



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 1 OF 2015

HINZANO NGONYO HINZANO

SALIM KIPONDA HINZANO

TSANGNOLEM KHAMIS KIPONDA.....PLAINTIFFS

VERSUS

NELSON TOTO & 17 OTHERS.....DEFENDANTS

RULING

1. Before me for determination is the Defendants/Respondents Notice of Motion dated 22nd January 2019 seeking an order that this Court be pleased to reinstate an earlier Notice of Motion application filed by themselves and dated 12th October 2018.

2. The application which is supported by an affidavit sworn by the 1st Defendant Nelson Menzah Mwambegu is premised on the grounds:-

i. That the earlier application dated 12th October 2018 sought orders for the Court to review, vary or set aside the Judgment delivered herein on 22nd February 2018.

ii. That the said application was dismissed on 21st January 2019 for want of prosecution.

iii. That on the day the matter was dismissed, the 1st Defendant was present in Court but had just stepped out to communicate with their Advocate who was travelling from Mtwapa to attend Court and when the 1st Defendant came back to Court he found that the application had been dismissed.

iv. That the Applicant is remorseful and it is in the interest of justice that the Defendants be granted a chance to defend the suit.

3. However in a Replying Affidavit sworn and filed herein on 1st February 2019 by the 3rd Plaintiff/Respondent, Tsangnolem Khamis Ponda, the Plaintiffs are opposed to the grant of the orders sought. It is the Plaintiffs case that the Defendants have never been willing to proceed with the suit and that there was no Advocate they had gone to consult when their application was dismissed.

4. The Plaintiffs further assert that the Defendants' application has been brought too late in the day and further that the application is irregular as the Defendants have filed a Notice of Appeal to set aside the orders sought to be reviewed.

5. I have perused and considered the application brought by the 1st Defendant in person and the Plaintiffs' response thereto.

6. A Court's discretion to set aside its Ruling or order is not restricted but that discretion must be exercised judiciously so as not to cause any injustice to the opposite party. It is therefore incumbent upon the party seeking the Court's favour to adduce sufficient and plausible reasons to warrant the exercise of such discretion in his favour.

7. In the matter before me, the 1st Defendant who purports to have brought the application on behalf of the 16 other Defendants avers that he was in Court on the date their application was dismissed and that he had stepped out to communicate with the said Advocate only to get back and find that the matter had been dismissed.

8. As it were the 1st Defendant neither gives the name of the Advocate whom he stepped out to communicate with nor is there an Affidavit from the said Advocate to confirm the Applicants assertions.

9. A perusal of the record herein gives me the impression that the Defendants have never been serious with the prosecution of this suit. While an Advocate entered appearance on their behalf in 2015, no defence was ever filed. One Advocate acting for them has in the history of the matter withdrawn and come back on record twice. For now the 1st Defendant has filed the present application for the reinstatement of another application purporting to act on behalf of the other 16 Co-Defendants. No authority to so act has however been attached to the application.

10. I have considered the circumstances herein. I am not persuaded that this is a matter in which I should exercise my discretion in favour of the Applicants.

11. Accordingly the application dated 22nd January 2019 is dismissed with costs to the Plaintiffs/Respondents.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE