



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 154 OF 2016**

**KHAMISI MATANO ALI.....PLAINTIFF/APPLICANT**

**VERSUS**

**GHEIDA FARAJ.....DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 6<sup>th</sup> December 2018, the plaintiff/applicant seeks to have the orders of Matheka, J made on 27<sup>th</sup> November, 2018 dismissing the suit reviewed and set aside and have the suit reinstated for hearing. The application is brought under Order 12 Rule 7, Order 51 Rule 15 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

2. The application is premised on the grounds set out in the motion and supported by the affidavit of Wambani Antonette sworn on 7<sup>th</sup> December, 2018. It is the applicant's case that the matter was fixed for hearing of Notice to show cause on 27<sup>th</sup> November, 2018 when the same was dismissed in the absence of all the parties. That the matter was last in court on 30<sup>th</sup> October, 2017 when the plaintiff was granted leave to serve pleadings upon the defendants by way of substituted service. That the period between 30<sup>th</sup> October, 2017 and 27<sup>th</sup> November, 2018 is twelve (12) months and 26 days which was barely less than one month since the matter became due for Notice to show cause. Ms. Wambani advocate for the plaintiff has deposed that on 27<sup>th</sup> November, 2018, she first appeared before Hon. Justice Njoki Mwangi in **HCCC No. 223 of 2017, Mohammed Nyando –v- Republic** and immediately rushed to attend to the Notice to show cause in this case but found that Matheka J had already dismissed the matter. That failure to attend court is excusable. It is the plaintiff's contention that the application herein has been brought without delay and that it is in the interest of justice that the suit be reinstated for hearing on priority basis.

3. In opposing the application the 3<sup>rd</sup> Respondent filed grounds of opposition dated 2<sup>nd</sup> April 2019 on the grounds that the application is misconceived and an abuse of the court process; that the orders sought by the applicant have no merit as the applicant has been indolent in prosecuting the suit since 2016 and that there is no proof that the applicant has complied with the order issued on 30<sup>th</sup> October, 2017. The 3<sup>rd</sup> Respondent avers that due to lapse of time, a fair hearing cannot be achieved, and that litigation must come to an end.

4. The application was canvassed by way of written submissions which were duly filed by both parties.

5. I have considered the application and the submissions made. The only issue to consider is whether the court orders of 27<sup>th</sup> November 2018 dismissing the suit should be set aside and the suit reinstated. Order 17 Rule 2(1) of the Civil Procedure Rules provides as follows:

**“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction may dismiss the suit. ”**

Order 12 Rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit.

6. In the affidavit in support of the application, the applicant's counsel has explained why she did not attend court in time on 27<sup>th</sup> November 2018 for the notice to show cause. She states that she first appeared before another court for another matter and by the time she arrived in this court, she found the suit had already been dismissed. It was then the present application was filed on 7<sup>th</sup> December 2018. In my view, the application was filed without undue delay. The explanation given by the applicant's counsel has also not been controverted by the respondents. I find the explanation given being satisfactory.

7. I have also looked at the court record. The record shows that the matter came up in court on 31/10/2017 when the court granted the applicant leave to serve the respondents by substituted service. The record further indicates that the matter came up before court on 30<sup>th</sup>

October, 2018 for notice to show cause why the suit should not be dismissed but it appears the parties were not served with the notice to show cause. In my view, even if the parties had been served for 30<sup>th</sup> October, 2018 notice would have been premature as it was issued on 17<sup>th</sup> September, 2018, since one year had not lapsed from the time the matter was last before court.

8. From the material before court, I am satisfied that the failure to attend court on 27<sup>th</sup> November 2018 was not intentional or deliberate on the part of the applicant. In my view, the failure to attend court has sufficiently been explained and the same is excusable. The overriding objective of the court would also come to the aid of the applicant. The respondents who themselves were also not present in court have not demonstrated that they will suffer prejudice if the orders sought are granted and the suit is reinstated and heard and decided on merit.

9. For the foregoing reasons, I am satisfied that the plaintiff's application dated 6<sup>th</sup> December, 2018 has merit. The application is allowed. The order made on 27<sup>th</sup> November, 2018 dismissing the suit is set aside and the case is reinstated for hearing on merit. Each party to bear own costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 5<sup>th</sup> day of February, 2020.**

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**C. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ondieki holding brief for Shimaka for Defendant/Respondent

No appearance for Plaintiff/Applicant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**