



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 82 OF 2019

1. KADZO KAHINDI

2. FURAHA KAHINDI KARISA.....PLAINTIFFS

VERSUS

1. FURAHA KATANA DYEKA

2. CHARO KATANA DYEKA

3. KADZO KATANA DYEKA

4. ZAWADI KATANA DYEKA

5. SAFARI KATANA DYEKA

6. KAINGU KATANA DYEKA

7. REHEMA KATANA DYEKA.....DEFENDANTS

RULING

1. I have before me for determination a Notice of Motion application dated 22nd November 2019. By the said application the two Plaintiffs pray that their application dated 3rd October 2019 be reinstated and set down for hearing. They further urge the Court to be pleased to reinstate the interim orders of injunction issued therein on 3rd October 2019.

2. The application which is supported by an affidavit sworn by the Plaintiffs' Advocate on record Conrad Atiang is premised on the grounds:-

i) That the suit was on 3rd October 2019 alongside the application dated 3rd October 2019 filed under Certificate of Urgency.

ii) That upon hearing the matter in Chambers the Court granted interim orders and directed that the application be heard inter-partes on 21st October 2019.

iii) That as it turned out, the date turned out to be a public holiday and the matter was subsequently re-scheduled for hearing on 22nd November 2019.

iv) That instead of diarizing the matter for the said date, Counsel on record misdiarised the matter for 27th November 2019 instead.

v) That on the said 22nd November 2019 the Court proceeded to dismiss the application for want of prosecution.

vi) That the Plaintiffs are committed to prosecute the dismissed application and hence the present application which has been brought without delay.

3. The seven (7) Defendants are however opposed to the application. In a Replying Affidavit sworn on their behalf by the 2nd Defendant-

Charo Katana Dyeka and filed herein on 27th January 2020, the Defendants aver that the Plaintiffs had an opportunity to be heard on merit but squandered the same.

4. The Defendants further asserts that the Plaintiffs Counsel has not given justifications for failing to attend Court even after he was notified by a colleague who was present in Court. The Defendants further assert that it is only the Counsel for the Plaintiff who pleads mistake. There are no reasons given why another Counsel was not instructed to hold brief after the Counsel was made aware of the matter.

5. I have perused and considered the application together with the response thereto. I have equally considered the oral submissions made before me by Mr. Atiang Learned Counsel for the Plaintiffs and Mr. Nyange, Learned Counsel for the Defendants.

6. The application before me is expressed to be brought inter alia under the provisions of Order 12 Rule 7 of the Procedure Rules. The said Rule provides that:-

“Where under this Order Judgment has been entered or the suit has been dismissed, the Court on application, may set aside or vary the Judgment or order upon such terms as may be just.”

7. The principles governing the exercise of judicial discretion in a matter such as this were succinctly summarized in the two cases of ***Patel – vs- EA Cargo Handling Services Ltd (1974) EA 75 and Mbogo –vs- Shah (1968) EA 93***. First, there are no limits or restrictions on the Judge’s discretion except that if he does vary the Judgment he does so on such terms as may be just. The main concern of the Court is to do justice to the parties.

8. Secondly, this discretion 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

9. In the instant matter, the Plaintiff’s Counsel pleads that he was given a date in Court for the hearing of the Plaintiff’s application dated 3rd October 2019. However while the Court gave 22nd November 2019, Counsel mis-diarized the date for 27th November 2019 and was therefore unavailable in Court when the application came for hearing on 22nd November 2019 and was dismissed for want of prosecution.

10. The Defendants are opposed to the application and cite the fact that Counsel was present in Court when the date was given. They also blame the Plaintiff’s Counsel for failing to attend Court even after he was notified by another Advocate that the matter was coming up for hearing that morning.

11. From the record it is evident that it is Mr. Atiang, Learned Counsel for the Plaintiffs who appeared before this Court on 22nd October 2019 and in the presence of the Defendants re-scheduled the application for hearing on 22nd November 2019. I am however unable to fault Counsel’s assertion that he mis-diarised the date and indicated in his diary instead that the matter was fixed for 27th November 2019.

12. I say so because Counsel has not only annexed a Copy of his diary showing the wrongful entry but also a Copy of the Hearing Notice which he served upon the Defendants herein. The Hearing Notice dated 25th October 2019, some three days after the matter came up in Court shows that, according to the Plaintiffs, the matter was listed for 27th November 2019 thereby validating Counsel’s assertion of the confusion he found himself in.

13. In the premises, I am satisfied that the failure to attend Court was as a result of an inadvertent and excusable mistake on the part of Counsel.

14. Accordingly, I hereby allow the Notice of Motion dated 22nd November 2019 in terms of Prayer No. 3 thereof.

15. As the Defendants were in Court when the application was dismissed, the Plaintiffs shall pay the Defendants thrown away costs which I hereby assess at Kshs 10,000/- within 30 days from today.

16. Orders accordingly.

Dated, signed and delivered at Malindi this 27th day of May, 2020.

J.O. OLOLA

JUDGE