



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 168 OF 2016**

**DANIEL KIMANTHI MUTISYA**

**JOSEPHAT WAITA MUTISYA** (*Suing on behalf and beneficiaries of the Estate of NDUNDA WAITA – deceased*) .....**PLAINTIFFS**

**VERSUS**

**THE CHAIRMAN**.....**1<sup>ST</sup> DEFENDANT**

**THE SECRETARY** .....**2<sup>ND</sup> DEFENDANT**

**THE TREASURER** .....**3<sup>RD</sup> DEFENDANT**

**MWEA FARMERS CO. LIMITED**.....**4<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 25<sup>th</sup> October, 2018, the Plaintiffs are seeking for the setting aside of the orders of this court of 27<sup>th</sup> September, 2018. The Application is premised on the grounds that the Plaintiffs' advocate's non-attendance of court on 27<sup>th</sup> September, 2018 was occasioned by an honest and inadvertent mistake and that the Plaintiffs herein have a legitimate claim that should be heard on merit.
2. The Application is supported by the Affidavit of the Plaintiffs' advocate who has deponed that although his representative informed him that he had fixed the suit for hearing on 26<sup>th</sup> September, 2018 which he diarized, the matter had been actually been fixed for hearing on the 27<sup>th</sup> September, 2018 and not on 26<sup>th</sup> September, 2018; that he proceeded to serve the Defendants' advocate with a hearing notice of 26<sup>th</sup> September, 2018 and that when he attended court on 26<sup>th</sup> September, 2018, he was informed by the registry that the matter was coming up for hearing on 27<sup>th</sup> September, 2018.
3. According to counsel, on 27<sup>th</sup> September, 2018, he sent a representative to have the matter adjourned on account that he had mis-diarized the date; that while his representative was still looking for an advocate to hold his brief, he found the matter already dismissed and that the Plaintiffs have a legitimate claim that this court should hear and determine on merit.
4. The Plaintiffs' advocate finally deponed that a mistake of a counsel should not be meted on the client; that the Plaintiffs are ready and keen to prosecute the matter and that no prejudice will be suffered by the Defendants if the Application is allowed. The Defendant did not oppose the Application.
5. The record shows that when this matter came up for hearing on 7<sup>th</sup> May, 2018, the Plaintiffs' advocate informed the court that the hearing could not take off because they had not served on the Defendants with a hearing notice. The court allowed the Application for adjournment and fixed the matter for hearing on 27<sup>th</sup> September, 2018.
6. When the matter came up for hearing on 27<sup>th</sup> September, 2018, neither the Plaintiffs' nor the Defendants' advocate was in court. The court dismissed the suit *suo moto* for want of prosecution.
7. According to the Plaintiffs' advocate, the advocate who held his brief on 7<sup>th</sup> May, 2018 informed him that the matter had been fixed for hearing on 26<sup>th</sup> September, 2018, which is the date that he diarized. Indeed, counsel has annexed a copy of his diary which shows that he diarized the hearing of this matter on 26<sup>th</sup> September, 2018.

8. The Plaintiffs' counsel has also annexed a copy of the hearing notice dated 7<sup>th</sup> May, 2018, that he served on the Defendants' advocate on the same day. The said hearing notice shows that the matter was to be heard on 26<sup>th</sup> September, 2018.

9. To the extent that the Plaintiffs' advocate was under the inadvertent impression that the suit was to be heard on 26<sup>th</sup> September, 2018 and not 27<sup>th</sup> September, 2018, I shall exercise my discretion in his favour.

10. For those reasons, I allow the Application dated 25<sup>th</sup> October, 2018 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF JULY, 2019.**

**O.A. ANGOTE**

**JUDGE**