



**REPUBLIC OF KENYA**

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

Civil Case 186 of 2010

**CHARLES LUTTA KASAMANI ..... RESPONDENT/ PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL .....1<sup>ST</sup> APPLICANT/DEFENDANT**

**COMMISSIONER OF LANDS ..... 2<sup>ND</sup> APPLICANT/DEFENDANT**

**RULING**

The application dated 13.6.12 seeks orders that the Proceedings herein dated 14.2.12 and the Judgment entered on 24.5.12 be set aside.

The application is supported by the affidavit of KEPHA OCHIENG ONYISO, Counsel for the applicants.

According to the said affidavit, the failure to attend court on 14.2.12 was not deliberate. That the applicant's counsel was unaware of the hearing date as the hearing Notice was served on their Nairobi Office when the Attorney General had opened County offices in Kakamega where the said counsel had been posted. According to the said counsel, there was failure on their part to harmonize their Nairobi and Kakamega diaries due to the abrupt opening of the Kakamega Office and for confusion that ensued. It is the applicant's contention that under article 67 of the Constitution, the management of public land is vested on the National Land Commission and the 2nd applicant is not capable of complying with the court orders for allocating the Respondent alternative land.

In opposition to the application, the Respondent filed a replying affidavit sworn on 28.6.12. The thrust of the said affidavit is that the applicants have had a history of failure to attend court and lack of commitment. That the applicants have failed to show that they have an arguable defence to the plaintiff's claim. That by virtue of the National Land Commission Act, 2012 transitional provisions, the National Land Commission has responsibility to comply with the orders made in the judgment herein.

Mr. Onyiso appeared for the applicants while Mr. Kasamani appeared for the Respondent. Both parties

relied on their affidavits and made no submissions.

The principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte were well set out in the case of **SHAH VS MBOGO & ANO. 1967 EALR 116.** The discretion is wide and flexible and is exercised upon terms that are just. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence of excusable mistake or error but is not designed to assist a person who was deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

I have considered the facts and circumstances of the case at hand. The applicants filed a defence on 2.2.11. In the said defence, the Plaintiff's claim is denied and its averred that the plot the subject matter of this suit had been set aside for government use and therefore that the allocation was irregular from the very beginning. The defence is therefore arguable and not a mere denial.

I have also observed that 14.2.12 was the first hearing date. There was therefore no history of deliberate delay or obstruction of the course of justice. Judgment was given on 24.5.12. The application herein was filed on 13.6.12. There was therefore no inordinate delay.

The National Land Commission Act, 2012 section 30 (b) makes transitional provisions. The Ministry of Lands is therefore able to comply with the decree issued herein. However, the reasons given by the Respondent for failure to attend court due to the confusion caused by the opening of the Kakamega office and the failure to harmonize the diaries is an excusable mistake. For the Respondent who has obtained judgment, no prejudice will be occasioned that cannot be compensated by way of costs if the judgment is set aside.

Consequently, I allow the application. Costs of the application and throw away costs to the Defendant/Respondent.

***Delivered, dated and signed at Kakamega this 31<sup>st</sup> day of July, 2012***

**B. THURANIRA JADEN**  
**J U D G E**