



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**HCCC NO. 289 OF 2007**

**KENYA COMMERCIAL BANK OF KENYA LIMITED**

**MARY WAMBUI CHEGE.....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA**

**CHEBE HOLDINGS LIMITED**

**AUKOLAND AGENCIES.....DEFENDANTS**

**RULING**

1. This is the Notice of Motion dated 21<sup>st</sup> November, 2017. It is brought under Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 17 Rule 2 of the Civil Procedure Rules, 2010, Article 159 of the Constitution of Kenya and all other enabling provisions of the law.

2. It seeks orders;

**1) That the orders issued on 11<sup>th</sup> October, 2017 dismissing the suit herein for want of prosecution be and are hereby set aside and the suit herein reinstated forthwith.**

**2) That upon granting prayer 1 above, this suit be and is hereby set down for hearing.**

**3) That costs of the application be provided for.**

3. The grounds are on the face of the application and are listed as in paragraph a – j. I do not need to reproduce them here.

4. The application is supported by the affidavit of Clive M. Mulama, the Advocate of the Plaintiffs/Applicants sworn on the 21<sup>st</sup> November, 2017.

5. The 1<sup>st</sup> Defendant through counsel told the court that they would not be opposing the application.

6. There are grounds of opposition filed by the 2<sup>nd</sup> Defendant/Respondent dated 4<sup>th</sup> December, 2017.

7. On 5<sup>th</sup> February, 2018, it was agreed amongst the parties that the application be disposed of by way of written submissions.

8. It is the 2<sup>nd</sup> Defendants/Respondent's submissions that the affidavit in support is not sworn and not commissioned. I have gone through the affidavit of Clive M. Mulama filed in court on 21<sup>st</sup> November, 2017.

I find that the same is sworn. It is also commissioned by Noel Inziani Adagi, Advocate, Commissioner for Oaths and Notary Public of P. O BOX 90585-80100 Mombasa. It is therefore not true to say the affidavit is not commissioned.

9. It is the Plaintiffs'/Applicant's' submissions that the failure to attend court on 11<sup>th</sup> October, 2017 was inadvertent and not deliberate. That

it was occasioned by the change of Advocates.

That the Notice to show cause was served on the previous Advocates and that the Plaintiffs/Applicants should be excused.

10. It is also the Plaintiffs/Applicants' submission that the delay in prosecuting this case was not inordinate. They have relied on the cases of *Mwangi S. Kaimenyi –versus- Attorney General And Another (2014) eKLR, Lochab Bros Limited –versus- Peter Kaluma Advocates and 2 OTHERS (2013) eKLR.*

Further that the 2<sup>nd</sup> Defendant/Respondent would suffer no prejudice if this suit is reinstated. They urge that the court do exercise its discretion in favour of the Plaintiffs/Applicants and allow the application.

11. I have gone through the court record and I find that the Court of Appeal delivered its judgment on 17<sup>th</sup> December, 2013. It also directed that the suit herein be given a hearing date in a priority basis. The suit herein was dismissed for want of prosecution on 11<sup>th</sup> October, 2017.

It appears the Plaintiffs/Applicants did not take any steps to set down the suit for hearing after they got the judgment from the Court of Appeal. The notice to show cause was served on the Plaintiff's/Applicant's counsels way back in September.

12. I am of the view that the Plaintiffs/Applicants are not serious in prosecuting this case. I find that no justifiable cause has been given to warrant this court to set aside the orders of 11<sup>th</sup> October, 2017.

13. I find that no merit in this application and the same is dismissed with costs to the 2<sup>nd</sup> defendant/Respondent.

**It is so ordered.**

**DATED, and SIGNED at MOMBASA on the 20<sup>th</sup> day of June 2018.**

---

**L. KOMINGOI**

**JUDGE**

**DATED, SIGNED and DELIVERED at MOMBASA on the 20<sup>th</sup> day of June 2018.**

---

**A. OMOLLO**

**JUDGE**