



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 839 OF 2012**

**TERESIA MUKELI KISULI.....PLAINTIFF**

**=VERSUS=**

**KENNETH MWANZIA MUSEMBI.....DEFENDANT**

**RULING.**

The matter coming up for determination is a Notice of Motion application dated **26<sup>th</sup> April, 2013**, brought by the Plaintiff herein, ***Teresia Mwikali Kisuli***. The applicant seeks for these orders:-

- a) *That the court be pleased to set aside the Order of dismissal made on the 19<sup>th</sup> February, 2013 and reinstate the suit herein and the application dated and filed on 14<sup>th</sup> November 2012.*
- b) *That cost of this application be provided for.*

The application is supported by the grounds on the face of the application and also by the supporting affidavit of ***Melaine P. E Kemunto Advocates***. Among the grounds in support of the application are; in advertence of advocate should not be visited upon the litigants; that the applicant is likely to suffer grave and irreparable loss and damages should the orders herein sought not issued; further, no prejudice will be suffered by the Defendants as a result and it is in the interest of justice and fair play.

The application was vehemently opposed by the Defendant herein, ***Kenneth Mwanzia Musembi*** who swore his Replying Affidavit and averred that the averments by the applicants in the supporting Affidavit are not supported by any evidence from the other third parties that are involved. He further averred that the Plaintiff did not bring the application within reasonable time as no reason has been given for the lapse of time between 19<sup>th</sup> February, 2013 and 24<sup>th</sup> April, 2013 when the instant application was filed. The Respondents further contended that he will be prejudiced if the application is allowed as the Plaintiff seems to be dragging her feet in prosecuting her case. The Defendant/Respondent urged the court to dismiss the application with costs.

The parties herein filed their written submissions, which I have now carefully considered. I have also considered the pleadings generally, the court records and the relevant law and I make the following findings:-

There is no doubt that this suit was filed by the Plaintiff/Applicant on 14<sup>th</sup> November, 2012.

Simultaneously the Plaintiff filed a Notice of Motion application even dated. The said Notice of Motion was set down for hearing on 19/2/2013. However on 19/2/2013 when the application was to come for hearing, the Defendant counsel, Mr Mutia was present, but Ms Kemunto, for the applicant was not present in Court Mr Muriuki held her brief and informed the court that M/s Kemunto was held up in another matter and therefore sought for adjournment.

The said application was opposed by Mr. Mutia who argued that he received the Hearing Notice through the Registered Post and that he had not even been served with summons to Enter Appearance. It was his contention that the Plaintiff was not serious with the prosecution of the suit and he urged the court to dismiss the application.

The court upon consideration of sentiments by both counsels held that the plaintiff was not serious with prosecution of matter and proceeded to dismiss the Plaintiff's Notice of Motion dated 14<sup>th</sup> November, 2012 for want of prosecution with costs to the Defendant. The Plaintiff has now come to court to have the said application reinstated.

The Plaintiff application is premised under **Order 12 Rule 7 of the Civil Procedure Rules** which reads as follows:-

***“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.***

The said application is also premised under **Sections 1A and 1B of the Civil Procedure Act** which deals with the Overriding Objectives of the Act and section 3A of the said Act which gives the court inherent jurisdiction to issue any order that would ensure the end of justice is met. **Order 12 Rule 7** gives the Court discretion to set aside or vary the Judgment or order of the court upon such terms that may be just. The applicant has stated that though her advocate was not in court on 19<sup>th</sup> February, 2013, it was not in her interest to delay the course of justice and that mistake of her counsel should not be visited upon her as she is likely to suffer grave and irreparable loss and damage should the orders sought not granted. The Defendant on its part submitted that there is unreasonable delay in presenting the application and that allowing the application will prejudice the Defendant.

The Plaintiffs' counsel has explained the reasons why she was not in court at the time the matter was called out. The counsel had averred that failure to attend court was neither intentional nor deliberate and that the applicant is eager to see the matter presented expeditiously. The applicant relied on various authorities among them **Consolata Ndunda Owira and others Vs Banuelboris Omambia, HCCC No. 2050 of 1993 and John Gatia Vs Seo forth Shipping Kenya Ltd and another Hccc No. 434 of 1996** where applications for reinstatement of dismissed suits were allowed.

In deciding this matter I will be guided by the decision in the Court of Appeal in the case of **CMC Holdings Lts Vs Nzioki ( 2004) 1KLR** 173 , where the Court held that:-

***“ In an application for setting aside exparte Judgment , the court exercises its discretion in allowing or rejecting the same, That discretion must be exercised upon reasons and must be exercised judiciously”.***

There are a number of judicial pronouncements which have set out the tests for setting aside judgments. In the case of **Shanzu Investment Ltd Vs The Commissioner of lands, Civil Appeal No. 100 of 1993** the court held that;

***“ The court has a wide discretion to set aside judgment and there is no limit and restriction on the discretion of the Judge except that if the Judgment is varied , it must be done on terms that are just and the jurisdiction being judicial discretion must be exercised judicially ;***Further the tests for setting aside judgments are:-

**ii. Prejudice**

**iii. Explanation for the**

**delay”**

The applicant had filed an application seeking for injunctive orders. She alleges that dismissal of the same for want of prosecution is prejudicial to her. The explanation for failure to attend court has been given by her advocate. I will concur with the applicant’s submissions that mistakes of the counsels ought not to be visited on the party or litigant (applicant herein).

Having now carefully considered the applicant’s Notice of motion dated 26<sup>th</sup> April, 2013, I find that the same is merited. The said application is allowed entirely with costs to the Defendant/Respondent. Applicant to set down the said application for hearing within the next 30 days from the date of this Ruling.

It is so ordered.

Dated, signed and delivered this **18<sup>th</sup> day of July , 2014**

**L.GACHERU**

**JUDGE**

In the presence of

..... for the Plaintiff/Applicant

..... Defendants/Respondents

Kamau : Court Clerk

**L.GACHERU**

**JUDGE**