

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 164 OF 2017

MATUI NAIBEL.....PLAINTIFF

VERSUS

GLADYS MASAI.....DEFENDANT

RULING

1. By a Notice of Motion dated 24/5/2021 and filed on 27/5/2021 brought under **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Order 36 Rule 7** of the **Civil Procedure Rules**, the defendant/applicant seeks orders that the order made on 12/4/2021 closing the defence case be set aside and upon setting aside the order made on 12/4/2021, the defence case be re-opened and the defendant be allowed to testify and that the costs this application do abide to the outcome of the main suit.

2. The application is supported by the affidavit of Michael Wafula, the defendant's counsel, sworn on 24/5/2021. The application is premised on the grounds that this suit was scheduled for hearing on 12/4/2021 and the defence never attended court and the defence was deemed as closed; that the defendant's advocate never saw the hearing notice for that date and thus could not attend; that it will be fair and just if the defence case is opened and the defendant together with her witnesses are allowed to testify; that no party shall be prejudiced if the orders sought are granted; it is stated that the demands of justice favour the grant of the orders sought.

The Response

3. No response was filed to the application.

Submissions

4. Parties did not file any submissions to the application.

Determination

5. I have considered the application. The applicant's counsel states in the supporting affidavit that he never saw the hearing notice in respect of the hearing scheduled for 12/4/2021. On that day the matter was called out and neither the defendant nor his counsel were in court. I have considered that the subject hearing date was fixed in the absence of the parties and their counsel when the matter came up for mention on 2/12/2020. I have also perused the court file and found no evidence that the defendant's counsel was served with a hearing notice for that date. Consequently the claim that he was not aware of the hearing date must be considered to be true and the instant application has merit.

6. I therefore grant the application dated 24/5/2021 and I also order that the matter shall be mentioned by way of teleconference on 1/7/2021 for the fixing of a hearing date. **By this ruling the parties are so notified.**

It's so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 28TH DAY OF JUNE, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.