



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**ENVIRONMENT & LAND CASE NO. 51 OF 2016.**

**MATHEW MUNYOLE WAFULA.....PLAINTIFF**

**VERSUS.**

**JAPHETHER WAMALWA KILUI.....DEFENDANT**

**R U L I N G.**

[1].This application is brought under order 10 Rule II of the CPR. The applicant seeks for setting aside the Judgment of this court of 25/7/2016. Counsel for the applicant states that on 6/8/2016 the defendant instructed him to enter appearance and file a defence. That he duly entered appearance on 6/8/2016 but forgot to file the defence. He found out that the Judgment had been entered on 25/7/2016 and the case was cause listed for formal proof on 5-12-2016. He filed a defence on 5-12-2016.

[2].The plaintiff filed a replying Affidavit on 10/1/2016 and opposed the application. He argued that the defendant was served and he entered appearance and did not file his defence. That the defendant ignored the courts summons and that the defence and this application has been made as an afterthought.

[3].I have perused the Affidavit of Mr. J.S. Khakula advocate sworn on 6<sup>th</sup> December, 2016. There is nothing in the Affidavit that can make the court set aside the Judgment. The reason that his firm forgot to file the defence is not good enough.

However, I have perused the Defence he filed in court on 5/12/2016. It states that the Land parcel Kimilili/Kimilili/4087 does not exist. That it was extinguished by Bungoma HCCC NO. 113 of 2002. If indeed the suit land does not exist, this court will be making orders invain. This case therefore must be heard on merits. I will therefore set aside the interlocutory Judgment entered against the defendant on 25/7/2016 and grant the defendant leave to file his defence out of time. The defence filed and served on the plaintiff on 5/12/2016 will be deemed as duly filed.

The costs of this application shall be to the respondents to be paid by the applicants and to be assessed by the deputy registrar of this court.

Ruling read in open court in the presence of the Plaintiff.

DATED at BUNGOMA this 6<sup>th</sup> day of **April**, 2017.

**S. MUKUNYA**

**JUDGE**

**In the presence of:**

Court Assistant: Gladys

Plaintiff: Present

Defendant: Absent