



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 338 OF 2017**

**DANIEL MUTISO MWANIA.....1<sup>ST</sup> PLAINTIFF**

**MICHAEL MUSEMBI MWANIA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FRANCIS MUREITHI.....1<sup>ST</sup> DEFENDANT**

**RULING**

What is before me for determination is the Plaintiffs' Notice of Motion application dated the 12<sup>th</sup> July, 2018 brought pursuant to Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules and Section 1A and 3A of the Civil Procedure Act. The Application is seeking to set aside orders of the Court dated the 12<sup>th</sup> June, 2018 dismissing the suit. Further, the Plaintiffs' seek for orders to reinstate the suit.

The application is premised on the grounds that the Plaintiffs' counsel's failure to act on time on the matter was not deliberate and/or intentional. The failure for the Plaintiffs' counsel to file documents/ act on this matter was caused by lack of communication between the Plaintiffs' Counsel and the Plaintiffs since they had relocated. It would be unfair to punish the Plaintiffs for misfortunes beyond their control.

The application is supported by the affidavit of CHARLES MUOKI ADVOCATE who is the Advocate having the conduct of the matter on behalf of the Plaintiffs' where he reiterates their claim above. He explains that he filed this suit on behalf of the Plaintiffs' on 23<sup>rd</sup> August, 2013 at the ELC Machakos. He states that since there was a shortage of ELC Judges, the matter was transferred to Kajiado. He contends that Mr. Muoki attended Court after they were served with a Mention Notice and later prepared an Amended Complaint and other documents ready for filing, but was unable to communicate with the Plaintiffs as they moved offices. He avers that when they were served with a Notice to Show Cause why suit should not be dismissed for want of prosecution, Mr. Maina Advocate attended Court on 12<sup>th</sup> June, 2018 on his behalf, but the matter was dismissed. He reiterates that it is not fair for the Plaintiffs to be punished for the mistakes related to the present circumstances. He reaffirms that the Plaintiffs appeared in their offices recently and they are ready to proceed with the matter. Further, that dismissal of this suit is a denial of justice on the part of the Plaintiffs. He claims the Defendants will suffer no prejudice if this application is allowed.

The Defendant opposed the application and filed Grounds of Opposition where he contended that the instant Notice of Motion is incurably defective and incompetent. He states that the Plaintiffs to mislead the Court have introduced the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively, yet there has never been an application to do so, filed in court. He avers that lack of communication with the Plaintiffs demonstrate they do not have an interest in this suit and the affidavit sworn by CHARLES MUSYOKI MUOKI lacks merit as well as substance. Further, the provisions of the law in the said application do not confer jurisdiction on the court to reinstate the suit and it would be unfair to do so. He reiterates that he has always been in possession of the suit land.

Both the Plaintiffs and the Defendant filed their submissions that I have considered.

**Analysis and Determination**

Upon consideration of the materials filed in respect of the Notice of Motion dated the 1<sup>st</sup> July, 2018, the only issue for determination is whether this suit should be reinstated for hearing and final determination.

The Plaintiff's Counsel admitted that he lost contact with his client and that was the reason for the delay in setting the suit down for hearing. In the case of *GOLD LIDA V NIC LIMITED & 2 OTHERS* (2018) eKLR in which Justice Eboso favourably cited the case of **Philip Chemwolo & Anor V Augustine Kubede (1982 – 88) KAR 103** where Apaloo JA held that: **'Blunder 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.'**

In relying on the evidence as presented including the Court record and being persuaded by this authority, I opine that the mistake to counsel cannot be visited upon the plaintiff. Further delay in filing this application is not inordinate and will exercise my discretion to reinstate the suit. I find that no prejudice will be suffered by the Defendant if he is compensated with costs.

In the circumstances, I find the application merited and will allow it. I will award the Defendant costs of Kshs. 10,000. I direct the Plaintiff to set down the suit for hearing within 90 days from the date hereof failure of which it will stand dismissed with costs.

**Dated and delivered at Kajiado this 21<sup>st</sup> Day of March, 2019**

**CHRISTINE OCHIENG**

**JUDGE**