



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO.456 OF 2009**

**JOHN RAMA KENDA & 14 OTHERS.....PLAINTIFFS/APPLICANTS**

**-VS-**

**MOHAMED SOOD FAKIH.....DEFENDANT/RESPONDENT**

**RULING**

1. The application for determination is the Notice of Motion dated 1<sup>st</sup> March, 2018 in which the Plaintiffs/Applicants are seeking to reinstate the suit which was dismissed on 15<sup>th</sup> January 2018 for non-attendance. The application is brought under Order 12 Rule 7 of the Civil Procedure Rules and is based on the grounds that the Plaintiffs' counsel failed to diarize the matter for hearing on 15<sup>th</sup> January 2018 and that the Plaintiff is desirous to have the matter heard. That the defendant will not suffer prejudice if the suit is reinstated as the case will be heard on merits. That it is fair this being a land matter, the plaintiff's claim and the counter-claim be determined on merits.

2. The application is supported by the affidavit of Mathew Nyabena, advocate for the plaintiffs sworn on 1<sup>st</sup> March, 2018 in which he depones that the matter herein was fixed by consent on 21/9/2017 for hearing on 15<sup>th</sup> January, 2018 but that he inadvertently failed to include the same in his 2018 diary, hence the failure to attend court. He depones that he later learnt that the matter was in court for hearing and the case had been dismissed for non-attendance. That the non-attendance on his part was not intentional and was due to failure to diarize.

3. The application is opposed by defendant who filed a replying affidavit dated 16<sup>th</sup> May, 2018 in which he depones inter alia, that the suit was filed way back on 7<sup>th</sup> December 2009 and that since the filing of the case, the Plaintiff has displayed the highest of indolence and lethargy in handling the matter and gave particulars in which he alleges the plaintiff has frustrated the hearing by ensuring that it does not proceed. That the plaintiffs took almost three (3) months to file the present application with no explanation given for the delay. The defendant further depones that the plaintiffs' counsel failed to disclose how he learnt of the dismissal of the suit and that the date was fixed by consent in court when all the plaintiffs were in court and they had not even made arrangements for the site visit as directed by the court.

4. I have considered the application, the affidavits in support and against as well as the submissions filed by the parties. This suit was before court for hearing on 17<sup>th</sup> May, 2017 when PW1 was stood down to enable the court make a site visit where the witness was to continue giving his evidence. The case was stood over to 21<sup>st</sup> September 2017 for further hearing at the site. However, on 21<sup>st</sup> September 2017 the matter could not proceed because the plaintiffs' counsel informed the court that his witness was unwell. The matter was then fixed for hearing on 15<sup>th</sup> January 2018 when none of the parties was present in court, hence the dismissal of the suit for non-attendance.

5. Order 12 Rule 3 of the Civil Procedure Rules allows the court to dismiss a suit for non-attendance while Rule 7 allows the aggrieved party to apply to set aside that order and reinstate the suit. In the affidavit in support of the application, the plaintiffs' counsel has explained why he did not attend court on the material day. He states that he forgot to diarize the matter for that day. I note that even the defendant and his advocate were not present in court when the suit was dismissed. I also note that the case is part heard, the plaintiffs having called one witness who however is yet to conclude testifying. The plaintiffs' said witness was to continue testifying at the site on 21<sup>st</sup> September 2017. However, on that material day, the matter could not proceed because the witness was said to be unwell. The matter was then fixed for hearing on 15<sup>th</sup> January 2018 when none of the parties attended, hence the dismissal. I will exercise my discretion and give the plaintiffs the benefit of doubt. The plaintiffs' advocate might have forgotten to diarize the matter when he secured the 2018 diary. From the material before court, I am satisfied that the failure to attend court was not intentional or deliberate on the part of the applicants and their advocate. In my view, the failure to attend court has sufficiently been explained and the same is excusable. In the case of **Shah -v- Mbogo (1967)EA 116**, it was stated that the exercise of discretion of the court to set aside ex-parte orders is to avoid injustice or hardship from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice. The overriding objective of the court would also come to the aid of the plaintiffs. They defendants who themselves were also not present in court have not demonstrated that they will suffer prejudice if the orders sought are granted.

6. For the foregoing reasons, I am satisfied that the plaintiff's application dated 1<sup>st</sup> March 2018 has merit. The application is allowed. The order made herein on 15<sup>th</sup> January 2018 dismissing the suit is set aside and the case is reinstated for hearing on merit. Each party to bear own costs.

**Delivered, signed and dated at Mombasa this 24<sup>th</sup> September, 2018.**

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**C. YANO**

**JUDGE**