



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 82 OF 2013

PETER KIM BAKER.....1ST PLAINTIFF

ASHOK BALKRISHNA PATEL.....2ND PLAINTIFF

=VERSUS=

SIDI KATANA BONGO.....1ST DEFENDANT

BAHATI KATANA BONGO.....2ND DEFENDANT

R U L I N G

1. This court dismissed the suit on 6th October 2014 for non-attendance and want of prosecution.
2. The Plaintiffs have now filed an Application dated 17th October 2014 in which they are seeking for the reinstatement of the suit.
3. The Application is premised on the ground that the Applicant and his advocate appeared in Court on 8th October 2014 only to learn that the suit had been dismissed on 6th October 2014 for non attendance; that there is a counterclaim which has never been prosecuted and that the Applicant's advocate wrongfully diarised this matter for 8th October 2014 instead of 6th October 2014.
4. According to the affidavit of the Applicant's advocate, after diarising the hearing date as 8th October 2014, he proceeded to serve on the Defendant a hearing notice. The advocate has deponed that the failure to attend court on 6th October 2014 was not deliberate but an innocent mistake by counsel which should not be visited on the Plaintiff.
5. The Defendants' advocate admitted in his submissions that he was indeed served with a hearing notice of 8th October 2014; that the Application is an abuse of the court process and that the Application should be dismissed with costs.
6. The Plaintiffs' advocate filed his submissions in which he reiterated the contents of his Affidavit.
7. According to counsel, the suit property has cost the Applicants millions of shillings and if the same is not heard on merit, they will suffer irreparably.

8. I have read the Plaintiffs' advocate affidavit and the annexures.

9. The Applicants' advocate was not in court on 6th October 2014 when the suit was dismissed for non attendance. In his affidavit, he has stated that Mr. Otara, an advocate, informed him that the matter had been slated for hearing on 8th October 2014 when he held his brief on 1st July 2014.

10. Counsel annexed an the Supporting Affidavit a copy of his diary showing that he diarised the matter for hearing for 8th October 2014 and when he turned up in court on that day, he found the matter had been dismissed for non-attendance.

11. Counsel also annexed a copy of the Hearing Notice that he served on the Defendants' advocate. The said notice, which was acknowledged by the Defendants' advocate, shows that the matter was coming up for hearing on 8th October 2014.

12. On the basis of the annexed copy of the diary and the hearing notice, I am satisfied that the failure by counsel and the Plaintiff to attend court on 6th October 2014 was because they were under a bona fide mistaken belief that the matter was coming up for hearing on 8th October 2014 and not 6th October 2014.

13. The explanation given by counsel for non-attendance of court on 6th October 2014 is plausible and excusable.

14. For that reason, I allow the Plaintiffs' Application dated 17th October 2014 with no orders as to costs.

Dated and delivered in Malindi this 8th day of May, 2015.

O. A. Angote

Judge