REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 398 OF 2014

PASCAL NETIA NAIKA.....PLAINTIFF/RESPONDENT

VERSUS

JAMES NALIANYA WANGATIA.....1ST DEFENDANT

ANDREW MBAYAKI MAKOKHA..... 2ND DEFENDANT/APPLICANT

RULING

This application is dated 24th September 2018 and is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 9 Rule 9 (a) and Order 12 of the Civil Procedure Rules 2010 and Article 159 of the Constitution, seeking the following orders;

1. That this application be certified extremely urgent and be heard ex parte in the first instance.

2. That the first of E.K. Owinyi & Co. Advocates be granted leave to act for the 2nd defendant/applicant herein, in place of M/s Wafula Wawire & Co. Adv.

3. That pending inter parties hearing and determination of the application herein, there be an interim stay of execution of the proceedings, judgment delivered herein on 16th May, 2018 and any other orders made pursuant thereto.

4. That pending hearing and determination of the suit herein, there be an interim stay of execution of the proceedings, judgment delivered herein on 16th May, 2018 and any other orders made pursuant thereto

5. That the ex parte proceedings and judgment delivered herein on 16th May, 2018, together with orders made pursuant thereto be lifted and/or set aside.

6. That the 2nd defendant/applicant be granted leave to defend the suit herein.

7. That the costs of this application be provided for.

It is based on the grounds that, the 2nd defendant/applicant herein is facing imminent eviction from his parcels of land known as Bunyala/Budonga/1808 and Bunyala/Bundonga/929 measuring 2 acres and 3.5 acres respectively. That the 2nd defendant/applicant herein was being represented by the firm of M/s. Wafula Wawire & co. Advocates, which firm is no longer in active practice and the 2nd defendant/applicant has lost contact with the said law firm, and instead instructed the firm of E.K. Owinyi & co. Advocates to represent him in this suit. That the said firm of M/s. Wafula Wawire & co. Advocates failed to inform the 2nd defendant/applicant of the ongoing case as his counsel on record and neither was the 2nd defendant/applicant served with a hearing notice by the plaintiff/respondent herein, and as a result, judgment was delivered against the defendants herein on 16th May, 2018 without the 2nd defendant/applicant being heard. That failure of the 2nd defendant/applicant to defend himself was not a mistake of his own making, but the advocate's mistake and that mistakes, errors and lapses of an advocate should not be visited on a litigant and should not debar a litigant from the pursuit of his rights. That the 2nd defendant/applicant only found out that judgment had been delivered against himself in this case when the plaintiff/respondent went and cut the 2nd defendant/applicant's sugarcane on the suit land parcels known as Bunyala/Budonga/1808 and Bunyala/Budonga/929 measuring 2 acres and 3.5 acres respectively. That it is in the interest of justice that the prayers sought are granted and the plaintiff/respondent will suffer no harm if the orders sought herein are granted. That the 2nd defendant/applicant stands to suffer substantial loss if the orders sought are not granted, as he will be condemned unheard. That the principals of natural justice provide that no party should be condemned unheard and each party should be allowed to have his day in court.

The respondent submitted that, the application is an afterthought belated and devoid of merits. That it is not simply a defence or ground to say that an advocate is inactive or has no certificate of practice when no evidence is shown. That at any rate, it is now settled that a litigant is the owner of the case and must show that he had been checking on his or her advocate to be in touch with the goings on. The applicant cannot go home and sleep for over two years than simply approach the court that his advocate's mistakes should not be visited on him, the mistakes herein are those of the applicant. The respondent served their advocate on record, the matter proceeded to hearing, they had a chance to defend and even their defence was on record, hence no good reason exists to disturb the judgment on record. The applicant has not in any way demonstrated any injury, loss or prejudice that may result to him if the judgment is not vacated as they have simply said a party should not be condemned unheard. That interests of justice also demand that litigation comes to an end and it must be within a reasonable time.

This court has considered the application and the submissions therein. I have perused the court file and find that in this suit judgement was entered on the 16th May 2018. It is was not until the 24th September 2018 that the present application was filed. I find that there is inordinate delay in filing this application. The defendant was served with the hearing date and failed to attend court. Be that as it may the reasons given are excusable in my opinion.

In the case of Utalii Transport Company Ltd & 3 Others vs NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. This also applies to the defendant attending court when required to do so. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application is merited and I grant the same on condition that the applicant obtains a hearing date of the main suit within the next thirty (30) days from the date of this ruling. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE