



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 610 OF 2013**

**SAMUEL H. KANYI.....1<sup>ST</sup> PLAINTIFF**

**ISHMAEL GICHAGA KAGUONGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE COUNTY GOVERNMENT OF KIRINYAGA.....DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 25<sup>th</sup> June 2018 brought under **Section 1A, 1B and 3A CPA and Article 159 of the Constitution of Kenya, 2010**. The applicant is seeking the following orders:

1. *(Spent).*
2. *That this Honourable Court be pleased to halt the judgment slated for 27<sup>th</sup> June 2018 and re-open both the plaintiffs and defence case.*
3. *That this Honourable Court be pleased to allow the defendant/applicant an opportunity to defend this suit.*
4. *That this Honourable Court be pleased to grant leave to the defendant/applicant to file its defence and pre-trial documents within 10 days.*
5. *That costs of this application be in the cause.*

The application is based on grounds shown on the face of the application and the supporting affidavit sworn by Richard Ngari who is the County Attorney of the applicant. In that affidavit, the applicant deponed that he assumed the position of County Attorney on 12<sup>th</sup> June 2018 and immediately he was sent to attend a three (3) day induction course at the Kenya School of Government from 18<sup>th</sup> June 2018 to 20<sup>th</sup> June 2018. Upon return, he was briefed concerning the instant case that was slated for judgment on 27<sup>th</sup> June 2018. Upon perusal of their office file, he realized that instructions were availed on 6<sup>th</sup> June 2018 by the relevant department. He annexed a draft defence which he belief has credible defence to the plaintiffs' claim.

In a replying affidavit filed in opposition to that application, sworn by the 2<sup>nd</sup> plaintiff/respondent, it is stated that the applicant was served with a hearing notice on 23<sup>rd</sup> May 2018 and that there were other competent officials in the defendant's offices who could have instructed lawyers to handle their matters. The respondents further contend that the application is an after thought and intended to delay the cause of justice. The respondents also state that the applicant has no defence to their claim.

I have carefully considered the affidavit evidence and the submissions by counsels appearing for the parties. I have also considered the applicable law. In the case of **MACAULEY VS DE BOER & ANOTHER (2002) 2 K.L.R, Justice Onyancha** (as he then was) set out the principles for setting aside an interlocutory judgment when he held as follows:

***“1. The High Court has inherent power and discretion to set aside and ex-parte judgment after deciding that the circumstances of the case before it are such that it would be in the interest of justice that such a judgment should be set aside.***

***2. The Court in deciding whether to set aside a judgment will take into consideration the following factors:***

***(a) the reasons why the defaulting party failed to file defence within the prescribed time;***

*(b) whether or not the applicant's application was filed without delay;*

*(c) whether or not the applicant has prima facie a good defence;*

*(d) whether or not the granting of the prayer to set aside would be easily compensated in costs and that it would, considering all circumstances of the case, to the ends of justice to exercise the Court's discretion in favour of the applicant; and*

*(f) every case however will be considered in the context of its own circumstances as No Two cases may easily be exactly the same”.*

The applicant in this case is the County Government of Kirinyaga and the deponent of the supporting affidavit is the County Attorney who stated that he assumed that position on 12<sup>th</sup> June 2015 and that immediately upon assumption of office, he was sent to attend an induction course for three (3) days. When he came back, his assistant informed him that this matter has been slated for judgment on 27<sup>th</sup> June 2018. The deponent also explained that upon perusal of their file, he realized that instructions were availed on 6<sup>th</sup> June 2018 by the relevant department.

I have considered the totality of the matters deponed by the applicant's Attorney and the replying affidavit in opposition thereto. I find that the applicant acted diligently in filing this application but may not have done so in obtaining instructions and filing defence in good time. I cannot speak to the draft defence annexed to the supporting affidavit as a party can always seek to amend their pleadings at any stage. In view of the matters aforesaid, I find and hold that it will be in the interest of justice to give the applicant a chance to defend this suit bearing in mind that the respondent could easily be compensated in costs. In the upshot, I allow the application dated 25<sup>th</sup> June 2018 in the following terms:

***1. The proceedings and orders of 29<sup>th</sup> May 2016 are hereby set aside.***

***2. The plaintiff/respondent to be paid thrown away costs assessed at Ksh. 10,000/= to be paid within 7 days from today.***

***3. The defendant/applicant to file and serve their defence within 7 days from today.***

***4. In default of any of the above terms, the proceedings of 29<sup>th</sup> May 2016 shall be reinstated and further directions to be given.***

***5. Mention before the Deputy Registrar on 12<sup>th</sup> November 2018 to confirm compliance and further directions.***

***DATED, DELIVERED and SIGNED in open Court at Kerugoya this 25<sup>th</sup> day of October 2018.***

**E.C. CHERONO**

**ELC JUDGE**

**25<sup>TH</sup> OCTOBER, 2018**

In the presence of:

Mr. Ombachi holding brief for Mr. Kariithi for Plaintiffs

1<sup>st</sup> Plaintiff present

2<sup>nd</sup> Plaintiff present

Mr. Mbogo, Court Clerk – present