



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 222 OF 2014**

**SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LTD T/A**

**SOLACE LIFESTYLE AND WELLNESS RESORT.....PLAINTIFF**

**VERSUS**

**MARIO RASHID AND 16 OTHERS.....DEFENDANTS**

**RULING**

1. By a Notice of Motion application dated and filed herein on 22<sup>nd</sup> October 2018, the Seventh Day Adventist Church (East Africa) Ltd T/A Solace Lifestyle & Wellness Resort (Plaintiff/Applicant) prays that the orders made herein on 18<sup>th</sup> October 2018 dismissing the Plaintiff's suit be reviewed, varied and/or set aside. The Plaintiff further urges the Court to reinstate its suit dated 27<sup>th</sup> November 2014 for hearing.
2. The Application which is supported by an Affidavit sworn by Kelvin Mbura Advocate for the Plaintiffs is based on the grounds:-
  - i) That when this matter was called out for hearing on 18<sup>th</sup> October 2018 Counsel for the Plaintiff was on his feet before the High court at Malindi in another matter;*
  - ii) That the Plaintiff's Managing Director Jared Kiplagat Cheruiyot was also within the vicinity of the Court ready to adduce evidence;*
  - iii) That the Plaintiff was not accorded a chance to be heard before the Court dismissed its suit for want of prosecution;*
  - iv) That the Plaintiff is desirous to prosecute this suit and the application has been brought without undue delay; and*
  - v) That unless the orders sought are granted, the Plaintiff will suffer irreparable damage and loss as the Respondent will continue to erect structures which pose a security threat to the Plaintiff's property.*
3. The 1<sup>st</sup> to 16<sup>th</sup> Defendants did not file any response to the application. But in a Replying Affidavit sworn by its Head of Legal (Affairs) Michelle Bibi Fondo, the County Government of Kilifi (the 17<sup>th</sup> Defendant) asserts that the Plaintiff has dragged the 17<sup>th</sup> Defendant into this suit without any justifiable cause when it has no cause of action against it.
4. The 17<sup>th</sup> Defendant avers that the Plaintiff's application is an abuse of the Court process and that it should be dismissed as the 1<sup>st</sup> to 16<sup>th</sup> Defendants are also entitled to the enjoyment of the shoreline to the beach from which the Plaintiff seeks to exclude them.
5. The 17<sup>th</sup> Defendant avers that the reinstatement of the suit will only amount to an academic exercise and wastage of Judicial time. It is their case that the continued existence of this suit is prejudicial to the Defendants who have not only been subjected to untold anxiety with the suit hanging over them but also have to contend with high legal retainer fees to defend the same.
6. I have considered the application and the response thereto. I have equally considered the written submissions and authorities filed herein by the Learned Advocates for the parties.
7. The Court's power in considering an application to set aside an interlocutory order or Judgment is discretionary. As was held in **Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75:-**

*“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. 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.”*

8. In the same vein, the Court of Appeal in ***Shah –vs- Mbogo (1967) EA 166***, held that:-

***“.....this discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”***

9. In the matter before me, the Plaintiff’s Advocate avers that as at the time this matter was called out on 18<sup>th</sup> October 2018, he was before the High Court in conduct of a matter therein and that he had arranged with his Court Clerk to have the matter placed aside. As it turned out, his clerk arrived in Court after the matter was called out and was dismissed. In support of his case he has annexed a copy of the cause list from the High Court on the same day from which it was clear that he was appearing before that Court.

10. Even though the 17<sup>th</sup> Defendant vehemently opposes this application, I note from the record that they were equally absent from Court on that day the suit was dismissed. So were all the other Defendants.

11. In the circumstances of this case I did not think that a reinstatement of this suit would cause any prejudice to the Defendants.

12. Accordingly I hereby allow the Plaintiff’s application dated 22<sup>nd</sup> October 2018. The costs shall be in the cause.

**Dated, signed and delivered at Malindi this 5<sup>th</sup> day of December, 2019.**

**J.O. OLOLA**

**JUDGE**