



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO.90 OF 2011**

**1. ERNEST MUNGAI KAMAU.....1<sup>ST</sup> PLAINTIFF**  
**2. GALERCO LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**1. KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> DEFENDANT**  
**2. JIHAN FREIGHTERS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 4<sup>th</sup> November 2016 made under Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules, the plaintiffs seek orders that: -

**1) Spent**

**2) THAT the order of this court made on 24<sup>th</sup> June 2014 dismissing this suit and all consequential orders be aside.**

**3) Costs be provided for**

2. The application is grounded on the grounds set out on the face of the application namely:

**a) This suit was dismissed on 24<sup>th</sup> June 2016 for non-attendance by the plaintiffs and the plaintiffs' advocates then on record.**

**b) The plaintiffs' advocates then on record did not inform the 2<sup>nd</sup> plaintiff herein about the hearing date.**

**c) The plaintiffs' advocates then on record did not inform the 2<sup>nd</sup> plaintiff herein about the dismissal of the suit.**

**d) The 2<sup>nd</sup> plaintiff has now discovered that the 1<sup>st</sup> plaintiff who was the one liaising with the plaintiffs' advocates ceased being owner of his portion of the suit property before the date of dismissal without informing the 2<sup>nd</sup> plaintiff. Consequently, the 1<sup>st</sup> plaintiff appears to have lost interest in the suit but again failed to inform the 2<sup>nd</sup> plaintiff.**

**e) The 2<sup>nd</sup> plaintiff is still very much interested in the suit and wishes to pursue it to its conclusion.**

3. The application is further supported on the grounds contained in the supporting affidavit of the Enock Tuitoek a director for the 2<sup>nd</sup> plaintiff sworn on 4<sup>th</sup> November 2016. The applicant depones that at the time of filing this suit in April 2011 and throughout the life of the case, the plaintiffs had agreed that the 1<sup>st</sup> plaintiff would swear affidavits and generally act on behalf of the plaintiffs in court in the matter. Indeed, the said Enock Tuitoek signed a written authority giving authority to the 1<sup>st</sup> plaintiff to swear any affidavit in respect of this suit on behalf of the 2<sup>nd</sup> plaintiff and to act on behalf of the 2<sup>nd</sup> plaintiff in respect of the suit. It was deponed that the 1<sup>st</sup> plaintiff was the contact person with the plaintiffs' lawyers, Ms. Onindo Onindo and Associates Advocates who were then on record for the plaintiffs. On 6<sup>th</sup> February 2014, the plaintiffs advocates then on record fixed the suit for hearing on 24<sup>th</sup> June 2014 and a hearing notice was served on the defendants to attend the hearing. On 24<sup>th</sup> June 2014 the plaintiffs and their counsel were absent. The defendants admitted no part of the plaintiffs claim and therefore the plaintiffs' suit was dismissed pursuant to the Provision of Order 12 Rule 3 of the Civil Procedure Rules. In their affidavit in support of the application, the plaintiffs aver that neither the plaintiffs' advocates then on record nor the 1<sup>st</sup> plaintiff informed the 2<sup>nd</sup> plaintiff or its directors about the hearing date or even the dismissal.

4. It is the applicant's contention that they are still very much interested in pursuing their case and that the dismissal was a result of no fault on their part. They urged the court not to visit the mistake and misdeeds of the 1<sup>st</sup> plaintiff and the advocate then on record upon the 2<sup>nd</sup> plaintiff. It was deponed the 2<sup>nd</sup> plaintiff remains the registered proprietor of its plot, and a reinstatement of the suit will not occasion any injustice to the parties to the case but will instead enable the court to conclusively determine the disputes.

5. The application is opposed by the defendants. The 1<sup>st</sup> defendant filed a Replying Affidavit sworn by Nelson Sitonik on 18<sup>th</sup> January 2017 and grounds of opposition dated 18<sup>th</sup> January 2017. It was deposed on behalf of the 1<sup>st</sup> defendant that the application will not in any way assist in determining the suit because the applicants do not seek to reinstate the suit. It was further deposed that no good reason has been given for the non-attendance in court on 24<sup>th</sup> June 2014 and that there is no explanation for the two year delay in bringing the present application. In addition, the 1<sup>st</sup> defendant contended that the suit property has since changed hands and is registered in the name of Hardware and General Stores Limited who have since filed another suit being Mombasa ELC No.83 of 2014 against the 1<sup>st</sup> and 2<sup>nd</sup> defendants in this suit.

6. The 2<sup>nd</sup> defendant filed a Replying Affidavit sworn by one Abdalla Salim Omar Abubakar on 2<sup>nd</sup> February 2017 in which it was deposed that the application has been brought after an inordinate delay which has not been explained and that no good reason has been provided for the setting aside other than to cast blame on the applicants' lawyer. According to the 2<sup>nd</sup> defendant, the plaintiffs' interest in the land has since been extinguished as the properties have been transferred to a third party, M/s Hardware and General Stores Limited.

7. Both the counsels for the applicants and the respondents made oral submissions in support of their respective cases. Mr. Omondi learned counsel for the applicants reiterated the contents of the affidavit in support of the motion.

Counsel submitted that he 2<sup>nd</sup> plaintiff was a victim of a failure by its advocate to diarize the case, inform the client and attend court. The learned counsel urged the court to grant the orders sought to save the 2<sup>nd</sup> plaintiff from suffering great injustice as it risks losing its land. He relied on the cases of **JOSEPH NJUGUNA MUNIU –VS- MEDICINO GIOVANNI (1998) eKLR** and **PAULA WALETI MUCHINA –VS- HENRY WANJOHI MUCHINA, (2003) eKLR**, both cases expounding on the principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte.

8. On his part, Mr. Sitonik, learned counsel for the 1<sup>st</sup> defendant reiterated the contents of his Replying Affidavit and the grounds of opposition. He particularly took issue with the failure by the applicants to have their former advocate and his clerk to swear affidavits to explain and confirm what was being alleged by the applicant in their affidavit in support of the motion. Counsel submitted that since it was the plaintiffs' former advocate who issued notice to the defendants to attend court on 24<sup>th</sup> June 2014, he was better placed to explain what transpired for them not to attend court on the hearing date. He further submitted that the advocate was an agent of the plaintiffs and whose actions would bind the plaintiffs as the principals. Counsel pointed out that the plaintiff's former advocates were available and even the court record shows that they gave consent to the current advocates to come on record for the plaintiffs.

9. On his part, Mr. Mohamed, learned counsel for the 2<sup>nd</sup> defendant relied on the affidavit of Abdalla Salim Omar Abubakar sworn on 2<sup>nd</sup> February 2017. In addition, learned counsel fully associated himself with the submissions made by the counsel for the 1<sup>st</sup> defendant.

10. I have considered the application. The plaintiff's suit was filed on 11<sup>th</sup> April 2011. On the 6<sup>th</sup> February 2014, the then plaintiff's advocates fixed the suit for hearing on 24<sup>th</sup> June 2014 and served the defendants with hearing notices for the said date. On 24<sup>th</sup> June 2014 when the suit was scheduled to be heard, only the defendants were present in court. The plaintiffs and their counsel were absent. The defendants admitted no part of the plaintiffs' claim and urged the court to dismiss the suit. The court, having satisfied itself, dismissed the plaintiffs' suit pursuant to the provisions of Order 12 Rule 3 of Civil Procedure Rules. 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.

11. The Notice of Motion herein was filed by the plaintiffs on 3<sup>rd</sup> November 2016, almost 2½ years after the dismissal order was made. The affidavit in support of the Notice of Motion explains what steps the deponent took from August 2016 to find out the position of the case. There is no explanation on what steps the plaintiffs took from 24<sup>th</sup> June 2014 to August 2016. It is alleged that the 1<sup>st</sup> plaintiff was generally in charge of the plaintiffs' common interest in the suit and that he was the contact person with the plaintiffs' lawyers. There is no explanation from the 1<sup>st</sup> plaintiffs as to what transpired, either by way of affidavit or otherwise. I have looked at the documents accompanying the plaint. It is true that there is an authority given by Enock Tuitoek, a director of the 2<sup>nd</sup> plaintiff, to the 1<sup>st</sup> plaintiff to swear any affidavit in respect of the suit on behalf of the plaintiffs. Indeed the 1<sup>st</sup> plaintiff signed the verifying affidavit accompanying the plaint. However, the said Enock Tuitoek is also listed as one of the plaintiffs' witnesses and therefore was expected to follow up the case with interest.

12. Besides blaming the 1<sup>st</sup> plaintiff for failing to inform them of the case, the applicants have also faulted their former advocates for failure to inform them of the hearing or the dismissal. There is no affidavit from the firm of Onindo Onindo and Associates to say that through inadvertence or otherwise, they failed to inform their client of the hearing date or the dismissal. There is no affidavit to say why the said advocates failed to attend court. Curiously, on 18<sup>th</sup> October 2016, some days before the filing of this application, the firm of Onindo Onindo & Associates signed a consent granting the present advocates for the plaintiffs leave to take over the representation of the plaintiffs in the case. What was so difficult in obtaining an affidavit from them at the time to explain what actually transpired, considering that they are the ones who fixed the matter for hearing and even went ahead to serve the defendants?

13. I am being requested to apply sections 1A, 1B and 3A of the Civil Procedure Act. These inherent powers of the court should be exercised judiciously. They should not be used to aid a litigant that has slept on his rights or one that has been indolent. In **Shah vs- Mbogo (1967)EA 116**, Harris J. said: "I have considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte. 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 has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".

14. In the application, there is no discernible reason why the advocate did not attend court. The inference one can draw from the failure to get an explanation from the plaintiffs' advocates who fixed the case for hearing and failed to attend is that there was no reason for their failure to attend. There was evidence adduced that part of the suit property has changed hands and is subject of another suit. It is clear from the length of time taken to file the application that the plaintiffs are guilty of laches.

15. Taking into account the inordinate delay in presenting the application and there being no excusable mistake or error advanced nor a sound explanation given why the plaintiffs and their former advocate were absent on the date of the hearing, I am not persuaded to exercise my discretion in the plaintiffs' favour. The overriding objective of the court would not come to the aid of the plaintiffs. Counsel was well aware of the matter and failed to attend court or obtain representation.

16. For all the above reasons, I find that the plaintiffs' Notice of Motion dated 4<sup>th</sup> November 2016 lacks merit. I order that it be dismissed with cost to the respondents.

17. It is so ordered

**RULING DELIVERED, SIGNED AND DATED AT MOMBASA ON 3<sup>RD</sup> APRIL 2017**

**C. YANO**

**JUDGE**