

IN THE HIGH COURT OF KENYA AT BUNGOMA

LAND AND ENVIRONMENT CASE NO. 2 OF 2012

1. **FRED JUMA WANDABUSI**
2. **WILBERFORCE KEITH WAFULA** **PLAINTIFFS**

VERSUS

JAMES K.S. MUKHALE.....DEFENDANT

RULING

1. The applicants who are the plaintiffs have moved this court under section 3 and 3A of the Civil Procedure Act seeking orders of setting aside this court's order dismissing their suit. The application is supported by two affidavits sworn by the 1st applicant and Mr. Paul Juma, advocate.

2. The application is opposed by defendant/respondent vide a replying affidavit filed. The counsels for the parties then made oral submissions. Mr. Sichangi has submitted that the plaintiffs were never informed of the hearing date and only learnt about dismissal of their suit when the auctioneers pounced on their goods. The advocate also stated that setting aside is a discretionary exercise therefore failure to disclose the rules under which the application is brought is not fatal.

3. The respondent submits the application is incompetent having failed to state the orders under which it is brought. Mr. Murunga further submitted the applicant did not depose that his previous advocates on record Ms. Wanyonyi Korir & Co. advocates had closed shop hence such submissions coming from the bar should be disregarded. He urged the court to dismiss the application with costs to the respondent.

4. Under Order 12 rule 7, the court on an application being made, may set aside or vary judgment upon such terms as it deems fit. In the case of **Pithon Waweru Maina vs. Thuka Mugiria [1983] e KLR**, the court of appeal stated that principles governing the exercise of the court's discretion in setting aside ex parte judgments. These include but not limited to that there are no restrictions or limits on the judge's discretion. Secondly the main aim of the court is to do justice to the parties. The court of appeal also referred to the case of **Patel Vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75** which held that the exercise of such discretion is to avoid injustice or hardship resulting from inadvertence, excusable error or mistake etc.

5. The question this court will try to answer in regard to the present application is whether the applicants herein deserve the exercise of the court's discretion to set aside the order dismissing the suit. The applicants explanation for not attending court on the day fixed for hearing is because they were never informed of the hearing date by their advocates previously on record. Mr. Juma advocate who held brief for the former advocates indicated his instructions were limited to seeking an adjournment as he had been given the file in court. Although the respondent indicated that the applicants did not depose that the said firm of Wanyonyi Korir advocates had closed shop and evidence from the bar on this information should be disregarded. This court takes judicial notice of the fact that she has never seen any advocate from that firm appear before her for the two years she has worked in Bungoma. Consequently I can safely presume that the said advocates may never have informed the applicants of the date of 9th July 2013 when the matter came up for hearing. Such mistake of counsel should not be visited on his client and falls within the category of excusable mistake. I do find that on this basis, the applicants deserves exercise discretion of the court in their favour.

6. This court grants the prayer (d) in the application and set aside the order of 9th July 2013 dismissing

the plaintiffs suit and all consequential orders. The plaintiffs/applicants however did not demonstrate to this court from the inception of their suit what they did to facilitate the suit being heard. Public policy requires that litigation should have an end and the exercise of this discretion is upon such terms as the court deems just. The defendant's counsel attended court on 9th July 2013 and was ready to proceed. For their attendance and action, I will therefore make an order that the applicants pay the defendant Kshs. 15,000/= as thrown away costs within 45 days of this ruling in default execution to issue. The applicants deposed that the auctioneers carted away their goods without serving them with notice (proclamation) first. This action was not submitted on by the parties but since the setting aside affects the auctioneers action, it is imperative that I make an order as regards their costs. In the interest of natural justice I order that the auctioneers file an application for the court to determine whether he is entitled to costs or not. Parties are however at liberty to negotiate the auctioneers issue without filing a formal application to enhance the chances of the substantive suit being set down for hearing. The costs of this application awarded to the respondent.

DATED and Delivered at Bungoma this 2nd day of October 2014.

A. OMOLLO

JUDGE.