



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 301 OF 2014**

**ROSH MOTORS LIMITED.....PLAINTIFF**

**VERSUS**

**1. ABDULRAHMAN KASSIM JEFFER**

**2. ABDULRISAK OMAR HAJI**

**3. MARIAM KASSIM SAID**

**4. MARY SYEVUTHA PETER**

**5. COMMISSIONER FOR LANDS**

**6. HON. THE ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. The application before me for determination is the Notice of Motion dated 25<sup>th</sup> November, 2019 brought by the Plaintiff/Applicant under Article 51 of the Constitution of Kenya, Order 17 Rule 2 (2) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of law. The Plaintiff is asking the court to set aside the order dated 2<sup>nd</sup> November, 2018 issued by Matheka J which dismissed this suit for want of prosecution. The application also prays for reinstatement of the suit.

2. The application is premised on the grounds thereon and supported by the affidavit of Gikandi Ngibuini advocate for the plaintiff sworn on 6<sup>th</sup> December, 2019. It is deposed that the plaintiff filed this suit initially as Mombasa Suit No. 28 of 2011 in the Commercial and Admiralty Division but was later transferred to this court and allocated serial number ELC Case No. 301 of 2014. That the suit was listed for hearing on 19<sup>th</sup> April 2016 but the matter did not proceed and the court directed parties to fix another suitable hearing date. That by a letter dated 22<sup>nd</sup> August, 2016, the plaintiff's advocate invited the other parties to meet in the court registry to fix a suitable hearing date but parties could not proceed to fix the matter for hearing because the court file was missing. That the plaintiff's advocate wrote a letter dated 5<sup>th</sup> September, 2019 to the Deputy Registrar of the Court requesting that the court file be availed to enable the plaintiff file pre-trial documents. Copies of the hearing notice and letters referred to hereinabove have been annexed.

3. Mr. Gikandi has deposed that the court did not reply to his letter, forcing his office to thoroughly trace the file and on tracing the same on 16<sup>th</sup> November, 2019, he was surprised to learn that the suit had been dismissed on 2<sup>nd</sup> November, 2018 during the then service week as the plaintiff had failed to prosecute the suit as required by law. It is deposed that the notice to show cause was never served either upon the plaintiff or the plaintiff's advocate and hence the proceedings that took place on 2<sup>nd</sup> November, 2018 were unknown to the plaintiff. That in the circumstances the dismissal order that was made violated the plaintiff's right to natural justice as the plaintiff was condemned unheard. It is further deposed that this is a land matter and land matters are generally of a highly emotive nature whereby the same should be determined in a full hearing as possible.

4. None of the defendants filed any response to the application, although they were duly served. I have considered the application. The only issue for determination is whether the court should set aside the orders issued on 2<sup>nd</sup> November, 2018 dismissing the plaintiff's suit herein and have the same reinstated.

5. The plaintiff avers that the notice to show cause why the case should not be dismissed for want of prosecution given under Order 17 Rule 2 of the Civil Procedure Rules was not served on their advocate. I have perused a copy of the notice dated 15<sup>th</sup> October, 2018 which is in the court file. There is no evidence of service of the said notice upon the plaintiff and even upon the defendants. The plaintiff has also explained

that previously, the court file herein had gone missing. Looking at the material before me and the explanation offered, I am persuaded that in the circumstances of this case, the order issued on 2<sup>nd</sup> November, 2018 by Matheka J which dismissed the plaintiff's suit for want of prosecution should be set aside as there is no evidence that service of the notice to show cause was effected. It would result in grave injustice to the plaintiff if the orders sought are not granted because it would have been condemned unheard.

6. Accordingly, I find that the notice of motion dated 25<sup>th</sup> November, 2019 is merited and the same is allowed. I set aside the order issued on 2<sup>nd</sup> November 2018 dismissing this suit. The suit is reinstated. Parties to bear own costs.

7. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 17<sup>th</sup> day of November, 2020**

.....

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

**Yumna Court Assistant**

**C.K. YANO**

**JUDGE**