



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**LAND CASE NO 180 OF 2011**

**MONIKA KIOKO.....PLAINTIFF/APPLICANT**

**VERSUS**

**RENSON MUNGA.....DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is a Notice of Motion dated 9<sup>th</sup> October 2017. The Plaintiff Monika Kioko is praying for Orders:-

- 1. That this Honourable Court be pleased to set aside and vacate its order made on 30<sup>th</sup> June 2016 dismissing the Plaintiff's main suit and that the same be and is hereby reinstated; and***
- 2. That the costs of this application be in the cause.***

2. The Application is supported by the Applicant's Affidavit and is premised on the grounds stated on the body thereof as follows:-

- i) That Counsel's mistake should not be visited upon the client;***
- ii) That the Plaintiff's former Advocate on record had not disclosed to the Plaintiff that the suit was dismissed;***
- iii) That the Plaintiff has a strong and arguable case with a high probability of success;***
- iv) That the dismissal was not due to laxity or indolence on the Plaintiff's part;***
- v) That it is in the best interest of justice that the Plaintiff's suit be determined on merits;***
- vi) That the Defendant is not prejudiced in any way by the Orders sought; and***
- vii) That this Honourable Court has jurisdiction to grant the relief sought.***

3. In response to the said application, the Defendant/Respondent filed Grounds of Opposition stating as follows:

- i) That the Plaintiff/Applicant's application is misconceived and non-meritorious***
- ii) That the Plaintiff is guilty of laches and has exhibited gross indolence and is therefore underserving of the discretionary Orders sought as the delay is inordinate;***
- iii) That the Plaintiff's application is an abuse of the Court Process, an afterthought and therefore bad in law and/or incompetent.***
- iv) That the Plaintiff's application if allowed will prejudice the Defendant; and***
- v) That for the above said reasons the application dated 9<sup>th</sup> October 2017 ought to be dismissed with costs.***

4. I have considered the application and the Grounds in Opposition thereto. I have also taken into account the oral submissions made before me by the Learned Advocates for the parties.

5. In *Patel –vs- EA Cargo Handling Services Ltd(1974) EA 75*, the Court stated that:-

***“...Where there is a regular Judgment as is the case here, the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a “triable issue” that is an issue that raises a prima facie defence which should go to trial for adjudication.”***

6. Earlier in *Shah –vs- Mbogo(1967)EA 166* at paragraph 123B the Court had stated that:-

***“.....this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”***

7. From the record, it is apparent that this suit was filed on 30<sup>th</sup> November 2011 seeking various declaratory Orders in respect of three plots of land situated at Maweni Area in Mtwapa Township being Sub-divisions from land portion No. 334/111/MN. It is apparent that on or about 20<sup>th</sup> April 2016 when the matter came up for hearing, Mr. Maranga Maosa Advocate then acting for the Plaintiff requested for and was granted the last adjournment. The Court then proceeded to fix the matter for hearing on 30<sup>th</sup> June 2016.

8. On the said date Mr. Mwadilo advocate held brief for Mr. Maosa Advocate and sought another adjournment on the basis that Mr. Maosa was indisposed. Having previously granted a last adjournment and in the absence of any evidence that Mr. Maosa was indeed indisposed, the Court then seized of the matter declined the request and proceeded to dismiss the Plaintiffs suit in its entirety.

9. According to the Plaintiff, she was out of the country and was entirely reliant on her said Advocate for information in regard to the case and the said Advocate did not disclose to her that her case was coming for hearing and/or that it had been dismissed on 30<sup>th</sup> June 2016 in their absence. Instead on 25<sup>th</sup> May 2017, the Plaintiff avers that her Advocate sent her a text message indicating that the case was coming up for hearing on 29<sup>th</sup> September 2017.

10. As it were, it is apparent that the said Advocate had been ailing for some time and from the Supporting Affidavit to this application, he passed on or about 15<sup>th</sup> August 2017. It is only upon hearing of the death that the Plaintiff started following up on her file.

11. While it is clear to me that this case had taken some time and should have proceeded to hearing by the time it was dismissed, I am not persuaded that the delay on the part of the Plaintiff was deliberate and that it was calculated to delay the completion of the dispute herein. On the contrary, there is every possibility as contended by the Plaintiff that her Advocate on whom she relied had been unwell for some time thereby contributing to the delay in prosecuting the case.

12. A perusal of the Plaintiff and the Supporting Affidavit reveal that the Plaintiff claims to have a permanent building on one of the plots in contention which building she considers her residential home. I think it is only fair and just in the circumstances that the suit herein be heard on its merits.

13. Accordingly, I allow the application dated 9<sup>th</sup> October 2017. The costs shall be in the cause.

**Dated, signed and delivered at Malindi this 3<sup>rd</sup> day of May, 2018.**

**J.O. OLOLA**

**JUDGE**