



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KAJIADO**

**ELC NO. 789 OF 2017**

**JEDIDAH WANJIKU KANGETHE.....PLAINTIFF**

**VERSUS**

**LENKAI OLE LENKAIKON.....1<sup>ST</sup> DEFENDANT**

**OTELEKU OLE LENKAIKON.....2<sup>ND</sup> DEFENDANT**

**IKOYO OLE LENKAIKONI.....3<sup>RD</sup> DEFENDANT**

**RULING**

This ruling is on the Notice of Motion dated 23/11/2020.

The motion which is under *Sections 1A, 3 and 3A of the Civil Procedure Act and Orders 10 Rule 11, 19 Rules 2(1) and 22, 40 Rules 1, 2 and 3 of the Civil Procedure Rules*, seeks the following orders;

- 1) Stay of execution of the Judgement herein.
- 2) Setting aside the Judgement of 11<sup>th</sup> March, 2020.
- 3) Any other orders to meet the ends of justice.
- 4) Costs.

The application is by the three respondents herein and the grounds for seeking the above orders are that the applicants were condemned unheard due to a mistake of their advocates yet the suit concerns land which is very emotive.

In support of the application the first defendant Lenkai Ole Lenkaikoni has sworn two affidavits whose gist is that he should not be condemned unheard.

The application is opposed by the plaintiff who has sworn a replying affidavit with five (5) annexures.

In the affidavit, she says that the application is an afterthought and that the defendants were aware of the hearing date because their advocate was kept abreast of every development in the case at each and every stage as the annexures show.

I have carefully considered the application dated 23/11/2020 including the pleadings, record, affidavits, annexures and the subject matter.

I have not received any submissions as I write this ruling but that will not make any difference to the decision that I have reached.

The right to be heard is paramount. It is one of the rules of natural justice and it should not be denied any party who appears before court.

This court has a wide discretion under *Order 10 Rule 11* to set aside a Judgement entered into in the absence of one party. Such discretion is unfettered and such judgement may be set aside upon such terms as are just.

I will allow the application dated 23/11/2020 partially for the following reasons;

Firstly, we are not sure if the former counsel for the Defendants informed them of each and every development in the case. The mistakes of counsel should not be visited upon a party who may be innocent.

Secondly, the Plaintiff who has acted diligently in prosecuting the case and serving the defendants may adequately be compensated with an award of thrown away costs.

I set aside the Judgement of 11<sup>th</sup> March, 2020 on two conditions;

Firstly, the defendants pay the Plaintiff thrown away costs which in my discretion I assess at Kshs. 50,000/= . Such costs to be paid within 45 days from the date hereof.

Secondly, the Defendants to cooperate in ensuring that this case is heard and determined within six (6) months from the date hereof.

If the Defendants fails to comply with any of the two conditions, the Judgement of 11<sup>th</sup> March, 2020 will take effect.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF OCTOBER 2021.**

**M.N. GICHERU**

**JUDGE**