



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 77 OF 2004**

**DANIEL MUTHURI.....1<sup>ST</sup> PLAINTIFF**

**BENSON KINOTI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**M'IKIARA KARIGI.....DEFENDANT**

**RULING**

1. The Notice of Motion dated 30<sup>th</sup> May, 2017 seeks the following Orders:-

- a) THAT the Honourable Court be pleased to set aside the orders of THE HON. LADY JUSTICE L.N. MBUGUA made on 29<sup>th</sup> May 2017 and re-instate the plaintiff / applicant's application herein filed on 16<sup>th</sup> December 2016.
- b) THAT the Honourable Court be pleased to give directions as to an early Hearing date for the plaintiff's application.
- c) Costs of this application be provided for.

2. The application is based on the following grounds:-

- i) That the plaintiff's application raises weighty issues of law and facts which ought to be ventilated in Court at the hearing.
- ii) Unless this Honourable Court moves to set aside the orders in question and to extend the time within which the application may be heard, the applicant is bound to suffer irreparable loss.
- iii) Under Article 159 of the Constitution and Section 1A and 2A of the Civil Procedure Act, it would be fair expedient and in the best interest of justice to reinstate the suit.
- iv) The suit was dismissed on 29<sup>th</sup> May 2017 for non-attendance by counsel for the Applicant herein who was not present.
- v) The plaintiff / applicant has an arguable case with high chances of success and it is in the best interest of justice that this application be reinstated so that it can be heard and determined on merit.

3. On 27.9.17, Advocates for the parties informed the Court that they desired to file written submissions in respect of the application. Such submissions have been filed.

4. Applicant avers that on 29.5.17, it is his Advocate who was not in Court but he was and therefore the mistake of his Advocates should not be visited upon him.

5. Applicant also avers that the application was filed on 30.5.17 just a day after his earlier application had been dismissed.

6. To this end, applicant has relied on case of

1) *CMC HOLDINGS LIMITED VS NZIOKI*[2004]1KLR 173 which held :

**“That discretion must be exercised upon reasons and must be exercised judiciously .....In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle.....The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by his Advocate”.**

2) In the case of *LUCY BOSIRE VS KEHANCHA DIV. LAND DISPUTE TRIBUNAL & 2 OTHERS (SUPRA)* ODUNGA J held as follows: -

**“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See *Philip Keipto Chemwolo & Another Vs Augustine Kubende* [1986]KLR 492; [1982-88]1 KAR 1036 at 1042; [1986-1989]EA 74.”**

7. Further, the applicant is beseeching the Court to invoke the overriding objective set out in Section 1A and 1B of the Civil Procedure Act.

8. On the part of the Respondent, he has given a history of the dispute averring that the 1<sup>st</sup> plaintiff who is the son of the Respondent has vowed to punish the latter with Court cases until his demise.

9. Respondent has also delved into the merits of the application of 5.12.16 averring that the said application seeks to commit the Respondent to civil jail so as to have him punished.

10. Further, Respondent avers that no sufficient reasons have been advanced as to why applicant’s counsel was not in Court.

11. I have weighed all the averments raised herein. I find that the applicant has been diligent in filing this application just a day after the earlier one was dismissed.

It is also not proper for this Court to wade into the merits of the application of 5.12.16 as that is not the issue at hand.

12. I am inclined to find that this is a case where the Court ought to exercise its discretion in favour of the applicant.

13. I am of the view that the mistake of the counsel ought not to be visited upon the applicant who was actually in Court on 29.5.17.

**14. The application of 30.05.17 is allowed but with costs to the Respondent.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 6<sup>TH</sup> DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-**

**C: A Janet/Haway**

Nelima H/B for Otieno for Plaintiff present

Mammu for Defendant Respondent present

**Hon. L. N. MBUGUA**

**ELC JUDGE**