



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 121 OF 2009

MALINDI MAGAZINE LIMITED.....PLAINTIFF/RESPONDENT

=VERSUS=

- 1. AISHA OMAR FMAU**
- 2. YUSUF BURHANI**
- 3. ALI ABDALA TWAHA**
- 4. MWANAISHA MOHAMED SAID**
- 5. LUCY WAMBUI KIMANGU.....DEFENDANT/APPLICANT**

R U L I N G

Introduction:

1. What is before me is the 5th Defendant's Application dated 8th April 2014. In the Application, the Applicant is seeking for the following orders.
 - a. **THAT the Honourable Court be pleased to set aside or discharge its judgment dated 28th March 2014 arising from ex-parte proceedings and trial taken before this court on 10th February 2014.**
 - b. **THAT this matter be set down for trial on merits by taking of evidence of all parties on priority.**
2. The Application is premised on the grounds that the 5th Defendant was condemned unheard; that the purported consent for and on behalf of the 5th Defendant in fixing of the hearing date as illustrated on the face of the record was never obtained and is a forgery and that neither the 5th Defendant nor his advocate participated in taking of the hearing dates and no notice was ever served upon them.
3. According to the Applicant's affidavit, she was not aware of the hearing date of 10th February 2014 when the matter came up for hearing. According to her, she only came to know that the case had been heard when her advocate called her and told her to sign an affidavit seeking to stay the delivery of judgment in this matter.
4. The Plaintiff filed a Replying Affidavit and deponed that since the year 2009, the 5th Defendant

- had never shown up in court; that a date for the hearing of this suit was fixed by consent in the registry and that it is not true that the 5th Defendant is the owner of the suit property.
5. The Plaintiff's advocate clerk swore an affidavit and deponed that on 24th October 2013, he was at the Environment and Land court registry with Mr. Jamen, the 5th Defendant's advocate's clerk; that a lady who was in registry by the name Makena gave them a hearing date of 3rd February 2014 and that before they could leave the registry, they were informed that the court would not be sitting on 3rd February, 2014.
 6. Consequently, it was deponed, the date of 3rd February 2014 was cancelled and replaced with the date of 10th February 2014 in the presence of the 5th Defendant's advocate's clerk.
 7. Mr. Jamen Apela, the then 5th Defendant's advocate's clerk also swore an affidavit and deponed that the suit was scheduled for hearing on the 3rd February 2014; that on that day, he realised from the registry that the court was not sitting and consequently did not enlist the services of an advocate to hold Mr. Mwadilo's brief.
 8. It was the evidence of the said clerk that his office diary did not reflect the date of 10th February 2014 and that the date of 10th February, 2014 was not fixed by consent as alleged.
 9. Both clerks were cross-examined on their respective affidavits. The Plaintiff's advocate's clerk reinstated what he had stated in the affidavit and insisted that the hearing of 3rd February, 2014 was changed to 10th February, 2014 by George, the court clerk, in the presence of both clerks.
 10. On the other hand, the 5th Defendant's advocate's clerk maintained that the date that was fixed by consent was 3rd February and not 10th February 2014. The said clerk denied that he was present when George changed the hearing date from 3rd February 2014 to 10th February 2014.
 11. I have perused the record and the evidence by the two clerks.
 12. The record shows that Nahashon, the Plaintiff's advocate's clerk and Jemin, the 5th Defendant's advocate's clerk were in the registry on 24th October 2013 and fixed the matter for hearing on 3rd February 2014. The date of the 3rd was cancelled by hand and replaced with a date of 10th. The change was countersigned by a person who is different from the said two clerks. The court was informed that the change was done by George, the court's clerk.
 13. It is not clear from the record if the change of the hearing date from 3rd to 10th February, 2014 by the court clerk was done on the same day the two clerks were in the registry or on a different date. The person who changed the dates did not indicate when the said changes were made and if the changes were made in the presence of the two clerks.
 14. Considering that the two clerks had consented on a hearing date of 3rd February 2014, a date that the court was not sitting, the said changes could only be valid if the two clerks countersigned the changes
 15. In the circumstances, I agree with the 5th Defendant's position that she was not aware that this matter was slated for hearing on 10th February 2014. The date that was known to the 5th Defendant's then advocate was 3rd February 2014 and not 10th February 2014. The proceedings of 10th February, 2014 and the subsequent Judgment are therefore a nullity.
 16. In the circumstances, I shall, which I hereby do, allow the 5th Defendant's Application dated 8th April 2014 as prayed.

Dated and delivered in Malindi this 5th day of **September**, 2014.

O. A. Angote

Judge