



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 76 OF 2011**

**COAST DEVELOPMENT AUTHORITY.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**ADAM KAZUNGU MZUMBA & 49 OTHERS.....DEFENDANTS**

**R U L I N G**

**Introduction:**

1. This Ruling is in respect to the Plaintiff's Application dated 12<sup>th</sup> August 2014. in the Application the Plaintiff is seeking for the following reliefs.

**(a) That this Honourable court may be pleased to set aside, vacate and or vary its orders made on 11<sup>th</sup> July 2013.**

**(b) That this Honourable Court be pleased to enlarge and extend the time within which the Plaintiff is to fix its main suit for hearing to thirty (30) days from the date of the determination of this Application**

**(c) That costs of this suit be in the cause.**

**The Plaintiff's/Applicant's case:**

2. The Plaintiff's Application of 12<sup>th</sup> August 2014 is premised on the grounds that in full compliance of the order of 11<sup>th</sup> July 2013, the Plaintiff took steps to set down the suit for hearing; that after various steps, the Plaintiff managed to take a date on 18<sup>th</sup> October 2013 for hearing on 24<sup>th</sup> February 2014 and that unfortunately, the 90 days within which the Plaintiff was to take a date for hearing expired on 11<sup>th</sup> October 2013.

3. The Plaintiff's advocate has deponed that the failure to fix a hearing date on or before 11<sup>th</sup> October 2013 was not occasioned by laxity, sloppiness or negligence on the part of the Plaintiff but the same was due to the unavailability of the court file.

4. The Plaintiff's counsel further deponed that as a matter of fact, the Plaintiff had to reconstruct this file in the year 2012 when the file went missing in unclear circumstances and that closing the Plaintiff's suit without granting them an opportunity to be heard will prejudice it.

### **The Defendants'/Respondents' case:**

5. The Defendants' advocate filed a Replying Affidavit in which he deponed that if the applicant was not satisfied with the court's Ruling, then it should have filed an appeal; that this court can only set aside its Ruling of 11<sup>th</sup> July 2013 if there is an application to review the said order and that the Ruling of this court is not in violation of the overriding objectives.

### **Submissions:**

6. The Plaintiff's advocate submitted that he invited the Defendants' advocate for fixing of the case on 19<sup>th</sup> September 2013 but could not do so as the court file was not available; that the letter does not bear the court's stamp acknowledging receipt due to the absence of the court file and that after the court file resurfaced, the Plaintiff set down the suit for hearing.

7. Counsel submitted that this court has the discretion to enlarge time within which the Plaintiff is to fix the main suit for hearing and that the Plaintiff will suffer great and irreparable harm if the orders sought are not granted. Counsel relied on several authorities which I have considered.

8. The Defendants' counsel submitted that the action by the Plaintiff to fix the matter for hearing on 24<sup>th</sup> February 2014 was an exercise in futility; that the current application is in violation of Section 6 of the Civil Procedure Act and Order 3 Rule 4 of the Civil Procedure Rules.

9. The Defendants' counsel submitted that if indeed the file could not be traced as alleged, the Plaintiff should have reconstructed the file or seek for an extension of time before the expiry of the 90 days and that the court is now *factus officio*.

### **Analysis and submissions:**

10. On 11<sup>th</sup> July 2013, this court ordered the Plaintiff to fix the matter for hearing within 90 days and if not, the matter was to stand dismissed.

11. The 90 days granted by the court to have the matter fixed for hearing lapsed on 11<sup>th</sup> October 2013.

12. The Plaintiff has annexed on its Application a letter dated 25<sup>th</sup> September 2013 addressed to the Deputy Registrar of this court. In the letter, the Plaintiff's advocate was requesting the Deputy Registrar to avail the court file for purposes of fixing the matter for hearing.

13. The letter does not have the Deputy Registrar's stamp indicating that it was ever received.

14. It is the practice of this court that all letters addressed to the Deputy Registrar are received, with or without the file. I do not accept the Plaintiff's advocate argument that the registry refused to stamp the letter dated 25<sup>th</sup> September 2013 because the court file was missing. In the circumstances, I find and hold that the letter dated 25<sup>th</sup> September 2013 was never presented to either the registry or the Deputy Registrar as alleged by the Plaintiff.

15. The first letter that was received by the registry is from the Plaintiff's advocate is the one dated 10<sup>th</sup> October 2013. The said letter was inviting the Defendants' advocate for fixing a suitable hearing date. The letter was received in the registry on 25<sup>th</sup> October 2013, way after the 90 days that the court had granted for the fixing of a hearing date had lapsed.

16. Instead of filing an application to enlarge time within which to fix the matter for hearing, the Plaintiff's advocate fixed the matter for hearing on 24<sup>th</sup> February 2014. Indeed, there was no suit to be fixed for hearing by that time.

17. Having read the Plaintiff's advocate affidavit, I am convinced that no good reason has been given as to why Plaintiff did not comply with the orders of this court of 11<sup>th</sup> July 2013 and the suit stands dismissed with costs to the Defendants.

18. In the circumstances, the Application dated 12<sup>th</sup> August 2014 is hereby dismissed with costs.

Dated and delivered in Malindi this **6<sup>th</sup>** day of **February**, 2015.

**O. A. Angote**

**Judge**