



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 31 OF 2011**

**LA MARINA LIMITED.....PLAINTIFF**

**VERSUS**

**RIZIKI CHARO KAMBTI.....1<sup>ST</sup> DEFENDANT**

**GIDEON MAINA MURIUKI.....2<sup>ND</sup> DEFENDANT**

**SHADRACK NDUNDI.....3<sup>RD</sup> DEFENDANT**

**AND**

**ROBERT PHILIP ASHWORTH.....INTERESTED PARTY**

**RULING**

1. By this Notice of Motion application dated 6<sup>th</sup> February 2019, La Marina Ltd (the Plaintiff) urges the Court to be pleased to set aside its orders issued on 5<sup>th</sup> February 2019 dismissing this suit and to allow the Plaintiff to prosecute the same within certain terms set by the Court.

2. The application which is supported by an affidavit sworn by the Plaintiff's Advocate Joseph Manzi Munyithya is premised on the grounds inter alia that:-

***i) The Applicant has been willing and able to proceed with the hearing of this suit since it was filed in 2011;***

***ii) That a day before 5<sup>th</sup> February 2019 when the matter came up for hearing, the Applicant's advocates received a call and an email from Edward Rombo Advocate for the 3<sup>rd</sup> Party confirming that his client is deceased and that he was to make an application to substitute;***

***iii) Based on that information, the Applicant's Advocates advised the Plaintiff not to attend Court on 5<sup>th</sup> February 2019. When the Court subsequently declined the application for adjournment, it was too late to mobilize the Plaintiff's witnesses to attend Court;***

***iv) The failure to attend Court by the Plaintiff was not deliberate but a product of wrong Judgment by Counsel on record. The Plaintiff should be allowed his day in Court for the determination of the proper ownership of the suit property.***

3. The application is opposed. In a Replying Affidavit sworn and filed herein on their behalf by their Advocate Kevin Kokebe, Richard Charo Kambiti and Gideon Maina Kariuki (the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively) aver that since this suit was filed on 14<sup>th</sup> April 2011, the Plaintiff has never been keen on prosecuting the same.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further aver that the Plaintiff squandered the opportunity to proceed with the case on 5<sup>th</sup> February 2019 knowing only too well the delay and time loss occasioned by various incidents which have hampered the hearing of this matter in the past. They further accuse the Plaintiff's Advocates of failing to inform them in time or at all of their intention not to proceed with the matter on the date it was scheduled for hearing.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants asserts that the failure of the Plaintiff/Applicant to appear in Court for the hearing was deliberate and that it is only meant to delay this matter and deprive the 2<sup>nd</sup> Defendant of his right to enjoy the use of his property.

6. I have perused and considered the Plaintiff's application and the response thereto by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties. The Interested Party did not file anything in response but indicated at the hearing hereof that they supported the Plaintiff's application.

7. The application before me is expressed to be brought under Order 12 Rule 7 of the Civil Procedure Rules. The same 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.”***

8. The Court's power in considering an application such as the one before me is discretionary. As was held 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.”***

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

***“This discretion to set aside .....Judgment is intended to be exercised to avoid injustice or hardship resulting from accidents, 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.”***

10. In the matter before me, the Plaintiff's Counsel deposes in the supporting affidavit that they were aware of the hearing date and had indeed served all the parties with notices for hearing on 5<sup>th</sup> February 2019. However on the afternoon of 4<sup>th</sup> February 2019, they learnt from the Advocates of the Interested Party that their client had passed away and that they would be applying for adjournment in order to substitute the Party.

11. On that account, Learned Counsel submits that they instructed their client the Plaintiff not to send witnesses to Court as the matter was not likely to proceed. It was further Counsel's submission that as at the time the application for adjournment was rejected by the Court, their witnesses were not nearby and could not be availed to proceed with the hearing thereby leading to the dismissal of the case.

12. While I did not think that the Counsel made a proper Judgment in unilaterally asking his client not to attend Court, it has not been denied that one of the parties herein had died as stated by Counsel and that there was therefore need for substitution before the matter could proceed for hearing.

13. And while again I agree with the Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that this is an old matter that ought to have been concluded at the very earliest opportunity, I have perused the record herein and it was apparent that the delay in the prosecution hereof cannot wholly be attributed to the Plaintiff.

14. In the premises, I am persuaded that there was merit in the Plaintiff's application. I will allow the same in terms of Prayer No. “C” thereof but on condition that the Plaintiff shall pay the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's thrown away costs which I hereby assess at Kshs 35,000/-.

15. Given the age of the matter, the Plaintiff has 90 days to fix the suit for hearing failure to which the same shall stand dismissed for want of prosecution.

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

**J.O. OLOLA**

**JUDGE**