**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. APPEAL NO. 193 OF 2014**

**ALFRED NZOKA KATHONDE.....1ST APPELLANT**

**VERONICA WANJIKU NZOKA.....2ND APPELLANT**

**VERSUS**

**WILSON NJOROGE KAMAU.....1ST RESPONDENT**

**HENRY KIMARU KAMAU.....2ND RESPONDENT**

**SOLOMON NJOROGE KAMAU.....3RD RESPONDENT**

***(Being an Appeal from the Ruling of Chief Magistrate's Court at Machakos***

***in Civil Case No. 324 of 2012 delivered on 7th August, 2014 by***

***Hon. L. Simiyu – Ag. SRM)***

**JUDGMENT**

1. The Respondents herein sued the Appellants in the Chief Magistrate's Court. In their Plaint, the Respondents alleged that they were the registered proprietors of land known as Machakos/Mamba/130 *(the suit land)*; that they entered into a Sale Agreement in respect of the suit land with the Appellants and that although the Appellants failed to pay the purchase price, they trespassed on the suit land.

2. The Respondents claim in the lower court was for a permanent injunction restraining the Appellants *(Defendants)* from interfering with the suit land. After hearing the matter, the learned Magistrate ordered the Appellants to refund to the Respondents the deposit paid. The court further restrained the Appellants from interfering with the suit land and further held that the Sale Agreement between them and the Respondents was null and void. The said Judgment is dated 12th June, 2014.

3. In their Memorandum of Appeal, the Appellants have filed an Appeal *"from the Ruling of the Honourable Senior Principal Magistrate Mrs. Simiyu delivered on 7th August, 2014 at Machakos Law Courts in CMCC No. 324 of 2012"*. Indeed, in their prayers, the Appellants have sought for the setting aside of the Ruling of the court delivered on 7th August, 2014. This Appeal is therefore not in respect of the Judgment of the court that was delivered on 12th June, 2014, but rather, the Ruling of 7th August, 2014.

4. In their Memorandum of Appeal, the Appellants averred that the trial court erred when it dismissed the Application dated 4th July, 2014; that the learned Magistrate erred when he ignored the Appellants' advocate's oral submissions and that the Ruling of the Magistrate was against the weight of evidence adduced by the Applicant.

5. In his submissions, the Appellants' advocate submitted that the Appellants' Application dated 4th July, 2014 was for stay of execution and setting aside of the Judgment delivered on 12th June, 2014; that it was not intentional for the Appellants' counsel to deliberately fail to attend court and that the Appellants' advocate was in the High Court when the Application was dismissed. The Respondents' advocate did not file his written submissions.

6. The Ruling of the learned Magistrate dated 7th August, 2014 was in respect of an Application dated 4th July, 2014 by the Appellants. In the said Application, the Appellants had sought for the following orders:

***"3. That this Honourable Court be pleased to set aside its orders of 3rd July, 2014 dismissing the Defendants' Application dated 22nd June, 2014 and do reinstate the same for hearing and determination together with the order for stay of execution which had been granted."***

7. The above Application was grounded on the facts that the Application dated 22nd June, 2014 was dismissed for non-attendance of their counsel; that the counsel for the Defendants had sent her clerk with a brief for any advocate to take out the matter as she was held up in Nairobi High Court Misc. Application No. 260 of 2014 and that by the time the matter was called out, the said advocate had not gotten any advocate who was willing to hold the brief.

8. In her Ruling, the learned Magistrate found that the Defendants' advocates knowingly sent a representative to court while aware that the same person had no right of audience; that the court cannot be said that it denied her the right to be heard and that there was no sufficient reason for setting aside the orders of dismissal.

9. The learned Magistrate further observed that the suit had proceeded ex-parte initially even after the Defendants' advocate had participated in fixing the date. The court declined to exercise its discretion in favour of the Appellants due to the persistent absenteeism by both the advocates and the Appellants.

10. Having gone through the record, I cannot fault the learned Magistrate for refusing to allow the Application dated 4th July, 2014. As observed by the learned Magistrate, the Appellants participated in the fixing of a date for the Application dated 4th July, 2014. Furthermore, the Appellants' advocate was aware that her earlier Application dated 22nd June, 2014 had been dismissed for non-attendance. How could she then fail to personally look for an advocate to prosecute the second Application?

11. The holding of the trial Magistrate that the Appellants and their advocate were habitual absentees in court was apt. Indeed, as correctly observed by the Magistrate, the Appellants remedy lies against their advocate for negligence in the manner she handled their brief. It is not the business of the courts to keep on reinstating suits and Applications in situations where litigants and their advocates do not take the business of the court seriously. The weight of the work awaiting judicial officers in the court rooms cannot countenance such a situation.

12. Having gone through the proceedings, and on the basis of the reasons I have given above, I find that the learned Magistrate exercised her discretion judiciously. The Appellants and their advocate have themselves to blame for the orders that were granted by the court on 7th August, 2014.

13. Consequently, the Appellants' Appeal is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14TH DAY OF JUNE, 2019.**

**O.A. ANGOTE**

**JUDGE**