sup> November, 2017. The period between the date when the hearing date was fixed and the date for hearing is exactly two (2) months. That was sufficient period for the advocate on record for the Plaintiffs/Applicants to get in touch with them. As earlier on stated, there is no reason proffered by the 1<sup>st</sup> Plaintiff/Applicant as to why he never visited the chambers of his advocate to find out the progress of his suit the minute his phone developed "issues" as he put it. I am in agreement with the Counsel for the Defendant/Respondent that the conduct of the 1<sup>st</sup> Plaintiff/Applicant portrays an indolent person. Whereas the right to hearing is protected by the Constitution, that right cannot be extended to an indolent person who does not take or demonstrates steps that he took to get in touch with his advocate.

11. In the case of **Shah vs. Mbogo & Another [1967] EA 116**, it was held that,

*"applying the principle that court's discretion to set aside an exparte 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."*

In my view, failure to communicate due to "phone issues" cannot be said to be a hardship resulting from an accident or an act of inadvertence, or an excusable mistake.

12. The upshot of the foregoing is that the application lacks merit and I hereby proceed to dismiss it with costs to the Defendant/Respondent.

Signed, dated and delivered at **Makueni** this 2<sup>nd</sup> day of **May, 2019**.

**MBOGO C. G.,**

**JUDGE.**

**In the presence of:-**

Mr. Karui holding brief for Mr. P. M. Mutuku for the Defendant/Respondent

Mr. Masaku holding brief for Mr. Mutia for the Plaintiff/Applicant

Ms. C. Nzioka – Court – Assistant

**MBOGO C.G, JUDGE,**

**02/05/2019.**