



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**E.L.C. 91 Of 2011**

**ABDULRAZAK ABDULRAHMAN ADAM.....PLAINTIFF**

**VERSUS**

**ASLAM ABDULREIHMAN ADAM.....1<sup>ST</sup> DEFENDANT**

**SHAMIN ABDULREHMAN ADAM.....2<sup>ND</sup> DEFENDANT**

**KHATIJABHAI ABDULREHMAN ADAM.....3<sup>RD</sup> DEFENDANT**

**SERABANU ABDULREHMAN ADAM.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The motion for determination is one dated 25<sup>th</sup> November 2014 seeking to set aside the exparte proceedings of 20.11.2014 which dismissed the plaintiff's suit for non- attendance. It is supported by the grounds on the face of it and the affidavit of Mansur Satchu advocate. The application is opposed by the replying affidavit sworn by Shamin Abdulrehman Adam filed and on record.
2. Mr. Mutiso for the applicant submitted that although they were served with a hearing notice on 24.7.2014, they did not attend court for two reasons. First, this matter was not in the cause list that was posted in the judiciary website. Secondly that he received information that the new judge was not hearing any matters except for extension of the interim orders. He pleaded that the inadvertence was highly regrettable and the plaintiff ought to be given his day in court.
3. Mr. Sitonik for the Defendant/Respondent submitted that the plaintiff does not deserve the favourable exercise of this court's discretion. He stated that the defendant also saw the cause list posted in the web but took it upon himself to attend court on 19.11.2014 alongside other parties in seven matters that were listed. The advocate further submitted that the plaintiff has never been keen to prosecute this case as he is enjoying the interim orders.
4. I have considered the issues at hand. The plaintiff admits not attending court on 19.11.2014 but says the inadvertence was because the matter not was in the daily cause list posted in the web (judiciary website). This is confirmed by the defendant's counsel who submits that e-causelist is not conclusive. This court began her sitting in Mombasa on 18.11.14 having reported on transfer. It is therefore possible that due to the transition period the parties could be unsure whether hearings would go on or not. Therefore on this account only and on the fact that the cause list for 19.11.2014 posted in the web was not conclusive I find this is a matter which is deserving of the court's discretion. The prejudice if any to be suffered by the defendants can be compensated by costs.
5. In the result the motion is allowed and the orders of this court issued on 19.11.2014 dismissing the plaintiff's suit be and is hereby set aside. The cost of the motion is awarded to the defendants.

**Dated and delivered in open court at Mombasa this 17<sup>th</sup> day of April. 2015.**

**A. OMOLLO**

**JUDGE**