



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 155 OF 2015

JAPHETH KALAMA WASHE

PATRICK MONO MBURA.....PLAINTIFFS

1. CHRISPUS DECHE KADUK A

2. JUMAPILI MWOLOLO

3. SANGA DAVID KASSIM

4. KARIBU DAVID KASSIM

5. KALEWA MSIKITI

6. STEPHEN KADUKA

7. MWAMUYE KUTO

8. ZIRO MSIKITI

9. MAJIMBO MWANGOLO

10. NGOLINDO MSIKITI

11. MALAU KASIMU

12. KARIBU KASIMU

13. NGALA JILANI

14. KATANA KADUKA.....DEFENDANTS

RULING

1. By this Notice of Motion application dated and filed herein on 19th February 2019, Japhet Kalama Washe and Patrick Mono Mbura (the Plaintiffs/Applicants) urge this Honourable Court to be pleased to reinstate their suit herein for hearing and disposal.

2. The application which is supported by an affidavit sworn by the Plaintiffs' Advocate Angeline Adhiambo Omollo is based on the grounds:

a) That the suit was dismissed with costs on 17th October 2018 for want of prosecution;

b) That the Plaintiffs' Advocates are the ones who took the date for hearing but when the Hearing Notice was served upon the Defendants' Advocates, they received it on protest indicating that the date was not convenient for them.

c) That further to the receipt in protest, on 16th October 2018, the Defendants sent an email to the Plaintiffs' Advocates stating that on 17th October 2018, they would be held up in another matter at the High Court at Mombasa and that they would request for an adjournment when the matter comes up for hearing on 17th October 2018;

d) That contrary to their protest and email, the Defendants Advocates appeared in Court on 17th October 2018 and asked for the matter to be dismissed for want of prosecution which prayers were granted by the Court.

e) That the failure on the part of the Plaintiff's Counsel to be in Court was due to the misrepresentations by the Defendants; and

f) That it is in the interest of justice that the suit be reinstated and heard on merit.

3. The Plaintiffs' application is opposed. In a Replying Affidavit sworn on their behalf by their Advocate on record McMillan E Jengo and filed herein on 13th March 2019, the Defendants aver that while it was true they intended to request for an adjournment, the Plaintiffs did not respond to the email request. Accordingly, Counsel avers that he took the lack of a response as a rejection of his plea for an adjournment and he therefore made arrangements in regard to the Mombasa Court matters and travelled to Malindi for the hearing as scheduled.

4. The Defendants' Counsel further avers that he was under no obligation to notify the Plaintiffs' Advocates on any change in his plans as they had not acceded to his request to be indulged. Counsel further asserts that even if parties had agreed on adjournment, the Advocates were required to attend Court to notify the Court of the situation.

5. I have perused and considered the Plaintiffs application and the response thereto by the Defendants. The sole issue for determination in the present application is whether there is a basis for the Court to exercise its discretionary power to set aside the orders made herein on 17th October 2018 and reinstate the suit.

6. Section 3A of the Civil Procedure Act gives this Court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 Rule 15 of the Civil Procedure Rules gives the Court power to set aside any order made ex-parte. The Court's discretionary power to do so must however be exercised judiciously with the overriding objective of ensuring that justice is done to all the parties.

7. As was stated in *Mbogo & Another –vs- Shah (1968) EALR*, the exercise of discretion to set aside such an order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. It is not however intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

8. In the instant application, the Plaintiffs' Counsel avers that she failed to attend Court on the basis of a misrepresentation by the Defendants' Counsel that he was unavailable to attend Court on 17th October 2018 as he would be engaged in another matter at the High Court at Mombasa. While it is true as admitted by the Defendants' Counsel that he had earlier on sent an email to the Plaintiffs Advocates indicating he would be unable to attend Court on the date fixed for hearing, it is inconceivable how Counsel for the Plaintiffs could interpret that to mean that her own presence and that of her Clients would then not be necessary on the date fixed for hearing.

9. As Counsel for the Defendants submits, he was absolutely under no obligation whatsoever to alert the Plaintiffs Advocates of his change of mind to attend Court on 17th October 2018 more so given the lack of a response to his own email by the Plaintiffs Advocates. The accusation that Counsel for the Defendants lied to the Plaintiffs is therefore without basis and made in bad faith.

10. That notwithstanding, it is not lost upon this Court that it was the Plaintiffs Advocates who had moved the Court registry on 19th June 2018 to have the suit fixed for hearing on the said 17th October 2018. From the record, I did not find anything from which I could make an inference that the Plaintiffs conduct has been dilatory or aimed at delaying the proceedings herein.

11. I think, as Madan J stated in *Belinda Murai & Others –vs- Amos Wainaina (1978) KLR*:

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule.....”

12. Dealing with a similar matter in *Philip Chemwolo & Another –vs- Augustine Kubede (1982-88) KAR 103*, Apaloo JA stated thus:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

13. Arising from the foregoing and in view of the overriding objective to achieve substantive justice to litigants, this Court is of the view that the inconvenience that may be suffered by the reinstatement of this suit can adequately be remedied through an award of costs.

14. Accordingly, I hereby allow the application and reinstate the Plaintiffs' suit for hearing and disposal.

15. The Plaintiffs shall however pay unto the Defendants throw away costs assessed at Kshs 20,000/- within 30 days from today in default of which the order reinstating this suit shall stand vacated.

Dated, signed and delivered at Malindi this 18th day of September, 2020.

J.O. OLOLA

JUDGE