



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 165 OF 2018**

**1. RASHID MOHAMED SALIM**

**2. AHMED MOHAMED SULEIMAN**

**3. MOHAMED SULEIMAN SHAQSY (Suing as the Trustees of Mazrui Community**

**Development and Welfare) WAKF Lands Trust and Members of the Mazrui Community)**

**4. MOMBASA CEMENT LIMITED.....PLAINTIFFS**

**VERSUS**

**ABDULGAFFUR PASTA.....DEFENDANT**

**RULING**

1. I have before me for determination a Notice of Motion application dated 11<sup>th</sup> June 2019. By the said application, the Plaintiffs herein pray for orders:

- 2. That the Honourable Court be pleased to set aside the Court Order issued on 16<sup>th</sup> October 2018 and all consequential orders;***
- 3. That the Notice of Motion application dated 22<sup>nd</sup> August 2018 be reinstated and be heard on merits; and***
- 4. That the costs of this application be provided for.***

2. The application which is supported by an affidavit sworn by the Plaintiffs' Advocates on record Joseph Karanja Kanyi is premised on the grounds:

- i) That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are the registered proprietors of Plot No. LR 409/1/Kilifi which parcel of land they have since leased out to the 4<sup>th</sup> Plaintiff;***
- ii) That the Motion dated 22<sup>nd</sup> August 2018 sought restraining orders against the Defendants who had embarked on unlawfully developing the said property;***
- iii) That a Notice of Withdrawal of suit dated 13<sup>th</sup> September 2018 was erroneously filed herein and on 16<sup>th</sup> October 2018 the suit was withdrawn with costs to the Respondents; and***
- iv) That the Withdrawal Notice was meant for Malindi ELC 164 of 2018 which had also been filed by the Plaintiffs herein and the mistake was that of the Plaintiffs Advocates.***

3. The application is unopposed. In a Replying Affidavit sworn by the Defendant's Advocate on record Kiarie Kariuki and filed herein on 4<sup>th</sup> July 2019, Counsel avers that this matter had been severally adjourned before it was fixed for hearing on 16<sup>th</sup> October 2018 by the consent of the parties. On the date fixed for hearing, the Plaintiffs and/or their Advocates were not in Court and the Court proceeded to allow the withdrawal of the suit as per the notice that had been filed in Court.

4. The Defendant's Counsel further avers that the Plaintiffs have not advanced any reason why they failed to attend Court on 16<sup>th</sup> October 2018 and why it took them another eight (8) months thereafter to bring this present application. It is therefore the Defendant's case that this application lacks merit and that the same ought to be dismissed.

5. I have looked at the application and the response thereto. This suit was filed on 23<sup>rd</sup> August 2018 together with the Notice of Motion dated 22<sup>nd</sup> August 2018. While the Defendant contends that it had come up for hearing and had been adjourned severally, the record shows that it only came up once, on 17<sup>th</sup> September 2018 when one Ms Layoo Advocate who was holding brief for Mr. Kiarie for the Defendant requested for more time to enable Mr. Kiarie Advocate to respond to the application.

6. The matter was accordingly adjourned on the request of the Defence to 16<sup>th</sup> October 2018. On that date however, when the matter was mentioned, neither the Plaintiffs nor their Counsel was in Court. Upon perusal of the file, this Court noticed that there was a Notice of Withdrawal of the suit which had been filed on 13<sup>th</sup> September 2018. When the Court disclosed this to Mr. Kiarie who was present for the Defendant, Counsel answered as follows:

***"I was not aware of the Notice of Withdrawal filed in Court on 14/09/2018.***

***(The suit), may be withdrawn with costs to us."***

7. On that account, this Court proceeded to mark the suit as withdrawn with costs to the Defendant. It is that Notice that the Plaintiff avers was filed in error and that the same was meant to be filed in another matter being ***Malindi ELC No. 164 of 2018*** wherein the Plaintiffs had sued a different party.

8. I have looked at the said Notice of Withdrawal of suit dated and filed herein on 13<sup>th</sup> September 2018 and it is clear to me that the same was filed in error. While this matter has only one Defendant- Abdulgafur Pasta, the said Notice names two Defendants, Viz; Mohamed Islam Bashamak and Mombasa Maize Millers Ltd. Those were clearly not Mr. Kiarie's clients and the Defendant herein cannot therefore benefit from the error made by the Plaintiffs' Advocates.

9. While it is true that it took the Plaintiffs almost eight (8) months before they came to Court to rectify the mistake, it is evident from Mr. Kanyi Advocate's Supporting Affidavit that his then Associate Ms Lucy Mwangi Advocate who was handling the matter left Mr. Kanyi's Law Firm to start her own at around the same time. It was not lost on this Court that such transitions are often replete with poor communication and even misunderstanding and that delay is therefore in my view not inordinate and or inexcusable.

10. The upshot is that I do find merit in the Motion dated 11<sup>th</sup> June 2019 and do hereby set aside the orders issued herein on 16<sup>th</sup> October 2018. The Plaintiffs are accordingly directed to proceed to fix their Notice of Motion dated 22<sup>nd</sup> August 2018 for hearing inter partes as appropriate.

11. The costs of this application shall be in the cause.

**Dated, signed and delivered at Malindi this 24<sup>th</sup> day of July, 2020.**

**J.O. OLOLA**

**JUDGE**