



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 58 OF 2016**

**FATUMA HAMISI MWARASI.....PLAINTIFF**

**-VS-**

**1. ORINI LIMITED**

**2. REEFVIEW INVESTMENTS LTD**

**3. LAND REGISTRAR KWALE DISTRICT REGISTRY**

**4. HON. ATTORNEY GENERAL.....DEFENDANTS**

**RULING**

1. The application for determination is the Notice of Motion dated 3<sup>rd</sup> March 2020 in which the Plaintiff/Applicant is seeking orders to set aside and/or vary the orders of this court issued on 28<sup>th</sup> January, 2020 dismissing the suit for non-attendance and have the same reinstated for hearing and determination on merit. The Application is supported by the affidavit of Fatuma Hamisi Mwarasi the Applicant, sworn on 3<sup>rd</sup> March, 2020 and further affidavit sworn on 14<sup>th</sup> October, 2020. It is the Plaintiff's contention that when the suit came up for hearing on 28<sup>th</sup> January 2020, the Plaintiff's former Advocates Messrs Oduor Siminyu & Company Advocates not only failed to attend court but also did not inform the Plaintiff as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the matter was scheduled for hearing on the said date. The Plaintiff avers that she has been condemned unheard and that the inadvertent mistake of an advocate should not be visited upon her as an innocent litigant. The Plaintiff avers that the parties herein had executed a consent compromising the suit that was yet to be filed. That it is in the interest of justice that she be given an opportunity to ventilate her claim in a fair manner, adding that no prejudice will be suffered by the Defendant if the orders sought herein are granted. A copy of the said consent has been annexed.

2. The application is opposed by the 1<sup>st</sup> Defendant through a replying affidavit by Francis Munyao Mulinge sworn on 18<sup>th</sup> September, 2020. He has deposed inter alia, that no plausible reason or at all has been advanced to explain why the Plaintiff and her advocates fixed the matter for hearing, served all parties but opted not to attend court. That the former advocates ought to have sworn an affidavit to explain their failure to attend court. The 1<sup>st</sup> Defendant blames the Plaintiff for failure to prosecute the case since 2016 when it was filed. The 1<sup>st</sup> Defendant avers that the court is *functus officio* and the Plaintiff ought to have moved to a higher court to challenge the dismissal.

3. The application is also opposed by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants through grounds of opposition dated 21<sup>st</sup> September, 2020 on the ground that the application is misconceived, frivolous, vexatious and an abuse of the court process; that the application offends Order 12 Rule 3(1) of the Civil Procedure Rules; that the hearing date was taken by consent on 26<sup>th</sup> January, 2020 and none of the parties attended court on 28<sup>th</sup> January, 2020 except the 3<sup>rd</sup> and 4<sup>th</sup> Defendants; that the court duly exercised its discretion in dismissing the Plaintiff's suit under Order 12 Rule 3; and that it is in the interest of justice that the application be dismissed with costs.

4. The application was canvassed by way of written submissions which were duly filed by the Plaintiff and the 1<sup>st</sup> Defendant.

5. I have considered the application, the affidavits on record, the grounds of opposition filed and the submissions made. The only issue for determination is whether or not the court should set aside the order issued on 28<sup>th</sup> January, 2020 dismissing the Plaintiff's suit and have the same reinstated.

6. The case was before court for mention on 26<sup>th</sup> September 2019 to fix a hearing date. All parties were represented and the matter was fixed for hearing on 28<sup>th</sup> January 2020. However, on 28<sup>th</sup> January, 2020, only counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants attended court. The Plaintiff and her advocates as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not present in court. And since the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not admit any part of the Plaintiff's claim, the suit was dismissed for non-attendance.

7. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for a non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate that suit. The Notice of Motion herein was filed on 12<sup>th</sup> March, 2020, about one month and two weeks after the suit was dismissed. The same in my view was therefore filed without delay, considering that the Plaintiff may not have been aware of the dismissal.

8. In the case of *Shah –v- Mbogo (1967)EA 116*, it was stated that the exercise of discretion of the court to set aside ex-parte Orders is to avoid an injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. In this case the Plaintiff has explained that she was not aware that the matter was coming up for hearing on 28<sup>th</sup> January, 2020 because her previous advocate M/s Oduor Siminyu did not inform her of the hearing date. The Plaintiff has also explained that parties were in the process of compromising the suit and indeed have executed a consent that they intended to file in court. From the affidavits in support of the application, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the Plaintiff and the same should be excused. The Defendants have not demonstrated that they will suffer prejudice if the orders sought are granted. I am persuaded the circumstances of this case justifies giving the Plaintiff another chance which is not only feasible but also the just thing to do. The overriding objective+ of the court would also come to the aid of the applicant in order for the case to be decided on merit.

9. For the foregoing reasons, I am satisfied that the notice of motion dated 3<sup>rd</sup> March, 2020 has merit. The application is allowed. The Order made herein on 28<sup>th</sup> January, 2020 dismissing the Plaintiff's suit for non-attendance is set aside and the suit is reinstated for hearing and determination on merit. Costs of this application shall be in the cause.

10. It so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 7<sup>th</sup> day of December 2020**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**