



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC CASE NO. 60 OF 2012 (CONSOLIDATED WITH ELC NO. 290 OF 2013)**

**FRIDA MBITHE KIPOTO.....1<sup>ST</sup> PLAINTIFF**

**REHEMA KANINI IKUMI.....2<sup>ND</sup> PLAINTIFF**

**FAITH TATU CHAI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**SULTAN MALATU CHAI.....1<sup>ST</sup> DEFENDANT**

**A. O BAYUSUF & SONS LTD.....2<sup>ND</sup> DEFENDANT**

**KIRENGA CHAI NGAO.....3<sup>RD</sup> DEFENDANT**

**MUKEI CHAI NGAO.....4<sup>TH</sup> DEFENDANT**

**RULING**

*(Application to reinstate a suit that was dismissed for non-attendance; hearing notice issued by the court but not served upon counsel for the plaintiffs; plaintiffs deserved to be notified before their suit was dismissed; application allowed; suit reinstated)*

1. The application before me is that dated 18 September 2019 filed by the plaintiffs. The principal prayer in that application seeks orders for the reinstatement of this suit which was dismissed on 26 November 2018. The application is anchored on the ground that the hearing notice for 26 November 2018 was not served upon counsel for the plaintiffs/applicants.

2. The application is supported by the affidavit of Simon Mutugi, who is also counsel on record for the applicants. He has deposed that it has come to his knowledge that this suit was dismissed on 26 November 2018 when it went before Matheka J for hearing. He has deposed that the hearing notice was only served upon counsel for the defendants. He has further deposed that he tried to trace the court file in vain and he annexed a letter dated 6 August 2019 addressed to the Deputy Registrar advising of his inability to trace this file and a consolidated file being Mombasa ELC No. 290 of 2013.

3. The application is opposed by the 2<sup>nd</sup> defendant who has filed Grounds of Opposition. It is urged that there has been delay on the part of the applicant to fix the case for hearing and the court was justified to dismiss the suit on its own motion; that the applicant took too long to file this application and are thus guilty of laches; and that in any event the suit itself is frivolous.

4. I have considered the matter.

5. The record shows that prior to 26 November 2018, when the suit was dismissed, it was last in court on 31 July 2018 before Omollo J for pre-trial compliance. The pre-trial was adjourned to 21 September 2018. I have no record of the case going to court on 21 September 2018. What I have seen is a mention notice, issued by the court, stating that the matter will be mentioned on 26 November 2018. I have no evidence that this mention notice was ever served upon counsel for the applicants. The applicants cannot therefore be faulted for not appearing in court on 26 November 2018 when the matter was dismissed. It is apparent that they were not given an opportunity to explain themselves and it would be against the rules of natural justice to have the order of dismissal remain. It is a cardinal principle of law that no party should be condemned unheard. I am not persuaded that this application should fail on the reasons tabled by the 2<sup>nd</sup> defendant. I have seen evidence that the applicants' counsel was trying to trace the file in vain after the order of dismissal. They cannot therefore be held to be guilty of laches. Neither can I at this stage delve into the merits of the case for that is not what is before me. Whatever view the 2<sup>nd</sup> defendant has of the applicants' case is not sufficient to deny the applicant a hearing.

6. For the above reasons, I allow this application. The result is that the order of 26 November 2018, which dismissed the case of the plaintiffs is hereby set aside. For the avoidance of doubt, the case of the plaintiffs is hereby reinstated. I make no orders as to costs.

7. Orders accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF MAY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**