



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 210 OF 2011**

**LAKEVIEW INVESTMENTS LTD.....PLAINTIFF**

**VERSUS**

**IAN MAGARA BWOSIEMO.....1<sup>ST</sup> DEFENDANT**

**BRENDA KWAMBOKA MANWAH.....2<sup>ND</sup> DEFENDANT**

**AL RUHIA ESTATE LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. In the Application dated 21<sup>st</sup> May, 2018, the Defendants/Applicants are seeking for the following orders:

*a. The Honourable Court be pleased to review and set aside the dismissal order of the Application dated 17<sup>th</sup> January, 2018 on 15<sup>th</sup> May, 2018.*

*b. The Honourable Court be pleased to reinstate the Application dated 17<sup>th</sup> January, 2018 and give directions accordingly.*

*c. Costs be provided for.*

2. The Application is premised on the grounds that the Application dated 17<sup>th</sup> January, 2018 was dismissed for want of prosecution and non-attendance; that the Defendants' advocate sent a representative to attend court with instructions to request Mr. Uvyu advocate to adjourn the matter because the Applicants' counsel was unwell and that the said representative arrived in court late.

3. The Defendants' counsel deponed that there was no deliberate intention to fail to attend court; that the Defendants' Application raises serious issues of law and fact and that the mistake of an advocate should not be visited on the Applicants.

4. The Applicants' advocate's court clerk deponed that while on his way to court, the vehicle he had boarded was stopped by the traffic police who held it up for a long period and that he arrived in court at 9. 15a.m and found the matter had already been called out and dismissed.

5. In response, the Plaintiff's/Respondent's counsel deponed that this suit was heard and determined by the court on 5<sup>th</sup> October, 2017; that the court exercised its discretion to dismiss the Application dated 17<sup>th</sup> January, 2018 and that although the Applicants were served with Summons to Enter Appearance, they never defended the suit.

6. The Defendants' advocate submitted that the court should exercise its direction by doing justice to the parties; that the dismissed Application be reinstated and that the overriding objective as enshrined in Article 159 of the Constitution obligates the courts to do substantive justice.

7. The Plaintiff's advocate submitted that there is no evidence to show that the Defendants' advocate was unwell; that the court correctly exercised its discretion in dismissing the Application and that the Defendants have always employed delaying tactics to sabotage the successful determination of the matter. Both parties relied on authorities which I have considered.

8. The record shows that despite the Defendants having been served with the Summons to Enter Appearance by way of advertisement in the Nation Newspaper, they neither entered appearance nor filed a Defence. After hearing the evidence from the Plaintiff's witnesses, the court

entered Judgment in favour of the Plaintiff. The said Judgment was delivered on 5<sup>th</sup> October, 2017.

9. The Defendants/Applicants filed the Application dated 17<sup>th</sup> January, 2018 in which they sought to set aside the Judgment of the court. However, the Defendants' counsel was not in court when the Application came up for hearing on 15<sup>th</sup> May, 2018.

10. Although the Defendants' counsel has deponed that he was unwell and that he sent his clerk to instruct Mr. Uvyu advocate to hold his brief, he did not annex any medical or treatment note to show that he was unwell on 15<sup>th</sup> May, 2018. The issue of him being unwell on the day he was supposed to be in court to prosecute the Application dated 17<sup>th</sup> January, 2018 has not been proved.

11. In any event, if indeed the Defendants' counsel was aware that Mr. Uvyu was in court on 15<sup>th</sup> May, 2018, and that Mr. Uvyu was to hold his brief, what was so difficult with Mr. Uvyu addressing the court when the matter was called out? If the clerk came to court late and found the matter had been dismissed, it means that the Defendants' advocate never communicated to Mr. Uvyu advocate in advance to hold his brief.

12. The circumstances of this case shows that the Defendants' intention is to delay the finalization of this matter. Indeed, having not entered appearance and filed a Defence even after being served with the Summons to Enter Appearance by advertisement, the Defendants should refund the part payment of the purchase price as ordered by the court, so as to bring this old matter to a closure.

13. For those reasons, I decline to allow the Defendants' Application dated 21<sup>st</sup> May, 2018. The Application dated 21<sup>st</sup> May, 2018 is therefore dismissed with costs.

14. For avoidance of doubt, this suit is marked as having been finalized.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22<sup>ND</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**