



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.244 OF 2016

STEFANO POLI.....PLAINTIFF

=VERSUS=

ASHIONO DONALD SHIBACHI.....DEFENDANT

RULING

1. On 3rd October, 2016, this court dismissed the Plaintiff's Application dated 19th September, 2016 for want of prosecution.
2. The Plaintiff has now filed an Application dated 6th October, 2016 in which he is seeking for the following orders:-
 - (a) **THAT the order of this Court made on 3rd day of October 2016 dismissing the Plaintiff/Applicant Notice of Motion dated 19th September 2016 for non attendance of the Plaintiff's Advocate be set aside and the Plaintiff be allowed to argue his application on a date fixed by this Honourable court.**
 - (b) **THAT cost of Application be provided for.**
3. The Application is supported by the Affidavit of the Plaintiff's advocate who has deponed that on 3rd October, 2016, he attended court and after going through the cause list for the day, he realised that the Application of 19th September, 2016 which was coming up for hearing on that day was not listed.
4. The Applicant's advocate deponed that she checked with the court clerk to find out if she had the file in the bundle of files for the day but the file was missing; that he was assured that the matter was coming for hearing the following day and that he then proceeded to Justice Chitembwe's court to handle other civil matters.
5. However, when he attended court on 4th October, 2016, he realised that the Application dated 19th September, 2016 had been heard the previous day; that the cause list for the previous day had been changed to include this matter by hand and that he cannot be blamed for not attending court on 3rd October, 2016.
6. In his response, the Defendant's advocate deponed that the Application of 19th September, 2016 was fixed for 3rd October, 2016; that he recalls seeing the Plaintiff's advocate in court on 3rd October, 2016

before walking out and that when the matter was called out, neither the Plaintiff nor his advocate were in court.

7. The Defendant's counsel deponed that the Plaintiff's advocate did not carry out due diligence to ensure that the court file was not with the court clerk and that he conveniently relied on information from a clerk who is not attached to the Environment and Land Court.

8. The Plaintiff's advocate has annexed on his Affidavit the cause list for 3rd October, 2016.

9. Although the matter was fixed for the hearing of the Application dated 19th September, 2016 for 3rd October, 2016, the same was not listed on the cause list of 3rd October, 2016. Instead, the cause list showed that the Application was coming up for hearing on 4th October, 2016.

10. I have no reason to disbelieve the Plaintiff's advocate deposition that he was in court on 3rd October, 2016 to prosecute his Application. Indeed, the Defendant's advocate has deponed that he saw the Plaintiff's advocate in the court room on the said date before he walked out.

11. The erroneous listing of the matter for hearing of the Application dated 19th September, 2016 on 4th October, 2016 instead of 3rd October 2016 was not of the Plaintiff's advocate making.

12. Considering that the matter did not appear on the cause list of 3rd October 2016 and in view of the fact that the Plaintiff's advocate filed the current Application promptly on learning that the Application dated 19th September, 2016 had been dismissed for want of prosecution, I allow the Application dated 6th October, 2016 in terms of prayer number 1.

13. Each party shall bear his own costs.

Dated, signed and delivered in Malindi this 4th day of **November**, 2016.

O. A. Angote

Judge