



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 394 OF 2006**

**1. CONSTATINE DZOMBO**

**2. DAVID MRIMA**

**3. MARY KATANA MWANGIRI**

**4. OSCAR MWAWUGHAGA MDIDI**

**5. KADZO NGUMBAO MUHAMBI**

**(for and behalf of Mtomondoni Muungano**

**Self- Help Group).....PLAINTIFFS/APPLICANTS**

**-VS-**

**1. LUKYN COATS**

**2. MARYBELLE DRUMOND.....RESPONDENTS/DEFENDANTS**

**RULING**

1) By a Notice of Motion dated 16<sup>th</sup> January 2018, the Plaintiffs/Applicants seek orders:

**1. That this Honourable Court be pleased to reopen the suit which was marked as dismissed for non-attendance of the Plaintiff on 16<sup>th</sup> January 2018.**

**2. That this Honourable Court be pleased to reinstate the suit.**

**3. That costs of this Application be provided for.**

2) The Application is based on the grounds set out on the face of the Application namely: -

**a. That the Court on 16<sup>th</sup> January, 2018 made orders marking this suit as dismissed failure of the non-attendance of the Plaintiffs'/Applicants' Advocate.**

**b. That the Plaintiffs/Applicants have a good and/or merited cause of action and therefore the order should be set aside.**

**c. That unless the prayers sought for herein are granted the Plaintiffs/Applicants will suffer irreparable loss and damage.**

3) The Application is further supported by the Affidavit of William C. Kenga, Counsel for the Plaintiffs/Applicants sworn on 16<sup>th</sup> January 2018 and a Supplementary Affidavit sworn on 2<sup>nd</sup> May, 2018 in which he has explained the circumstances in which the suit was dismissed. Mr. Kenga depones that they arrived few minutes late and found the matter had already been mentioned and an order to dismiss the suit for non-attendance of the Plaintiffs/Applicants had been made. He avers that his absence was not deliberate since he was delayed by unavoidable

circumstances. That immediately he arrived in court, he tried consulting the advocate who was holding brief for Ghalia Advocates to have the suit reinstated by consent but was advised to make a formal application. He states that on the same day, he applied for a copy of the court's proceedings of the day that contained the order. It is counsel's further contention that the Plaintiffs have been faithful to the suit. He depones that once the suit is reinstated, he undertakes to set it down for hearing at the earliest date possible.

4) The Defendants oppose the Application and filed grounds of opposition on 13<sup>th</sup> March, 2018 to the effect that:

**1. The motion is fatally defective and the orders sought cannot be issued because:**

**a) The Court cannot re-open or reinstate a suit which has been dismissed for non-attendance because order dismissing has not been varied, set aside or vacated.**

**b) The motion is brought under Order 45 which does not apply to suits dismissed for non-attendance under Order 12 Rule 3.**

**c) Orders of dismissal for non-attendance under Order 12 Rule 3 are not subject to review.**

**d) The applicant has ignored the clear lay of procedure challenging orders dismissing a suit for non-attendance under Order 12.**

**e) It is trite law that where the law provides for remedies a litigant must exhaust the remedies provided before approaching the court for other remedies.**

**2. The motion has no chances of success because the Applicants have not demonstrated the reasons why they failed to attend court on 16/1/18.**

**3. In any event, the motion does not satisfy the grounds for review under Order 45 because it has not been shown that,**

**a) There is discovery of a new matter or evidence.**

**b) There is any error or mistake apparent on the face of the record.**

5) The application is made under Order 45 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3A & 63 (e), 1A and 1B of the Civil Procedure Act. In his submissions, Mr. Kenga, Counsel for the Applicants submitted that the Application was made without undue delay and that it was irregular for the defendants to have applied to dismiss the suit yet there was a Preliminary Objection pending. It was his argument that the Preliminary Objection should have been argued on the day suit was dismissed. Learned counsel submitted that other than that day, the plaintiffs and their advocate never failed to attend court and added that on many occasions, it was the defendants who failed to attend or the court was not sitting. He further submitted that the matter touches on land in which the plaintiffs are in occupation. He submitted that the application seeks to re-open and reinstate the suit and therefore it clearly seeks to set aside the order for dismissal. He added that there is no harm to be suffered by the Defendants if the suit is reinstated. Counsel relied on **Civil Appeal No.28 of 2014 (Malindi), Mohamed Salim Balala & Another –v- Tor Allan Safaris Limited, HCCA No.51 of 1992 (Nairobi), Muguti Kimotho –v- Samuel Ngewa, Adiel Muriethi Phillip –v- Thomas Maingi (2016)eKLR, and HCCA No.604 of 2012 (Nairobi) Burhani Decorators and Contractors –v- Morning Foods Limited & Another.**

6) Mr. Masila, learned Counsel for the defendants submitted that under 12 Rule 7 of the Civil Procedure Rules when a suit is dismissed, one may apply for varying or setting aside of the dismissal order. He pointed out that the present application is brought under Order 45 Rule 2 and seeks to re-open and reinstate the suit. It was his submission that Order 45 Rule 1 and 2 does not apply where a suit has been dismissed for non-attendance, and relied on the case of **Benjamin Barasa Wafula & Another – v – Moses Chatambe & 22 Others (2014) eKLR,** and **Grace Martha Mukembu –v – Katherinya Ruguru & Another (2017) eKLR.** Mr. Masila added that neither the Plaintiff nor their advocate were present and pointed out that there is a contradiction between the supporting Affidavit and the Supplementary Affidavit.

7) I have considered the Application. On 16<sup>th</sup> January, 2018 when the case came up for hearing, there was no appearance by the Plaintiffs or their advocate. Only the defendants and their advocate were present. The defendant did not admit any of the Plaintiffs claim. The hearing date was taken by the Plaintiffs' Advocate who duly served the Defendants to attend Court on 16<sup>th</sup> January, 2018.

Order 12 Rule 3(1) provides as follows:

***“(1) If on the date fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.”***

It is clear that Order 12 Rule 3 allows the court to dismiss a suit for non-attendance. Rule 7 however allows the aggrieved party to apply to set aside the order for dismissal and reinstate the suit

8) The Applicants herein have moved the court under Order 45 of the Civil Procedure Rules which deals with review. Order 45 which has been cited is of no relevance to solve the applicants' problem. In this regard, I am persuaded to quote the case Benjamin Barasa Wafula & Another (supra) where the court stated:

***“To worsen the applicant’s case is the wording of the prayer in that Application. Even if this court was to rely on article 159 of the Constitution to assist the Applicant, there is no prayer made seeking setting aside for non-attendance.”***

9) The dismissal of the suit was not unprocedural. It was done in compliance with the law. The provisions of Order 45 sets out the grounds upon which review can be sought and includes:

***a. Discovery of new evidence that was not within knowledge of the applicant even after exercising due diligence.***

***b. Mistake or error apparent on the face of the record***

***c. Any other sufficient reason.***

None of these grounds have been submitted by the Applicants. Parties to a suit are bound by their pleadings and the court cannot grant what is not sought. In my view even this is a dismissal for non-attendance which in my view does not fall under orders/decrees which can be reviewed.

10) In addition I also note that there is a clear contradiction in the averments made in the supporting affidavit and the supplementary affidavit. In the supporting affidavit, Mr. Kenga avers that immediately upon arrival in court he tried consulting the advocate who was holding brief for Ghalia Advocate to have the suit reinstated by consent but was told to make a formal application. This implies that Mr. Kenga was alone and that he met the advocate who was holding brief for Ghalia advocate for the defendants. However, in the supplementary affidavit, Mr. Kenga states that he had come to court with his clients but arrived late and since he found the advocate who appeared for the defendants had already left, the only option was the filing of the present application. To me, these averments are contradictory and I agree with submission by Mr. Masila, learned Counsel for the Respondents. The question that arises is which averment do the Applicants want the court to go by. In my view, the court cannot exercise its discretion in favour of a party who is not candid. The overriding objective of the court would not come to the aid of a party who is out to mislead the court. I am therefore not satisfied with the explanation for non-attendance.

11) The upshot is that the application before court lacks merit and is hereby dismissed with costs to the defendants.

**Delivered, signed and dated at Mombasa this 27<sup>th</sup> September, 2018.**

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**C. YANO**

**JUDGE**