REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 93 OF 2017

FORMERLY MERU ELC CASE NO. 11 OF 2006

RUKENYA BUURI.....PLAINTIFF

VERSUS

M'ARIMI MINYORA.....1ST DEFENDANT

DERICK KIRUJA.....2ND DEFENDANT

MUGENDI M'ARIMI.....3RD DEFENDANT

RULING

1. This ruling concerns an application dated **13th June, 2018**. On the face of the Notice of Motion, the application states that it has been brought to court in pursuance to Order 12 Rule 7, Order 9 Rules 9 & 10 and Order 51 Rule 1 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act.

The application seeks the following orders:

1. That this application be certified urgent.

2. That the firm of Basilio Gitonga,Muriithi & Associates Advocates be granted leave to act for the plaintiff in place of the firm of Gatari Ringera & Co. Advocates.

3. That an order of stay of execution of the judgment delivered on 14.02.2018 do issue in as far as it relates to L.R. No. Mwimbi/S. Mugumango/305 pending the interpartes hearing of this application.

4. That an order of stay of execution of the judgment delivered on 14.02.2018 do issue in as far as it relates o L.R. NO. Mwimbi/S. Mugumango/305 pending the hearing and determination of this application.

5. That the honourable court do set aside the order dismissing the plaintiff's suit and the judgment entered in favour of the defendants and do set the suit down for hearing.

6. That the costs of this application be provided for.

2. The application has the following grounds:

1. That this suit was heard on 18.12.2017 and a judgment delivered on 14.02.2018.

2. That the plaintiff was not informed that the suit had been scheduled for hearing on the said 18.12.2017.

3. That the failure of the plaintiff to attend court was purely and squarely occasioned by the refusal by his previous counsel to notify him that the suit was scheduled for hearing on that date.

4. That the plaintiff has all along been eager to have the matter heard and determined.

5. That the plaintiff stands to suffer immensely if the judgment obtained by the defendants is implemented.

6. That the mistake or oversight of counsel should not be visited upon a diligent litigant.

7. That judgment having been entered, it is a mandatory requirement of law that the court must authorize any intended change of advocate.

8. That the plaintiff has a very strong case against the defendants and a very strong defence against their claim.

9. That the relief sought herein is for purpose of advancing the course of justice and fairness.

3. The application was responded to through an affidavit filed by the 2nd defendant which states:

I DERICK KIRUJA OF P. O. Box 22 CHOGORIA in the Republic of Kenya make oath and state as follows;

1. That I am the 2nd respondent in the application dated 13th June, 2018 well versed with the particulars thereof and hence competent to make this oath.

2. That I have authority from the 3rd respondent which is already filed to make and swear this oath.

3. That the applicant's notice of motion dated 13th June, 2018 has been read and explained to me by my counsel on record and having understood the contents therein I wish to respond as follows:

4. That I am unable to respond to the deposition by the applicant that on 12th June, 2018 the applicant sent his son to the firm of Gatari Ringera & Co. Advocates to inquire as to why the matter had delayed and in particular noting that the said son has not sworn an affidavit to confirm that indeed he went to the firm of Gatari Ringera & Co. Advocates on the appointed day.

5. That I am equally not able to respond to the contents of paragraph 3 of the supporting affidavit which is to the effect that the secretary in the firm of Gatari Ringera & Co. Advocates informed the son of the applicant that the matter had been heard and determined.

6. That in further response to the contents of paragraphs 2 and 3 of the applicant's supporting affidavit I wish to aver that the applicant's suit was filed way back in 2006 and the applicant has not explained to this court why from 2006 he was not able to fast tract the hearing and determination of his suit which was filed by way of plaint dated 30th January, 2006 and received in court on 30th January, 2006.

7. That the applicant is economical with information by failing to disclose that his counsel had been indulged on several occasions before the matter proceeded into hearing and whether or not the mistake was that of the applicant's counsel not all acts and omissions of a counsel can be excused putting into account that the applicant or a litigant has a personal and legal duty to follow up one's case whether represented or not and the litigant should always rise to the occasion and fast tract the hearing and disposal of one's suit and in this case the errors and omissions of Gatari Ringera & Co. Advocates is not an excuse acceptable in law.

8. That I have no difficulties in accepting that the applicant consulted the firm of Basilio Gitonga, Muriithi & Associates Advocates who appraised the applicant with the position of the matter however I wish to aver that the applicant contacted another counsel too late given that this contacting another counsel if the firm of Gatari Ringera & Co. Advocates was not delivering should have done as early as 2006 or 2007 and not in 2018 after all that inordinate delay therefore the applicant did not act diligently enough in regard to his case and he should not be rewarded for laxity in prosecuting his case.

9. That it is true as deposed by the applicant at paragraph 6 of the supporting affidavit that the matter proceeded into hearing on 27.11.2017 and 18.12.2017 in the absence (sic) and his counsel as a result of which I was granted leave to proceed and prosecute my O.S (which operated as a counter claim) whereupon the case was heard and a date for judgment was given by the court.

10. That in response to the contents of paragraph 6 of the supporting affidavit which is to the effect that the applicant was not aware of the dates for hearing when the matter was heard and determined I wish to blame both the applicant and his counsel in that the counsel was supposed to (sic) his client the status and progress of his client's case and the applicant had a personal and legal duty to act diligently and find out from his counsel from time to time the status and progress of his case otherwise upon filing the suit in 2006 the applicant went to slumber hoping against hope that the suit will die naturally.

11. That in response to the contents of paragraph 7 of the supporting affidavit which is to the effect that the secretary from Gatari Ringera & Co. Advocates used to make phone calls to the applicant when the suit was scheduled for hearing I wish to aver that one wonders why then the applicant did not attend court at any single time if he was being informed and secondly what did the applicant do when he found out that the secretary who used to call him had now taken a long period without contacting him and the conclusion is that the applicant had lost interest in his case and no wonder from 2006 to 2018 he was swimming in his slumber land.

12. That in response to the contents of paragraph 8 of the supporting affidavit the respondent and the court had all the reasons to believe that the applicant was deliberately avoiding to attend court as opposed to the applicant's averments that the (sic) was utterly shocked.

13. That the contents of paragraph 9 of the supporting affidavit that the applicant has always been interested in prosecuting his case is a misrepresentation of the true facts granted the acts, omissions and commissions of the applicant from 2006 when the applicant

field his suit and more so noting particularly that there is no single (sic) that the applicant has ever been in court for any intent or purpose.

14. That in response to the contents of paragraph 10 of the supporting affidavit I wish to respond that the counsel for the applicant could have applied to cease acting as he had intimated but equally important the applicant was at liberty to file a notice to act in person and thereby do away with the counsel who was allegedly not delivering consequently the applicant is to blame for the suit proceeding ex-parte and judgment delivered thereon.

15. That in response to the contents of paragraph 11 which is to the effect that the applicant failing to attend court should be visited upon his former advocate cannot and should stand granted our averments herein above and more particularly that the applicant had a duty to act diligently to see to it that his suit is heard and determined and when his former advocate proved to be inefficient the applicant was at liberty to appoint another advocate as he has done now or file a notice to act in person (sic).

16. That true the defendants would wish to enjoy the fruits of their successful litigation consequently the applicant's averments at paragraph 12 of his supporting affidavit that the defendants are out to execute the judgment of (sic) is true and correct.

17. That I am advised by my counsel on record which advise (sic) I verily believe to be true that I should respond to the contents of paragraph 13 of the supporting affidavit in the following manner;

i) That the respondents were awarded half of the applicant's land on account of having occupied the same for a period in excess of twelve years.

ii) That the applicant has not demonstrated to this court his strong claim against the defendants.

18. That the applicant is at liberty to appoint as many counsels as he wishes and I have no reasons to oppose his appointing his current advocate on record.

19. That the setting aside of the order dismissing the applicant's case and allowing the respondents' claim in the O.S. should not be disturbed in any event the applicant's suit was dismissed for his own making and asking.

20. That justice is two edged and allowing the applicant's applicant (sic) is not the yard stake of justice and fairness and the court should look at both sides and their acts and omissions which led to the judgment of 14th February, 2018.

21. That I make this oath in opposition to the applicant's application dated 13th February, 2018 (save the prayer that the firm of BASIILIO GITONGA, MURIITHI & ASSOCIATES ADVOCATES be granted leave to act for the applicant) and in response to the applicant's supporting affidavit sworn and dated 13th February, 2018.

22. That all which is deponed herein is true to the best of my knowledge, belief and information.

4. The application was canvassed by way of written submissions.

5. The Plaintiff's/Applicant's written submissions are reporuded herebelow:-

PLAINTIFF'S/APPLICANT'S SUBMISSIONS ON AN APPLICATION DATED 13.6.2018

Your Lordship the following comprises of submissions on behalf of the plaintiff/applicant in relation to the application dated 13.6.2018.

Introduction

Your lordship, in the application, the plaintiff/applicant principally seeks two orders:-

Firstly, an order for the stay of execution of the judgment delivered on 14.2.2018 and secondly, for an order to set aside the order that dismissed his case and the judgment made in favour of the defendants.

The court directed that the application be canvassed by way of written submissions and we shall thus address separately, the two issues, the subject of the application.

Stay of execution

Your lordship, the applicant has invoked the provisions of sections 3 & 3A of the Civil Procedure Rules (sic) in pursuit of the prayer for stay of execution of the judgment delivered in this matter.

It should be noted that these provisions are distinguishable from those of Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 which basically deal with stay of execution pending the institution or hearing of an appeal.

In the present case your lordship, there being no appeal or intended appeal, (sic) renders the provisions of Order 42 Rule 6(2) of the Civil

PROCEDURE Rules, 2010 and the conditions set out there under, inapplicable.

The court is therefore being asked to make a determination on the premise of its wide discretion donated by sections 3 and 3A of the Civil Procedure Act.

In essence, the applicant seeks to have the judgment arrested pending the determination of the issue of setting aside the ex-parte judgment and order.

Your lordship, it is our submissions that the court is vested with a wide discretion to ensure that justice is served.

However, since the prayer for stay of execution and that of setting aside the ex-parte proceedings are being heard simultaneously, it is prudent to now delve in the latter.

Setting aside ex-pare order and judgment

Your lordship, Order 12 Rule 7 of the Civil Procedure Rules, 2010, provides that "where under this order judgment has been entered or the suit has been dismissed, the court on an application, may set aside or vary the judgment or order upon such terms as may be just."

Again your lordship, the unfettered discretion of the court comes into play.

The applicant has placed blame for his non-attendance during the hearing date on his former advocates. The record will show that the said former advocate never applied to cease acting for the plaintiff/applicant as he had informed court previously, but simply abandoned the suit despite having taken the hearing date in court.

This unfortunate set of circumstances confirms that the plaintiff/applicant was indeed not aware that the matter was slated for hearing on that particular day.

Your lordship, the courts have previously, extensively addressed the parameters to be observed when excising its discretion in an issue of this nature.

In Wachira Karani vs Bildad Wachira [2006] eKLR, the High Court cited several Courts of Appeal decisions to demonstrate the issues the court should take into consideration.

It was observed that a party who seeks the court to excise its discretion in its favour must demonstrate that it failed to attend court owing to a sufficient cause.

The applicant has shown that his previous advocate failed to notify him of the hearing date ad it can also be deduced from the record that the said advocate also failed to attend the hearing despite having been present when the date was given.

The court in Wachira Karani (supra) cited with approval the following passage made in Ongom vs Owota "**although it is an elementary principle of our legal system that a litigant who is represented by an advocate is bound by the acts and omissions of the advocate in the course of the representation in applying that principle, courts must exercise care to avoid abuse of the system and/or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."**

Your lordship, there has been no demonstration that the plaintiff/applicant was at fault, a fact vindicated by the fact that his previous advocate failed to do an application to cease from acting for him despite having informed the court that he no longer wished to represent the plaintiff.

We have had occasion to read the defendants/respondents replying affidavit and it is our take that the same seems to blame the non-prosecution of the suit since 2006 on the plaintiff/applicant instead of addressing the issues of 18.12.2017 when the matter proceeded ex-parte.

The defendants/respondents replying affidavit would be relevant if the suit had been dismissed for want of prosecution under Order 17 of the Civil Procedure Rules, 2010 and not for non-attendance.

In any case, the perusal of the record would demonstrate that the plaintiff/applicant has not contributed in any way in the delay in concluding the matter.

In conclusion your lordship we urge the court to find that the plaintiff/applicant has shown to satisfaction that there was sufficient cause for his non-attendance at the date scheduled for hearing and that the mistake is excusable having been solely contributed by his previous advocate.

We further seek to make reliance on the following judicial authorities.

1. ANNE NJERI MWNGI VS NJOMANTHA INVESTMENTS LTD [2013] eKLR.

We pray that the plaintiff's/applicant's application be allowed.

DATED AT CHUKA THIS 26TH DAY OF JUNE, 2018

FOR: M/S BASILIO GITONGA, MURIITHI & ASSOCITATE

ADVOCATES FOR THE PLAINTIFF/APPLICANT

6. The Defendant's/Respondent's written submissions are reproduced herebelow:

> **DEFENDANT'S/RESPONDENT'S SUBMISSIONS IN RESPECT OF THE PLAINTIFF'S/APPLICANT'S APPLICATION DATED 13TH JUNE, 2018**

A. BACKGROUND AND BRIEF FACTS

1. Your Lordship the plaintiff/applicant herein after the applicant filed Civil Suit No. 11 of 2006 in Meru High Court (sic). The applicant indeed filed the suit on 30th January, 2006. Before the matter could proceed into hearing the defendants/respondents herein after (sic) the respondents filed an originating summons in Meru High Court. The originating summons were filed by the respondents on 2nd July, 2009. The plaintiff was claiming that the respondents were claiming 3 acres out of LR; Mwimbi/S. MUGUMANGO/305 by way of adverse possession.

2. By consent the two suits were consolidated. As long as the two suits were in Meru High Court the matter was not heard. Then followed the opening of E. & L Court at Chuka and the two matters were transferred to Chuka EL.C.C. Court as number 93 of 2017. On 26th July, 2017 Gatare Ringera counsel for the applicant was present and I.C. Mugo counsel for the respondents was present. The court ordered and directed that parties do comply within 60 days of 26th July, 2017 and the matter was to be mentioned for directions on 16th October, 2017. On 16th October, 2017 the parties having complied a hearing date was taken by consent of both counsels. The matter was fixed for hearing on 27th November, 2017. On 27th November, 2017 Gatare Ringera counsel for the applicant arrived a little bit late at around 11.15am. I.C Mugo for the respondent was present. Counsel for the respondent was ready to proceed however counsel for the applicant was not ready to proceed and his explanation was as follows; "I am not ready to proceed. The plaintiff was aware of the hearing date but he is not in court. I will be seeking to cease acting for him. I regret the court has wasted precious judicial time. My client is to blame."

3. One should note that on 27th November, 2017 the applicant was indulged by the court. No explanation was given as to why the applicant was absent. We believe that the court indulged the counsel for the applicant in that the counsel for the applicant Mr Gatare Ringera intimated that he wished to apply to cease acting for the applicant. The matter was given another hearing date despite the applicant and his counsel having no explanation as to why the applicant was not in court. The matter was fixed for hearing on 18th December, 2017.

4. On 18th December, 2017 neither the applicant nor his counsel attended court. The applicant's counsel did not apply to cease acting for the applicant meaning therefore for all intent and purposes Gatare Ringera was counsel for the applicant. The applicant's suit was then dismissed for non attendance and the respondents were called to prove their counter claim which was in form of O.S. Judgment was then delivered in favour of the respondents on 14th February, 2018. It was on this background that the applicant has come before this court seeking to have the judgment of 14th February, 2018 set aside.

B. PLEADINGS

5. The applicant by a motion dated 13th June, 2018 moved the court with the following prayers for consideration:

> A. That this application be certified urgent.
>
> B. That the firm of Basilio Gitonga, Muriithi & Associates Advocates be granted leave to act for the plaintiff in place of the firm of Gatari Ringera & Co. Advocates.
>
> C. That an order of stay of execution of the judgment delivered on 14.2.2018 do issue in as far as it relates to LR; MWIMBI/S.MUGUMANGO/305 pending the interpartes hearing of this application.
>
> D. That an order of stay of execution of the judgment delivered on 14.2.2018 do issue in as far as it relates to LR; MWIMBI/S. MUGUMANGO/305 pending the hearing of this application.
>
> E. That the honourable court do set aside the order dismissing the plaintiff's suit and the judgment entered in favour of the defendants and do set aside the suit down for hearing.
>
> F. That the costs of this application be provided for.

6.

i) The applicant in support of his application dated 13th June, 2018 filed and served a supporting affidavit sworn and dated 13th June, 2018. In his supporting affidavit the applicant deposed that on 12th June, 2018 he sent his son to confirm the status of the suit due to the delay that had taken place. The son was informed by the secretary of his counsel that the matter had been heard and disposed and judgment delivered. That the applicant then contacted the firm of Basilio Gitonga, Muriithi & Associates to help him navigate the waters of the instant suit.

ii) That the firm of Basilio Gitonga, Muriithi & Associates then confirmed to the applicant that the matter was heard on 27.11.2017 and 18.12.2017. That the applicant had no information that the matter had been slated for hearing. That the secretary from the firm of Gatari Ringera did not telephone to the applicant as usual that the matter had been slated for hearing on 27.11.2017 and on 18.12.2017. That the applicant was shocked to learn that the court was informed that the applicant had deliberately refused to attend court. That the impression that the applicant was not interested with the matter as demonstrated to the court was not correct as the applicant has always been determined to have this dispute concluded.

iii) That the applicant avers that his former counsel was candid he ought to have applied to cease acting for the applicant. The applicant avers that he finds himself in the situation he is due to the errors and omissions of his former advocate. That the applicant has information that the respondents are moving with speed to execute and /or implement the judgment. The execution of the judgment would mean the applicant losing half of his land despite that the applicant has strong defence against the respondents' claim. That it is the wish of the applicant to now engage a new advocate for the former has not delivered.

iv) The applicant prays that the order dismissing his claim and that allowing the respondents' claim be set aside so that all parties can be heard.

7.

i) Your lordship in opposition to the applicant's application dated 13th June, 2018 and in response to the applicant's supporting affidavit sworn and dated 13th June, 2018 the respondent filed and served a replying affidavit sworn by the 1st respondent and dated 21st June, 2018. In the replying affidavit the respondent deposes that; the respondent was not able to confirm that indeed on 12 th June, 2018 the applicant sent his son to the firm of Gatari Ringera to find out the status of the suit. The son has not sworn an affidavit to that end. That the respondent would not also be able to confirm that the secretary in the firm of Gatari Ringera informed the applicant's son that the suit had been heard and determined.

ii) That the applicant's suit was filed way back in 2006 and the applicant did not explain to the court why he could not fast track the hearing of his case from then. That the applicant was economical with information and in particular the applicant's counsel was indulged on two occasions before the matter proceeded into full hearing. That the respondent has no issues in the applicant appointing the firm of Basilio Gitonga Muriithi & Associate Advocates as his alternative advocate. That the respondent admits that the matter proceeded into hearing on 18th December, 2017 in the absence of the applicant and his counsel and that the respondent was allowed by the court to proceed and prosecute their O.S which operated as a counter claim.

iii) That the respondent wish (sic) to blame both the applicant and his counsel in that the counsel was supposed to his (sic) client the status and progress of his client's case and the applicant had a personal and legal duty to act diligently and find out from his counsel from time to time the status and progress of his case otherwise upon filing the suit in 2006 the applicant went to slumber hoping against hope that the suit will die naturally. That the respondent wonders why the applicant did not attend court at any single time if he was being informed and secondly what did the applicant do when he found out that the secretary who used to call him had now taken a long period without contacting him and the conclusion is that the applicant had lost interest in his case and no wonder from 2006 to 2018 he was swimming in his slumber land.

iv) That the court and the respondent were entitled to take it that the applicant was deliberately absconding from attending court. That the applicant has not demonstrated in prosecuting his case from 2006 and this is confirmed by the fact that the applicant has ever (sic) been in court for intent or purpose.

v) That the applicant failing to attend court should be visited upon his former advocate cannot and should stand granted (sic) our averments herein above. That it is true that the defendants are out to execute the judgment of the court. That the respondents were awarded half of the applicant's land on account of having occupied the same for a period in excess of twelve years. That the applicant has not demonstrated to this court his strong claim against the defendants.

vi) That the applicant is at liberty to appoint as many counsels as he wishes and the respondents have no reasons to oppose his appointing his current advocate on record. That the setting aside of the order dismissing the applicant's case and allowing the respondents' claim in the O.S should not be disturbed in any event the applicant's suit was dismissed for his own making and asking. That justice is two edged and allowing the applicant's application is not the yard stake (sic) of justice and fairness and the court should look at both sides and their acts and omissions which led to the judgment of 14th February, 2018.

8. The application was then listed for directions on ……(sic)……but counsel or the respondent and the respondent did not appear for they had not been served with the date for mention for directions. The next appointment date for directions was on 26th June, 2018 and the court directed that the canvassed issues be canvassed by way of written submissions hence these submissions.

C. <u>Issues for determination</u>

9. Your lordship in our humble view the issues for determination in this application include but are not limited to the following;

(i) Who as between the applicant and his counsel was to blame for the matter proceeding ex-parte and an ex-parte judgment being delivered?

(ii) In (sic) the errors and omissions referred to in number (i) above were occasioned by counsel for the applicant can the said errors and omissions be visited upon the applicant?

(iii) Did the applicant contribute to the matter proceeding ex-parte and an ex-parte judgment (sic) delivered by the court?

(iv) How strong is the applicant's defence against the O.S and how strong is the applicant's plaint?

(v) Who should pay the cost of this notice of motion?

D. ANALYSIS

10.

i) The first issue raised by these proceedings if, "who as between the applicant and his counsel was to blame for the matter proceeding ex-parte and an ex-parte judgment being delivered?" The respondent squarely blames the applicant. A casual look at the general history of this matter let alone the instant motion is that the applicant has never appeared in court. When the matter was transferred from Meru to Chuka as No. 93 of 2017 the applicant did not appear in court for a single moment. On 27th November, 2017 the matter was listed for hearing. The applicant did not appear. His counsel arrived at around 11.00am. When counsel for the respondents was ready for hearing the counsel for the applicant responded as follows, "the plaintiff was aware of the hearing date but he is not in court. I will be seeking to cease acting for him. I regret the court has wasted precious judicial time. My client is to blame." The applicant was duly informed by his counsel of the hearing date but he chose and / or refused to attend court. The applicant himself was to blame. The applicant was given yet another chance. This was 18th December, 2017. Once more the applicant did not attend court. His counsel equally did not attend. The matter then proceeded ex-parte and a judgment was delivered on 14th February, 2018. The applicant should have followed keenly the status of his case. He seemed to car list (sic). The court should not reward laxity on the part of the applicant.

ii) The next question posed by these proceedings is whether the errors and omissions of a counsel can be visited upon a client. The general rule is that errors of a counsel should not be visited upon an innocent litigant. There are exceptions to this rule. A litigant will be bound by the errors and omissions of a counsel if the litigant participated or remained indifferent over the errors and omissions of his counsel. For example if a litigant keeps quiet or assists his counsel to perpetrate an error or omission such litigant cannot find shelter or defence in the general principle that errors and omissions of a counsel should not be visited upon a litigant. Going by our above submissions it is clear that the applicant cannot use this established principle to shield himself. In fact the applicant is using the principle as a sword rather than a shield. Your lordship it is important to note that on 27th November, 2017 when the main suit was listed for hearing the counsel for the applicant was present and sought for an adjournment. The counsel put it clearly to the court that the applicant was aware of the date. The applicant's counsel blamed the applicant squarely for his not being in court apparently because the counsel had informed him of the date. The court was however sympathetic with the applicant and allowed an adjournment thereby slating the hearing for 18th December, 2017. The applicant did not avail himself on 18th December, 2017 for hearing. We are saying that if the applicant was aware of the hearing date of 27th November, 2017 he should have availed himself on the 18th December, 2017 or he should have inquired of the status of the suit within a reasonable time. The matter having not succeeded on 27th November 2017, it was incumbent upon the applicant to inquire as to what had happened on 27th November, 2017. The applicant is wholly to blame for not being in court on 18th December, 2017 when the matter came up for hearing and indeed proceeded into hearing ex-parte.

We have already submitted supra that not all errors and omissions of a counsel can be visited upon a litigant. We are emphasizing that a litigant has a moral and legal duty to fast tract the hearing of his or her case. It is the applicant's submissions that a secretary from the office of Gatare Ringera & Co. Advocates used to inform the applicant whenever the matter was listed for hearing or mention. On this issue your lordship it is worth noting that the applicant has never appeared in court even for a single day and the record is clear about this. Your lordship it was only after the judgment was delivered that is on 14th February, 2018 that the applicant now chose to send his son to the firm of his advocate to know the status of the case whereupon he was told that the matter had been determined and judgment delivered. The question is why did the applicant in his wisdom went (sic) to his counsel's office through his son to inquire about the status of the case after the judgment was delivered? For he knew that the matter had been listed for hearing on 27th November, 2017 and he did not attend. Why didn't he send his son immediately and within a reasonable time to inquire about the status of the case? Had he done so he would have found out that the matter after being adjourned on 27th November 2017 had been set down for hearing on 18th December, 2017. He would have then fired his advocate for not delivered (sic) and hired another counsel. Appointing another counsel after delivery of judgment is only a ploy to hoodwink this court to believe that the applicant was not to blame (when indeed he was) for the matter proceeding ex-parte and an ex-parte judgment delivered. This court should not be party to rewarding an indolent litigant.

iii) It is generally accepted in judicial circles that the strength of a litigant's case and in particular the defence mounted by a litigant seeking for setting aside an ex-parte judgment should raise triable issues. This general accepted principle is the third issue for determination in these proceedings. We humbly submit that the applicant's plaint is coached in a manner that no prima facie case is mounted. At paragraph 4 of the plaint the applicant pleads as follows;

"**4. The defendant has illegally and for no justifiable cause entered the plaintiff's land and started putting structures thereon."** The applicant has avoided indicating the date the respondents have (sic) entered into his land. This is definitely because he is aware that if he mentions the date the respondents entered into the land he will be caught up by limitation of actions act section 7 in particular. The applicant

was obviously advised by a wise counsel the respondents had actually acquired three acres out of his land LR; MWIMBI/S.MUGUMBANOG/305 by way of adverse possession and when the applicant was registered with the land the respondents were still on the land that is on 18th November, 1970.

And what is the applicant's defence in the respondents' O.S. No. 82 of 2009? The applicant's defence is obviously contained in his replying affidavit sworn and dated 7th July 2009. A summary of this affidavit will point out that the applicants are putting mere denial to the respondent's allegations in the O.S. In fact the replying affidavit can safely be described as a sham vis a vis the weighty allegations posted by the respondents in the O.S. The respondents in their supporting affidavit in support of the O.S clearly stated at paragraph 3 thereof that the applicants herein have been in possession of approximately 3 acres out of LR; MWIMBI/S. MUGUMANGO/305 since 1954 and 1970 respectively and the respondents have been in the applicant's land with full knowledge of the applicant. The answer to these weighty questions by the applicant is that the respondents are out to frustrate the hearing and determination of Civil Suit No. 11 of 2006. Surely this is not a defence.

The statement of the applicant pursuant to compliance with order 11 C.P.R. should be taken as his evidence in chief. When recording the statement the applicant was aware that there was a counter claim by way of O.S. The applicant has avoided mentioning when the respondent entered into the land and he only prays that they be evicted. He has completely avoided the issue of adverse possession which has been pleaded by the respondents. As it were he has admitted but indirectly the respondents' claim that indeed the respondents have been on this land since 1954 for the 1st respondent and since 1970 for the 2nd and 3rd respondents. We are submitting that the applicant does not have any credible defence to the respondents' claim that the court should concern itself when exercising its discretion over the issues raised in this application. We pray that the application be disallowed with costs.

E. <u>Authorities</u>

10. We urge the court to be guided, persuaded and / or bound by the authorities herein following as the case may be.

i. IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS) CIVIL CASE NO. 534 OF 2008

ii. SHAH VERSUS MBOGO

iii. IN THE HIGH COURT OF KENYA AT NYERI CIVIL SUIT NO 101 OF 2011

11. Your lordship from the foregoing authorities a party who seeks to set aside an ex-parte judgment or ruling must convincingly persuade the court that he did not contribute to the ex-parte judgment being entered against him. An indolent litigant will not benefit from court's discretionally powers to set aside an ex-parte judgment or ruling. In our case the applicant was indolent and equity should not come to his assistance. There is nowhere in his pleadings and submissions that he has convincingly explained why despite being aware of the hearing date on 27th November, 2017 and 18th December, 2017 he never attended court.

12. In light of the foregoing your lordship we urge the court to dismiss the applicant's application dated 13th June, 2018. We rest our submissions and pray.

DATED AT CHUKA THIS 4TH DAY OF JULY, 2018

I.C. MUGO & CO. ADVOCATES,

<u>FOR THE RESPONDENTS</u>

7. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties in buttressing their diametrically incongruent propositions.

8. The plaintiff/applicant has proffered the following authorities in support of his case that the orders he seeks should be granted. I find them to be good authorities in their facts and circumstances. I, however, opine that no one case is congruent to the point of mathematical certitude to another. One common thread runs through them. It is that a court ought to exercise its discretion to reinstate a suit if it is satisfied that there are sufficient grounds. The cases are:

a) Wachira Karani versus Bildad Wachira – Nyeri HCCC No. 101 of 2011 [2016] eKLR

b) Anne Njeri Mwangi versus Njomaitha Investments Ltd, - Nairobi Milimani Commercial & Admiraltly Division HCCC No. 605 of 2010 [2013] eKLR.

c) Salma Kassim Said (Appellant) versus Watub Saad Ali (Respondent) Kisumu Civil Appeal 32 of 2013 [2017] eKLR

9. The respondents have proffered the following case in support of their assertions:

a) Wachira Karani versus Bildah Wachira, Nyeri HCCC No. 101 of 2011. [2016] eKLR

10. I note that that the case proffered by the defendants has also been proffered by the plaintiffs. This case enunciates the principles regarding when to reinstate or not to reinstate a case. Either way, there must be sufficient grounds for a court to arrive at its decision.

11. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their respective assertions. The plaintiff blames his former advocate, Gatare Ringera. However, the advocate had made it clear that he had lost touch with him. This was a clear indication that the plaintiff was not interested in prosecuting his case diligently. This case having been filed in 2006, it is clear that the plaintiff was indolent. Blaming his former advocate is not enough. A litigant must be diligent enough to follow up how his case is being handled by his advocate. It is pellucid that the plaintiff had failed in his duty to give his advocate proper instructions.

12. In ground 6 of the grounds of his application, the plaintiff's advocate states:

> **"6. That a mistake or oversight of counsel should not be visited upon a diligent litigant."**

I find that the plaintiff has not been a diligent litigant. He filed a sut in 2006 and 12 years later when a judgment in favour of the defendants was delivered, he had failed to prosecute his case. It is also noted that this application was filed on 12th June, 2018, four months after the impugned judgment was delivered. This four months delay does not evince any diligence that can be ascribed to the plaintiff.

13. I wholly agree with the submissions filed by the defendants' advocate and his conclusion that this application should be dismissed.

14. In the circumstances, this application is dismissed.

15. Costs shall follow the event and are awarded to the defendants/ respondents.

16. It is so ordered.

Delivered in open court at Chuka this 31st day of July, 2018 in the presence of :

CA: Ndegwa

Mutani h/b Muriithi for the Applicant

Mugo present for the Respondent

P. M. NJOROGE

JUDGE