



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO.466 OF 2008**

**GARDEN ESTATE COMPANY LIMITED.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**GULBANU D/O HUSSEIN**

**JAN MOHAMED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**AMIRALI AKBARALI**

**GULAM HUSSEIN NANJI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**FIROZ AKBARALI GULAM**

**HUSSEIN NANJI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 13<sup>th</sup> April 2021. It seeks orders:-
2. It seeks orders:-
  1. *Spent.*
  2. *That pending the hearing and the determination of the application the proceedings herein be stayed.*
  3. *That, the honourable court be pleased to set aside the dismissal order made on 4<sup>th</sup> February 2021 and the suit herein be reinstated.*
  4. *That, the honourable court be pleased to set aside the ex-parte hearing proceedings of the counter-claim of 4<sup>th</sup> February 2021.*
  5. *That, the suit and the counter claim be heard afresh.*
  6. *That the honourable court be pleased to make such other orders as it may deem fit in the circumstances.*
  7. *That, costs of the application be in the cause.*
3. The application is supported by the affidavit of Robert Otachi, one of the directors of the plaintiff/company.
4. The application is opposed. There are grounds of opposition filed by the Defendants/Respondents dated 14<sup>th</sup> April 2021 and the Replying Affidavit sworn by Firoz Nanji sworn on the 22<sup>nd</sup> April 2021.
5. On the 15<sup>th</sup> April 2021 the court with the consent of the parties directed that the notice of motion be canvassed by way of written submission.

6. I have considered the notice of motion and the affidavit in support. I have considered the grounds of opposition and the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

7. I have gone through the court record. It is clear that this matter has delayed largely due to the plaintiff's actions.

8. On the 4<sup>th</sup> February 2021, the plaintiff's witness arrived in court after the plaintiff's case had been closed. The defendant's witnesses testified but he neglected to ask any questions.

9. It is true that the plaintiff was represented by counsel who were not present on 4<sup>th</sup> February 2021. The plaintiff's witness claimed he had not gotten in touch with counsel.

10. I have considered the circumstances of this case. I find, it is in the interest of justice that the plaintiff is offered an opportunity to present its case.

11. I find merit in the notice of motion and the same is allowed in the following terms:-

*(a) That the dismissal order made on 4<sup>th</sup> February 2021 is hereby set aside and the suit reinstated.*

*(b) That ex parte hearing proceedings of the counterclaim of 4<sup>th</sup> February 2021 are hereby set aside.*

**On condition:**

*(c) That the plaintiff do pay to the defendant throw away costs of Kshs.15,000 within fourteen (14) days from the date of this ruling.*

*(d) That costs of this application be borne by the plaintiff/applicant.*

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 21ST DAY OF OCTOBER 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Manyara for the Plaintiff

Mr. Mwihuri for Kiragu Kimani for the Defendants

Steve - Court Assistant