



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 98 OF 2015**

**NOAH KIBIEGO RANDICH (Suing as a trustee for and  
on behalf of the African Inland Church**

**Kenya Trustee Registered).....PLAINTIFF**

**VERSUS**

**STANLEY KIPROP CHANGWONY.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH JEPKORIR (*Sued as the Chairman***

***and Secretary respectively of the School Management***

***Committee of Kaplogoi Primary School).....2<sup>ND</sup> DEFENDANT***

**WILLIAM KIGEN.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiff, **Noah Kibiego Randich**, suing as trustee for and on behalf of the African Inland Church Kenya Trustee Registered filed the plain herein against the defendants and the suit was slated for hearing on 26.9.2017. However, when the case was called out on the scheduled dated, the plaintiff was absent but his advocate was present. The court waited until 10.00 a.m. for the plaintiff and therefore, dismissed the suit for non-attendance.

The plaintiff has now filed an application under Order 10, Rule 11 of the Civil Procedure Rules, 2010 and section 13 of the Environment and Land Court Act praying that the plaintiff's suit dated 2.4.2015 dismissed on the 26.9.2017 be reinstated and listed for hearing on priority basis. The application is based on grounds that though the plaintiffs/applicants together with his witnesses failed to attend court on 26<sup>th</sup> September, 2017 the failure was not intentional. That some of the witnesses attended court though a bit late after the matter had been dismissed. That the plaintiffs'/applicants' advocate pleaded the matter to be placed aside but the plea was rejected. The failure by the witnesses to make it to court on time was due to lack of proper means of transport and poor road network due to the wet season. That the plaintiff/applicant is desirous of having this case heard to its lawful conclusion. That the application has been filed swiftly without delay. That the applicant will suffer great loss and damage if the instant application is not granted and the respondent will suffer no prejudice.

The plaintiff swore an affidavit stating that on the 26<sup>th</sup> September, 2017, he did not attend court due to a personal issue he attended to. That he is an elderly retired Church Minister. That he was unable to call his

lawyer in time. That he regrets the whole situation and he requests the court to temper justice with mercy and do reinstate the suit. That he has never missed court whenever this matter is listed. That the subject matter is a church property affecting so many people in the area who are desirous of concluding it. That they stand to suffer irreparable loss and damage if their application is not allowed. That the defendants will not suffer any prejudice at all.

**Mr. Barnabas Kipkering Chirchir** stated that he is the chairman of A.I.C., Kaplogoi Local Church. The said church is the registered owner of that parcel of land known as Tembeleo/Elgeyo Block 13 (Kaplogoi) 42, measuring approximately 1 acre. The school's representatives have encroached and/or trespassed on the church premises without such a right and erected structures effort to persuade them to desist have no fruits. It is in the interest of justice that they be evicted in order that they may roll out their programmes and plans on the said parcel of land.

**Mr. Nehemiah Kipyator Tanui** on his behalf stated that he is the current pastor of Kaplogoi African Inland Church and so has he been since the year 2013 to date. He can confirm that there are school structures on the church plot. He comes from the neighbourhood and he knows a brief history of the church. The church plot is a one-acre parcel of land. The structures are currently being used by the children of Kaplogoi Primary School. They comprise a kitchen and a store. The school also wants to put up a dining hall. On the 24<sup>th</sup> January, 2015, William Kigen who is the Chairman in a neighboring Catholic Church prevented them from fencing the land along its boundary.

In the replying affidavit, **Rev. Fr. Jonas Kiplimo Kimeli** states that he is a Catholic Priest based in the Sacred Heart Cathedral, currently designated as the Property and Insurance Manager and Youth Chaplain of the Catholic Diocese of Eldoret, herein hence competent make and swear this affidavit. That the application is not genuine but based on conjecture, suppositions and rumor. The matter was slated for hearing on 26/9/2017 when witnesses for the Defendant attended court. The matter was called out at 8.30 a.m, and the Plaintiff's advocates indicated that the same is ready for hearing and was given time allocation for 9.00 a.m. That no witnesses turned up for hearing. The Plaintiff's advocates could not explain where they were and what time they were expected in court. The matter could not be placed aside forever. The Plaintiff's witnesses were called out later but they were absent without explanation for their absence. That when the defendant's advocates and the state counsel applied for the dismissal of the suit, there was no plausible defence to the application, hence it was allowed on merit.

That he has read and understood the plaintiffs'/applicants' application dated 3<sup>rd</sup> October, 2017 together with the various supporting affidavits sworn by the plaintiff's witnesses and he is competent to reply thereto. That the reasons advanced by the plaintiff's witnesses for their failure to attend court are not reasonable as the defendant's witnesses were present in court on 26<sup>th</sup> September, 2017 yet they come from the same location. That the plaintiff's witnesses exhibited an attitude of lack of interest in prosecuting their case noting that Mr. Noah Kibiego Randich and Mr. Nehemiah Kipyator Tanui were not planning to attend court on the said hearing date. That the plaintiff's witnesses are guilty of indolence and their delay to come to court ought not to be excused, noting that two of them arrived in court very late.

I have considered the application before court and I do find that the plaintiff has not given any plausible reason for his failure to attend court. He has not told the court the personal issue that caused him not to attend court. For this court to exercise its discretion, it shall be satisfied that the failure to attend court by the plaintiff was caused by some hardship. There is no evidence that the plaintiff's witnesses failed to attend court due to an impassable road as this road is not described. I do find that the plaintiff has failed to satisfy this test. Discretion cannot be exercised whimsically, it has to be exercised judiciously.

However, this court has perused the plaint and the defence and the documents on record and do find that the case before it is not frivolous and has public interest because it is a dispute between a church and a school. The application is only allowed because of the public interest involved. However, the same is allowed on condition that the plaintiff pays each defendants Kshs. 5,000, as throw away costs, failure of which the application stands dismissed. Orders accordingly.

**Dated and delivered at Eldoret this 26<sup>th</sup> day of January, 2018.**

**A. OMBWAYO**

**JUDGE**