



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 288 OF 2012**

KYALO MUNYAO .....1<sup>ST</sup> PLAINTIFF/APPLICANT  
MUSYOKA USUSU .....2<sup>ND</sup> PLAINTIFF/APPLICANT  
DANIEL MUTINDA .....3<sup>RD</sup> PLAINTIFF/APPLICANT  
PATRICK NGOVI .....4<sup>TH</sup> PLAINTIFF/APPLICANT  
SIMON MAKAU .....5<sup>TH</sup> PLAINTIFF/APPLICANT  
KAVOI MASAI .....6<sup>TH</sup> PLAINTIFF/APPLICANT  
STEPHEN MULWA .....7<sup>TH</sup> PLAINTIFF/APPLICANT  
FRANCIS MUTISYA TUMBO .....8<sup>TH</sup> PLAINTIFF/APPLICANT

**VERSUS**

BONIFACE MAKAU MUIA .....1<sup>ST</sup> DEFENDANT/RESPONDENT  
JOHN MAKUMI .....2<sup>ND</sup> DEFENDANT/RESPONDENT  
PATRICK MUASA KATIKU ...3<sup>RD</sup> DEFENDANT/RESPONDENT  
NGUNYA MUTETA .....4<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

1. What is before me is the Plaintiffs' Application dated 16<sup>th</sup> March, 2015 in which he is seeking for the following orders:

*a. That this Honourable Court be pleased to review and/or set aside its order issued on 12<sup>th</sup> March, 2015 pursuant to a Ruling delivered on 2<sup>nd</sup> May, 2014 and all the consequential orders thereto.*

*b. That the costs of this Application be in the cause.*

2. The Application is premised on the grounds that the court delivered its Ruling on 2<sup>nd</sup> May, 2014 and

found that this suit is *sub-judice*; that the court was not aware of the fact that CMCC No. 1104 of 2011 had long being determined and that the Plaintiff had pleaded in the Plaintiff that the lower court could not hear CMCC No. 1104 of 2011 for want of jurisdiction and that there is an error apparent on the face of the record.

3. The 1<sup>st</sup> Plaintiff has deponed that he was not aware of the Ruling in this matter until 10<sup>th</sup> February, 2015 and that sufficient reasons have been given as to why the Ruling of the court should be reviewed.

4. In response, the 1<sup>st</sup> Defendant deponed that the Plaintiffs are guilty of laches; that the Application goes against the spirit of the Civil Procedure Act and that the Application should be dismissed.

5. The Plaintiffs' counsel submitted that the previous counsel for the Plaintiffs failed to file submissions in respect to the Defendants' Preliminary Objection; that even after the court delivered its Ruling, he failed to inform the Plaintiffs of the Ruling and that the finding of the court was arrived at on account of an error of fact.

6. Counsel submitted that litigants should not be punished for the errors of their advocates. Counsel relied on several authorities which I have considered.

7. The Defendants' counsel submitted that the delay in filing the current Application is unreasonable; that the Plaintiffs have not come to the court with clean hands and that the Application should be dismissed.

8. The Defendants filed a Preliminary Objection dated 24<sup>th</sup> October, 2012 in which they claimed that other than this suit, the Plaintiffs had instituted another suit being Machakos CMCC No. 1104 of 2011.

9. When the Preliminary Objection came up for hearing on 14<sup>th</sup> November, 2013, the court directed parties to file and exchange submissions. The Plaintiffs' previous advocates did not file submissions.

10. The court proceeded to deliver a Ruling on the Preliminary Objection without the benefit of the Plaintiffs' submissions on the issue of whether indeed there was another pending suit being Machakos CMCC No. 1104 of 2011.

11. In its Ruling, the court stated that the *"Plaintiffs have chosen to remain silent on the issue of whether they have already filed a similar suit before the Chief Magistrate's Court in Machakos."* The Court proceeded to allow the Defendants' Preliminary Objection in the absence of a response from the Plaintiffs.

12. It is therefore clear from the record that the Ruling of 2<sup>nd</sup> May, 2014 was arrived at without the benefit of the court record in Machakos CMCC No. 1104 of 2011.

13. The Plaintiffs have also deponed that their previous advocate never informed them of the Ruling of 2<sup>nd</sup> May, 2014.

14. The Plaintiffs have informed the court that indeed they had pleaded in their claim that they had filed Machakos CMCC No. 1104 of 2011 but the court declined to hear the matter for lack of jurisdiction.

15. The Defendants were aware of this averment in the Plaintiff but did not bring it to the attention of the court. Indeed, the Plaintiffs have now annexed a Ruling in Machakos CMCC No. 1104 of 2011 which shows that the court declined to hear the matter for want of jurisdiction.

16. Considering that the lower court declined to hear the matter for want of jurisdiction and advised the Plaintiffs to file the current suit, I find and hold that the Plaintiffs have shown sufficient reasons to warrant the review of the orders of 2<sup>nd</sup> May, 2014.

17. Although the Application was filed after a period of nine (9) months, I am compelled to agree with the

Plaintiffs that they were not informed by their previous advocate, who did not even oppose the Preliminary Objection, about the Ruling.

18. For that reason, I find that the Application was filed within reasonable time after the Plaintiffs learnt about the Ruling.

19. In the circumstances, I allow the Notice of Motion dated 16<sup>th</sup> March, 2015 as prayed.

**DATED AND DELIVERED AT MACHAKOS THIS 31<sup>ST</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**