



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

HCC CASE NO 72 OF 2012(O.S)

KACHIMBIZI KATANA MWAGANDI & 384 OTHERS.....PLAINTIFFS

=VERSUS=

FORT PROPERTIES LIMITED.....DEFENDANT

R U L I N G

1. The Notice of Motion before me dated 15th November 2016 is brought under Sections 1A, 1B and 3A of the Civil Procedure Act. The Application prays for Orders

(i)

(ii) THAT the Honourable court be pleased to reinstate the application dated 16th October 2016 and issue further directions regarding the hearing of the same.

(iii) THAT the costs of the application be in the cause.

2. It is supported by an Affidavit sworn by the Defendant/Applicant's property Manager one Akil Fazlehussein Ebrahimjee on 15th November 2016. The gist of the Application is that the Defendant's application dated 16th November 2016 had been slated for hearing on 7th November 2016. On the fateful day, Mr. Stephen Obaga Advocate was slated to hold brief for Messrs Anyoka & Company Advocates who are on record for the Defendants herein. As it were, Mr. Obaga was served with a Hearing Notice to appear in the Court of Appeal on a matter coming up on the same day in the Court of Appeal at Malindi and counsel was thus forced to send his clerk to place aside the file to enable him to finish first with the Court of Appeal. As things turned up, the clerk forgot to have this particular matter placed aside and the application dated 16th October 2016 was dismissed for want of prosecution.

3. The Plaintiffs are opposed to this application. In a Replying Affidavit sworn on 10th February 2017 by Mr. Richard Otara Advocate who is in conduct of the matter for the Plaintiffs/Respondents herein, the Plaintiffs aver that the application before me is frivolous, vexatious and that it is otherwise an abuse of the court process. The Plaintiffs contend that the Defendant's application seeks to reinstate an application which in itself is seeking to enforce orders which had long lapsed and that reinstating the same would serve no useful purpose. The Plaintiffs submit that the application is brought solely for the purpose of delaying the expeditious conclusion of this suit and question why Mr. Obaga Advocate never swore the Supporting Affidavit himself if indeed the events depicted by the Defendants are true.

4. I have looked at the application for reinstatement of the application dated 16th October 2016 and the

various arguments advanced in favour thereof and in opposition thereto. Essentially setting aside an ex-parte order is a matter of the discretion of the court. In *Esther Wamaitha Njihia & 2 others -vs- Safaricom Ltd (2014) eKLR* the High Court citing relevant cases on the issue held inter alia that: -

“The discretion is free and the main concern of the court is to do justice to parties before it. The discretion 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 a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the (other party) can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort. It also goes without saying that the reason for failure to attend court should be considered.”

5. In *Ongom -vs- Catherine Owola(2003)16 UGSC* the Supreme Court of Uganda held inter alia that in considering an application such as the one before me, the court must be satisfied about one or both of the following:-

(a) Either that the defendants was not properly served with summons; and/or

(b) That the defendant failed to appear in court at the hearing due to sufficient cause.

6. In the instant case, it is not denied that the Defendant/Applicant was aware of the date of the hearing for the application which was dismissed. I must therefore only turn to the consideration of whether or not the defendant failed to appear in court due to a sufficient cause. The Supreme Court of India in the case of *Parimal -vs- Veena(2011) 3 SCC545* observed that :-

“Sufficient cause” is an expression which has been used in a large number of statutes. The meaning of the word “sufficient” is adequate or enough, in as much as may be necessary to answer the purpose intended. In this context, “sufficient cause” means that the party had not acted in a negligent manner or there was want of bonafide on its part in view of the facts and the circumstances.....”

7. The Applicant in this case has deponed that they had duly instructed counsel to hold their brief on 7th November 2016 when the matter came up for hearing. As it turned out, the said counsel was also summoned on that particular day to attend a hearing in the Court of Appeal at Malindi. The Applicants have annexed the Hearing Notice said to have been served on Mr. Obaga Advocate by the Court of Appeal. Nothing has been put before me to make me doubt the authenticity of the Hearing Notice and/or the fact that Mr. Obaga attended the Court of Appeal as indicated. In my view therefore, the Applicant has offered a candid and frank explanation as to why the advocate did not attend court.

8. I find that the reason given by the Applicant for failing to attend court is candid and excusable and that this is a proper case for the court to exercise its discretion in favour of the Applicant. The application dated 15th November 2016 is accordingly allowed. Costs shall be in the cause.

Dated, signed and delivered in Malindi this 21st day of April 2017.

J. O. OLOLA

JUDGE