



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**E & L CASE NO. 691 OF 2012**

**KIPLAGAT KOTUT.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**ROSE JEBOR KIPNGOK.....DEFENDANT/JUDGMENT DEBTOR**

**RULING**

1. The Decree holder moved the court through the Motion dated the 11<sup>th</sup> October, 2019 seeking for the setting aside of the Order of 7<sup>th</sup> October, 2019 and reinstating of their application dated the 26<sup>th</sup> September, 2019 for hearing and determination. The application is supported by the affidavit sworn by Jonah K. Korir, sworn on the 11<sup>th</sup> October, 2019. He depones that after the interpartes hearing was agreed to take place at 3.00 p.m., he went to the High Court where he had another matter that took about 25 minutes from 2.40 p.m. That by the time he came to this court after 3.10 p.m., he found that their application dated the 26<sup>th</sup> September, 2019 had been dismissed.

2. The application is opposed by the Judgment Debtor through the replying affidavit sworn by Rose Jebor Kipngok on the 18<sup>th</sup> October 2019, among others challenging the competency of Mr. Jonah K. Korir deponing the affidavit in support of the application as he is not properly on record.

3. The application came up for mention on the 28<sup>th</sup> October, 2019 when the Counsel agreed that the court gives them a date for ruling.

4. The issues for determination are as follows;

***(a) Whether the Decree Holder has made a reasonable case for the setting aside of the dismissal order of 7<sup>th</sup> October, 2019.***

***(b) Who pays the costs?***

5. The court has after considering the affidavit evidence, and the record come to the following determinations;

(a) That the Decree Holder's notice of Motion dated the 26<sup>th</sup> September, 2019 was for mention for directions on the 7<sup>th</sup> October, 2019. That after hearing both Counsel for the Decree Holder and Judgment Debtor, the court directed that the Motion and Preliminary Objection dated 4<sup>th</sup> October, 2019 be heard together and that the deponent of the supporting affidavit be availed for cross examination at midday. However, both Counsel agreed that the hearing take place at 3.00 p.m. the same day and not the 9.00 p.m. mentioned in paragraph 2 of the supporting affidavit.

(b) That when the court resumed for the afternoon session at 3.01 p.m., both the Decree holder and his Counsel were absent. That the Counsel for the Judgment Debtor moved the court for the application to be dismissed with costs, which prayer was granted. That the learned Counsel for the Decree Holder has disclosed that he got late as he was dealing with another case before the High Court from 2.40 p.m. to 3.10 p.m. That by the time he came to this court, he found the application has been dismissed with costs. That averment has not been rebutted or challenged in any material aspect and considering that the application dated the 11<sup>th</sup> October, 2019 was filed on the 14<sup>th</sup> October 2019, which is about seven (7) days after the dismissal order of the 7<sup>th</sup> October 2019, the court finds merit in the motion.

(c) That however, as the absence from court of the Decree Holder and the Counsel is the cause of this application, the Decree Holder should nevertheless pay the costs of the application.

6. That the court finds merit in the Motion dated the 11<sup>th</sup> October, 2019 and orders as follows;

*(a) That the Order of 7<sup>th</sup> October, 2019 dismissing the Decree Holder's Motion dated the 26<sup>th</sup> September, 2019 with costs is hereby reviewed, and set aside.*

*(b) That the Decree Holder's Motion dated the 26<sup>th</sup> September, 2019 is hereby reinstated for hearing.*

*(c) The Decree Holder nevertheless pays the Judgment Debtor's costs of this application.*

Orders accordingly.

**Dated and delivered at Eldoret this 20<sup>th</sup> day of November, 2019.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

No appearance for Plaintiff/Decree Holder

Mr. Ngigi Mbugua for Chebii for Defendant/Judgment Debtor

Christine: Court Assistant