



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO.814 OF 2012

(FORMERLY CIVIL SUIT NO. 27 OF 2012 (OS))

JONATHAN CHERUIYOT.....1ST PLAINTIFF

SAMUEL SANG CHERUIYOT.....2ND PLAINTIFF

=VERSUS=

ESTHER MISHACK.....DEFENDANT

RULING:

1. This is a ruling in respect of a Notice of Motion dated 4th November, 2021 in which the Decree holders/Applicant seek to have the orders of 18th October, 2021 dismissing the Applicants' application dated 2nd September, 2021 set aside and the application dated 2nd September, 2021 allowed to proceed to hearing.

2. The Applicants contend that when their application dated 2nd September, 2021 came up for hearing on 18th October, 2021, their Advocate was unable to log in to the virtual hearing session due to network challenges. The Court proceeded to dismiss the application for non attendance. The Applicants therefore argue that non attendance on the part of their advocate was not deliberate.

3. The Applicants' deposition has been supported by their advocate in an affidavit sworn on 4th November, 2021. The Advocate states that on the material day, he was not able to log in into the virtual court hearing session due to network challenges.

4. The Applicants' application is opposed by the judgment debtor/Respondent through grounds of opposition dated 24th July, 2021. The Respondent contends that the Applicants' application is incompetent for want of form and that the Applicants have not explained why they could not make this application immediately. The Respondent contends that the Applicants had been given leave to file a supplementary affidavit in respect of the dismissed application but that they did not do so and that the said application should not be reinstated.

5. I have considered the Applicants' application as well as the opposition to the same by the Respondent. The only issue for determination is whether the Applicants have demonstrated that they have grounds to warrant this court exercise discretion in their favour. The Applicants have demonstrated that non attendance of their Advocate in court was due to network problems. This has been confirmed by their Advocate. It is common knowledge that generally there are network challenges. When this occurs, a litigant who is caught up in this situation should not be condemned by not being heard.

6. The fact that the Applicants' application has been brought as a Notice of motion instead of a chamber summons cannot be used to defeat the application. This is a matter of form which cannot defeat an application as per order 51 Rule 10(2) of the Civil Procedure Rules. A party is entitled to be heard and this right can only be denied for good cause.

7. This is a matter which is concluded. The Applicants are seeking execution. As the reason for non attendance has been satisfactorily explained, I find that the application dated 4th November, 2021 is well merited. The same is allowed with the result that the order made on 18th October, 2021 dismissing application dated 2nd September, 2021 is hereby set aside. The application dated 2nd September, 2021 is hereby reinstated for hearing.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF APRIL, 2022.

E. OBAGA

JUDGE

In the virtual presence of;

Mr. Kiboi for Plaintiff/Applicant.

Mr. Keter for Mr. Segoo for Respondent.

E. OBAGA

JUDGE

21ST APRIL, 2022