REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 294 OF 2012

1. FLORENCE MAKUNGU HARUN

2. NITAS ACHANGA INGATSO.....................PLAINTIFFS/RESPONDENT

VERSUS

STANLEY MAFOLI MUSINDI

SOLOMON MUNYASI ATIANYI.................DEFENDANTS/APPLICANTS

RULING

The application is dated 15th may 2018 and is brought under Sections 3A and 34 of the Civil Procedure Act, Cap 21 Laws of Kenya Order 12 Rule 7 and Order 22 Rule 22 of the Civil Procedure Rules 2010 seeking the following orders;

1. That service of this application be dispensed with, the same be certified as urgent and heard ex parte in the first instance.

2. That pending the hearing of this application inter-parties, there be a stay of execution of the decree herein.

3. That there be a stay of the execution of the decree herein.

4. That the judgement of this honourable court delivered on 15th October, 2017 together with all the subsequent orders be set aside.

5. That the proceedings of this Honourable court of 15th October, 2017 be set aside, this matter be heard afresh and the defendants be allowed to tender their evidence before the court.

6. That costs of this application be provided for.

It is supported by the annexed affidavit of Solomon Munyasi Atianyi, 2nd defendant/applicant and the following grounds: That this case proceeded exparte without the defendants/applicants knowledge.That the defendants/applicants' advocates then on record never informed the defendants/applicants of the hearing date of 5th October, 2017.That the mistakes of counsel then on record ought not to be visited upon the defendants/applicants.That the defendants/applicants have a good defence to the plaintiff's claim and it will be in the interest of justice if they are given a chance to be heard as they desire to be heard.That the subject matter herein is such that it will be in the interest of justice for the court to make its findings after hearing both parties.That failure by the defendants/applicants to be present and adduce evidence in defence was occasioned by the mistake on the part of their counsel and the same was beyond their control.

The respondent submitted that, it is not true that the matter herein proceeded ex-parte on 15/11/2017 as alleged by the applicants. Truth be told, the advocate then acting for the applicants were duly served with the hearing notice and there is an affidavit of service on record to that effect.That on the date of hearing neither the applicants nor their advocates were present in court, a clear indication that they had lost interest in the case.That the applicants have a remedy available if they feel aggrieved by their former advocates failing to turn up in court as they can sue them for negligence or file a complaint with the relevant authority that deals with complaints against advocates.That they cannot therefore be blamed for the laxity on the part of the applicants and their former advocates.That it is trite law that they should be left to enjoy the fruits of the judgement in their favour.

This court has considered the application and the submissions herein. The Application is based on the grounds that, this case proceeded exparte without the defendants/applicants knowledge. That the defendants/applicants' advocates then on record never informed the

defendants/applicants of the hearing date of 5th October, 2017. That the mistakes of counsel then on record ought not to be visited upon the defendants/applicants.I have perused that court file and find that, defendants/applicants' advocates were properly served with the hearing notice for 5th October, 2017 but failed to attend court. This is a very old matter and the defendants have been indolent. I do not accept his reasons for non attendance.

In the case of **Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR,** the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In **Ivita v Kyumbu (1984) KLR 441,** Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE