

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 38 of 2007

JOSEPH MUCHOE WANYAMA

(Suing for and on behalf of members of

YUYA FARMERS CO-OPERATIVE SOCIETY LIMITED)PLAINTIFF

VERSUS

MERCIA MULIRO (Sued as personal representative of

MASINDE MULIRO (DECEASED)) DEFENDANT

R U L I N G

This is an application inter alia for the default interlocutory Judgment entered on 26-04-07 against the Defendant to be set aside and the Defendant allowed to defend the suit unconditionally. The Defendant also prays that it be granted leave to file its Defence. The Defendant is the Estate of the Late Hon. Masinde Muliro being represented by the Administratrix Mercia Muliro.

Interlocutory Judgment had been entered on 26-04-07 in default of filing the Defence. The interlocutory Judgment for:-

- (a) A declaration that the Plaintiff's are entitled to 201.7 acres to be excised from L.R. No. 1120 a Sibanga Farm and/or its monetary equivalent.
- (b) Alternatively, Kshs. 490,000/= together with interest therein or interest at commercial rates from 24.1.1980 until payment in full.

From the supporting affidavit, it comes clear that the Defendant had duly instructed Counsel who entered a Memorandum of Appearance but failed to file the Defence. The delay and failure to file Defence is as result of the former advocates default and/or negligence.

While it is quite true that the Plaintiffs did all they could to serve the Defendant with all pleadings and hearing notices and they have been prejudiced by the delays in this suit due to the Defendant's omissions or defaults yet the subject-matter is quite substantial that it would be unfair for the formal proof to proceed without a hearing of the Defendant. This is a very old claim that had its genesis in 1980 when it is alleged the deceased sold part of his land to the Plaintiffs.

As stated by the Court of Appeal in **CMC HOLDINGS LIMITED –V- NZIOKI (2004) IEA 23** that:-

“A litigant who suffers through the mistake of Counsel can obtain recourse through suing his former Counsel. However, when the litigant has not deliberately sought to obstruct or to delay the cause of justice, ex parte Judgment should be set aside to avoid injustice or hardship resulting from accident, inadvertences or excusable mistake error.”

In exercising its setting aside discretion, the trial Court is also required to consider whether the defence on record or the draft defence is reasonable and whether it raises triable issues.

I have considered the draft defence, and find that it raises triable issues.

In exercise of this Court's discretion and considering all the circumstances. I do find that the Defendant's failure to file defence was excusable and inadvertent. Also the formal proof has not taken place and the Plaintiffs can be compensated in costs.

I do hereby grant Prayer 4 and 5. The Defence on record dated 5th December, 2009 is deemed duly filed and served upon payment of the requisite fees. However this order is granted on condition that the Applicant pays all thrown away costs including the costs of this application within twenty one (21) days of agreement and assessment by the Court.

In view of the financial constraints the Plaintiffs have faced to the extent that they say they cannot afford even representation by Counsel, I do hereby allow special taxation of the costs and liberty to the Plaintiff to execute for said agreed or taxed costs before trial if they so wish.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF MAY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:

Joseph Muchoe Wanyama (in person) for the Respondent

Mr. Wasike for the Defendant/Applicant