



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**JR APPLICATION NO. 17 OF 2017**

**IN THE MATTER OF: ORDER 53 RULE (1) & (2) OF THE CIVIL PROCEDURE RULES, SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND OTHER ENABLING PROVISIONS OF THE LAW.**

**IN THE MATTER OF: APPLICATION BY KATANA NGALA SIRYA ON HIS OWN BEHALF AND ON BEHALF OF THE FAMILIES OF THOMAS KALINGO KADZEHA AND NGALA MOSE.**

**AND**

**IN THE MATTER OF: ADJUDICATION AND REGISTRATION OF PARCEL OF LAND MWANDA-MBALAMWENI  
ADJUDICATION SECTION PARCEL NO. 2916**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE LAND ADJUDICATION OFFICER MWANDA MBALAMWENI**

**ADJUDICATION SECTION.....1<sup>ST</sup> RESPONDENT**

**THE ARBITRATION BOARD MWANDA MBALAMWENI**

**ADJUDICATION SECTION.....<sup>ND</sup> RESPONDENT**

**ROBERT SAFARI FONDO.....3<sup>RD</sup> RESPONDENT**

**AND**

**KATANA NGALA SIRYA & OTHERS.....INTERESTED PARTIES**

**RULING**

1. By this Notice of Motion dated 27<sup>th</sup> October 2018, the Ex-parte Applicants pray that the orders made by this Court on 27<sup>th</sup> September 2018 be reviewed, varied and or discharged and that the Notice of Motion dated 14<sup>th</sup> November 2017 be reinstated. The Applicants further urge the Court to stay the land adjudication process in respect of Mwanda/Mbalamweni Land Adjudication Section in so far as it affects Parcel No. 2916.

2. The application which is supported by two affidavits sworn by the Ex-Parte Applicant's Advocate on record Edward M. Gichana and his Court Clerk Tom Musembi Leandry is premised on the grounds:-

**i. That on 27<sup>th</sup> September 2018 when the matter came up for hearing Counsel was not feeling well and had gone to see his doctor;**

**ii. That Counsel had made prior arrangements with his clerk Tom Musembi to travel to Malindi and file submissions but it was a rainy day and the clerk arrived late at around 9.30 a.m. to find the application had been dismissed for non-attendance;**

**iii. That this being a land matter is a sensitive issue and unless the application is reinstated, the parties who are neighbours may resort to acts that would amount to a breach of the peace;**

**iv. That no prejudice would be occasioned to any of the parties if the application is reinstated ;and**

**v. That it is fair, just and equitable that the application be allowed in the circumstances.**

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 7<sup>th</sup> February 2019, Robert Safari Fondo (the 3<sup>rd</sup> Respondent) avers that the application lacks merit and is nothing but an afterthought.

4. The 3<sup>rd</sup> Respondent avers that the Ex-Parte Applicant has all along not been keen to prosecute the application dated 14<sup>th</sup> November 2017 as they had neither filed submissions as ordered nor were they present in Court when the application came up for hearing. The 3<sup>rd</sup> Respondent further asserts that out of professional courtesy, the Applicant Advocates ought to have called and informed the Respondent's Counsel of their illness and or asked another Counsel to hold their brief when the matter came up for hearing.

5. I have perused and considered the Ex-Parte Applicant's application as well as the response thereto. I have equally considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

6. The Court's power in considering an application to set aside an order such as the one herein is discretionary. As was stated in **Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75:-**

“There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte Judgment 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 and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

7. In the same vein, in **Shah –vs- Mbogo(1967) EA 166**, it was held 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.”**

8. In the matter before me, Counsel for the Ex-parte Applicant has sworn an affidavit indicating that he was unwell on the date scheduled for hearing and that he dispatched his clerk who due to the rains at the time arrived in Court late to find their application already dismissed.

9. In support of that position, Counsel has attached a Copy of a Medical Treatment Card from Baraka Maternity and Nursing Home Mombasa indicating that he was attended to on 8<sup>th</sup> February 2018 and was given off-duty for two days. Counsel further deposes that since December 2017, he has been in and out of hospital undergoing treatment for the same condition disclosed in the Medical Report.

10. I have no reason to doubt that Counsel was unwell as disclosed in the Report. I do however agree with the 3<sup>rd</sup> Respondent that an effort should have been made to inform the other Counsels on record and/or any other to hold their brief as appropriate.

11. From the record, I had similarly no reason to believe that the absence of the Counsel on the date fixed for hearing was deliberate and/or designed to obstruct or delay the hearing hereof.

12. In the premises, I am satisfied that the application has merit. The same is allowed subject to payment of the 3<sup>rd</sup> Respondent's thrown away costs which is hereby assessed at Kshs 30,000/-.

13. Those thrown away costs should be paid within 45 days from today failure to which this application shall instead stand dismissed.

14. Orders accordingly.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**