



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 329 OF 2009 (OS)**

MARY MWALIA KISASA & 6 OTHERS.....PLAINTIFFS

-VERSUS-

GAPCO (K) LIMITED.....DEFENDANT

**RULING**

1. This suit was dismissed for want of prosecution by a ruling delivered on 30th October 2014 by S. Mukunya J. The plaintiffs are unhappy with that decision and consequently filed the present notice of motion application dated 23rd December 2014. In this application, the plaintiffs (herein referred to as the “applicants”) asked the Court to grant them prayers

That “An order issued on 30.10.2014 dismissing their suit be set aside and the same be re-instated for hearing”.

The applicants also prayed for costs of the suit. The application is brought under Sections 1 A, 1B and 3A of the Civil Procedure Act and Order 17 rule 2 and Order 51 rule 1 of the Civil Procedure Rules.

2. The application is supported by grounds on the face of it and the affidavit of Musyoki Kisasa Mweu, the 5th applicant. The brief facts relied on by the applicants as set out in the supporting affidavit include inter alia; they had filed an application for directions which was overtaken by the application seeking to dismiss their suit; the decision given was harsh as the Court had other remedies at its disposal and mistake of their advocate should not be visited on them. Lastly that they through the generations of their fathers have lived on this land since 1931 and if they are evicted, they will undergo untold suffering.

3. The application is opposed by the defendant/respondent by a replying affidavit filed in Court on 3rd March 2015 and sworn by Subhasish Mukherjee. Mr Subasish deposes that he is the director herein chief executive officer of the Respondent. He urged the Court to disallow the application for; offending the principle objectives of the Judicial process; this Court lacks jurisdiction to entertain the application; the grounds raised in support of the application are res judicata e.t.c. The respondent depose that there was no mistake on the part of counsel for the applicants and that the ruling carvassed all the issues now being raised in this application. He urged the Court to dismiss this application with costs.

4. The parties agreed to argue the application by filing of written submissions. I have considered the rival submissions an the case law referred to. I shall not reproduce the said submissions here but shall make references to each as is appropriate. What I glean from the applicants pleadings and the submissions is the argument that this Court has unfettered discretion to set aside the dismissal order. This application is brought under the overriding objectives principles of the Civil Procedure Act and the exercise of discretion of this Court under sections 1 A, 1B and 3A. Order 17 rule 2 does not help applicant as it provides for dismissal of suits for want of prosecution and does not provide for setting aside orders. Under Order 17, there is no provision for applying to set aside once the suit is dismissed.

5 The case referred to by the applicants of **Inta vs Kyumbu (1984) eKLR 441** would have been relevant if what is before me is determination of the application for dismissal for want of prosecution. In **Peter Ndungu vs Lazaro Mugo (2014) eKLR** equally distinguishable as it discussed dismissal for non – attendance not where the application is heard on merits. Even in that instance, the application by the

plaintiff to reverse the dismissal did not succeed.

6. The Respondent on his part in the submissions gave a background of this case. He submits that the applicants had filed a replying affidavit to the application for dismissal for want of prosecution. The respondent submits the application is incompetent as it is imploring this Court to sit and hear an appeal on a decision made by a Judge of concurrent jurisdiction. He cited the case of law of Ketherman & Others vs Hansd Properties limited (1988) All ER 38 at 62 holding the principle that parties cannot blame their advocates where they have failed to show what steps they took to undertake whatever was needed.

7. The applicants did not move this Court to review the ruling of 30.10.2014. This Court is vested with powers to revise its decision or decisions of Judges of concurrent jurisdiction under section 80 of the Civil Procedure Act and Order 45 rule 1 & 2 of the Civil Procedure Rules. As earlier indicated in paragraph 4 above, the present application is not brought under this provisions. Instead the applicant has attempted to show cause why his suit should not be dismissed for want of prosecution.

8. The decision rendered by the Court on 30.10.2014 was reached on merits after listening to parties and analysis of facts presented in the application. If the applicants felt the decision was harsh, they ought to have filed an appeal to challenge it. The present application is imploring this Court to sit on appeal on an order made by a Judge of concurrent jurisdiction. Further if this Court were to assume it is asking for review of the ruling, no grounds were presented that are provided in law upon which an application for review may be made and allowed. The mistake of counsel in failing to fix the matter for hearing is not one of the grounds for reviewing and or varying a decision contested.

9. In the circumstances of this application; I find the applicants have approached this Court in the wrong format and on this account, the application fails. The orders by the applicants cannot be granted by this Court as the law prevents me from sitting on appeal on a decision rendered by a Court of concurrent jurisdiction. The result is the application dated 23rd December 2014 is dismissed with costs.

**Ruling dated and delivered at Mombasa on 3rd November 2015**

**A. OMOLLO**

**JUDGE**