



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 128 OF 2015

KINNOCK TRADING LTD.....PLAINTIFF/APPLICANT

VERSUS

EVANS MANGI DOGO & 131 OTHERS.....DEFENDANT/RESPONDENTS

RULING

1. By this Notice of Motion application dated 21st January 2019, the Plaintiff prays that the Court's order made on 16th January 2019 dismissing the suit for want of prosecution be set aside and that the suit be reinstated. The Plaintiff further seeks an order that directions be given as to which Counsel is on record for the defendants.

2. The application which is supported by an affidavit sworn by P. Cynthia Onyango Advocate is premised on the grounds: -

a) That failure to attend Court on 16/1/19 was due to inadvertent mistake on the part of the Advocate;

b) That earlier on the Defendants new Advocate Messrs Miller George & Gikonde Advocates engaged the Plaintiff's Counsel seeking to pursue settlement;

c) That on 16/1/2019 as the Plaintiffs' advocate walked into the Court precincts, the matter had already been dealt with and dismissed;

d) That it is unclear as to who exactly acts for the defendants and/or who had instructions to act for the defendant as at 16/1/2019; and

e) That the Plaintiff is being prejudiced by the order of 16/1/2019.

3. The application is opposed. In a Replying Affidavit filed herein on 12th February 2019 and sworn by Daniel Mwanzia, the 46th Defendant, the Defendants contend that the Plaintiff has not given any justification for failing to attend Court together with their Advocates on the date when the matter was coming up for hearing.

4. The Defendants deny having instructed the firm of Miller George & Gikonde Advocates. They further deny entering into negotiations for settlement and aver that the hearing of the suit was adjourned on 25th September 2018 because the Plaintiff wrote to the Defendants Advocate indicating that their sole witness had been involved in a road traffic accident.

5. I have considered the application and the response thereto. I have equally considered the oral submissions of the Learned Advocates for the parties.

6. Setting aside a ruling or Judgment of a Court requires the exercise of the Court's discretion. In *Shah -vs- Mbogo & Another (1967) EA 116*, the Court discussing the exercise of discretion observed as follows: -

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

7. In my mind, given that this is a matter for the exercise of discretion, it is incumbent upon the party seeking the Court's favour to adduce sufficient and plausible reasons that can be demonstrated and are persuasive to the Court.

8. In the matter before me, Counsel for the Plaintiff/Applicant states at paragraphs 4, 5 and 6 of her Supporting Affidavit as follows: -

4. That I am aware that the Court gave orders of dismissal for want of prosecution on the oral application of one Mr. Nyange Advocate on 16/1/2019.

5. That my failure to attend Court on 16/1/2019 on time was due to inadvertent mistake on my part as the advocate for the Plaintiff.

6. That Advocate's mistake should not be visited upon client."

9. As it were, Counsel does not explain what the nature of the mistake and/or how it led to her not attending Court on the date the matter was scheduled for hearing. Nor does it explain where her client or its representative was on the said date.

10. In the absence of any discernible reason why the Advocate and/or her client failed to attend Court, I find no basis upon which to exercise my discretion in their favour.

11. I therefore find no merit in the application dated 21st January 2019. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE