



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 116 OF 2015

FRANCISCA WAYUA KYULE.....PLAINTIFF/APPLICANT

VERSUS

DAVID GONA NGUMA.....DEFENDANT/RESPONDENT

RULING

1. By this Notice of Motion application dated and filed herein on 4th December 2017, Francisca Wayua Kyule (the Plaintiff) prays for an order setting aside the orders dismissing this suit for non-attendance on 22nd November 2017 and that in its stead the Plaintiff's case be reinstated for full hearing.

2. The Application is supported by the Plaintiff's Affidavit and is premised on the grounds:-

a) That on 10th March 2017, the Plaintiff appointed Messrs Momanyi & Associates and a Notice of Change to that effect was filed in that regard on 14th March 2017;

b) That subsequently the suit was fixed for hearing ex-parte on 22nd November 2017 when it proceeded in the absence of the Plaintiff and her new Counsel as they were unaware of the same;

c) That the Plaintiff and her Counsel have always been diligent and willing to proceed and they stand to suffer a grave injustice unless the orders sought herein are granted.

3. In a Replying Affidavit filed on 5th February 2018 in opposition to the application, David Gona Nguma (the Defendant) avers that the Plaintiff has not been diligent in prosecuting the suit as there are three other occasions when they failed to proceed with the matter.

4. The Defendant further avers that there was no way in which the Plaintiff's new Advocate could have been served as the purported Notice of Change of Advocates was never served upon the Defendant's Advocate and the Advocates previously on record kept on accepting service of invitation letters and hearing notices.

5. I have considered the application and the response thereto. I have also considered the oral submissions made before me by the Learned Advocates for the parties.

6. Order 10 Rule 11 of the Civil Procedure Rules provides that:-

“Where Judgment has been entered under this Order the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

7. Applying the spirit of the above provision in *Patel –vs- East African Cargo Services Ltd(1974) EA 75*, it was held that:-

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules....where it is a regular Judgment as is the case here the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on merits.”

8. In the matter before me, the Plaintiff states that she had filed a Notice of Change of Advocates on 14th March 2017 changing her Advocates from Messrs Nyakoe Macharia & Company Advocates to M/s Momanyi & Associates Advocates. It would however appear that this Notice of Change was never served upon the Advocates for the Defendant.

9. Subsequently on 25th September 2017, the Defendants Advocates appeared in Court and fixed this suit for hearing on 22nd November 2017. Prior to the hearing date, precisely on 17th November 2017, the Defendant's said Advocates filed an Affidavit of Service in which they stated that they served notice of the hearing upon Ms Nyakoe Macharia & Company Advocates on 29th September 2017. Attached to the Affidavit of Service was the Hearing Notice dated 29th September 2017 on the surface whereof there appears a stamp indicating that it was received by the Law Firm as stated.

10. On 22nd November 2017 this Court relied on the said Affidavit to dismiss the Plaintiff's case. I have examined the record herein and I am satisfied that the Plaintiff had indeed changed her Advocates vide a notice filed in Court on 14th March 2017. The new Advocates however apparently never served the notice.

11. In the circumstances of this case, I think it would not be in the interest of justice to visit the mistake of the Advocates in failing to serve the notice of Change of Advocates upon the Plaintiff.

12. I will accordingly exercise my discretion and set aside the orders made on 22nd November 2017 and to reinstate the Plaintiff' suit for hearing.

13. The Plaintiff shall however pay the Defendant's thrown away costs which I hereby assess at Kshs 10,000/-.

14. Order accordingly.

Dated, signed and delivered at Malindi this 29th day of May, 2019.

J.O. OLOLA

JUDGE