



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 420 OF 2013**

**DANIEL KIMELI KIPRONO.....1<sup>ST</sup> PLAINTIFF**

**JULIUS RONO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HOSEA K. KEMBOI.....1<sup>ST</sup> DEFENDANT**

**MATHEW KEMBOI.....2<sup>ND</sup> DEFENDANT**

**NG'ETICH A. J. A. T/A RONBOY AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

The defendant has come to court for an order that the defence case be re-opened to allow the defendant testify and produce his evidence and witnesses if any. That the orders of the court granted on 5.10.2017 be set aside. The application is based on grounds that on 5.10.2017, the applicants' advocate was held up and therefore, could not be present in court for this case at the same time.

The applicant states that the application to re-open to defence case and set aside the orders given on 5.10.2017 will not prejudice the respondent herein and that the scales of justice demand that the applicant be accorded a fair hearing which includes the right to be heard before an impartial court. The applicant states that this court has discretion to set aside its orders given on 5.10.2017 and allow the applicant to defeat his case by testifying and producing evidence or call his witnesses if any. Last but not least, that there has been no delay in bringing this application before this honourable court and the defendant has an arguable case.

The application is supported by the affidavit of John Kipkoech Chebii an advocate of the High Court of Kenya who states that on 5.10.2017, he was held up in the office and therefore, could not come to court for this case at the same time. That he had intended to adjourn the matter on the ground that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are not properly sued in the matter. He sent his legal assistant to communicate to the respondents' advocate but found that the respondents' advocate had already dealt with the matter.

He believes that the applicants/defendants have a good defence to this suit and should not be unheard due to mistake of counsel. The land belongs to Kipkemboi Busienei who died on 3.3.2013.

Ann Halwenge Odwa, learned counsel for the respondent filed a replying affidavit and states that the defendants were duly served with a hearing notice for matter before the hearing date. On the date of hearing, she appeared before the Judge with her client but the defendant with his advocate were absent. The defence was closed and the matter was scheduled for highlighting. No reason for non-attendance has been given. The case has been pending in court since 2013 and the defendants had ample time to pursue the defence.

I have considered the application and do find that this is a matter that the court should exercise its discretion judiciously. I do not intend to deny the defendant access to the seat of justice as the reasons given by the defendants' advocate for his failure to attend court for hearing at 8.30 a.m. are understood by this court that is, he was not aware that the court had changed its mode of operation, thus from hearing suits after mentions and applications to hearing suits at 8.30 am before mentions and applications and therefore, when the defence counsel came to court the suit had been dismissed.

The upshot of the above is that the defence case is hereby re-opened to allow the defendant testify and produce evidence and call witnesses. Orders accordingly.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of June, 2018.**

**A. OMBWAYO**

**JUDGE**