



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 61 OF 2017 (FORMERLY HCCC CASE NO. 79 OF 2012)**

**AGRICULTURAL FINANCE CORPORATION.....PLAINTIFF**

**VERSUS**

**GEORGE OCHIENG OJWANDO.....1<sup>ST</sup> DEFENDANT**

**PHILIP ODUOR.....2<sup>ND</sup> DEFENDANT**

**JAPHETH N. OTIENO.....3<sup>RD</sup> DEFENDANT**

**FESTUS NYANDO.....4<sup>TH</sup> DEFENDANT**

**MARY MAGONDO.....5<sup>TH</sup> DEFENDANT**

**JULIUS ODHIAMBO.....6<sup>TH</sup> DEFENDANT**

**JOSHUA ABITHA.....7<sup>TH</sup> DEFENDANT**

**RULING**

1. Agricultural Finance Corporation, the Plaintiff, seeks through notice of motion dated 10<sup>th</sup> May 2018 for the setting aside of the order of 11<sup>th</sup> April, 2018 that dismissed their suit for non-attendance and the reinstatement of the suit. The application is based on the six grounds marked (e) to (j) on its face and supported by the affidavit of Rashid Ngaira, Counsel on record for the Plaintiff, sworn on the 10<sup>th</sup> May 2018. That the main ground for the application is the Counsel diarizing the hearing as on 11<sup>th</sup> May 2018 instead of the 11<sup>th</sup> April 2018. That copies of the diary for the 11<sup>th</sup> April 2018 and 11<sup>th</sup> May 2018 are attached to the affidavit.

2. The application is opposed by George Ochieng Ojwando, Phillip Oduor, Japheth N. Otiemo, Festus Nyando, Mark Magendo, Julius Odhiambo and Joshua Abitha, the Defendants, through the replying affidavit sworn by Peter Daniel Onyango, Counsel on record for the Defendants, on the 19<sup>th</sup> June 2018. That the following are a summary of the deposition;

**a) That the Defendants' Counsel saw the Plaintiff's Counsel clearly write the hearing date of 11<sup>th</sup> April 2018 on both the Counsel's file and diary on the 17<sup>th</sup> October 2017 when the date was taken in court by consent.**

**b) That the copy of the Counsel's diary of 11<sup>th</sup> April 2018 annexed to the supporting affidavit is not about this case but Kisumu H.C.C.C No. 689 of 2009.**

**c) That the failure by the Plaintiff and their counsel to attend court on the 11<sup>th</sup> May 2018 was deliberate and a confirmation that the Plaintiff are not interested in prosecuting the case that was filed in 2012.**

3. The application came up for hearing on the 26<sup>th</sup> September 2018 when Mr. Mabonga and Onyango, Learned Counsel for the Plaintiff and Defendants respectively, made their oral submissions. The following are the issues for the Court's determinations;

**a) Whether the Plaintiff has given a reasonable explanation for their failure to attend court on the 11<sup>th</sup> April 2018.**

**b) Whether the court should exercise its discretion in favour of the Plaintiff by setting aside the dismissal order of 11<sup>th</sup> April 2018.**

c) **Who pays the costs.**

4. The Court has carefully considered the grounds on the application, the depositions in the supporting and relying affidavits, counsel's oral submissions and come to the following conclusions;

a) That the suit was commenced through the plaint dated 10<sup>th</sup> April 2012 and filed in Court on the 3<sup>rd</sup> May 2012, as Kisumu High Court Civil Case No. 79 of 2012, vide receipt No. 2397517 dated 3<sup>rd</sup> May 2012. That the suit was later registered as Kisumu ELC No. 61 of 2017 which is its current reference. That the submission by the Learned Counsel for the Plaintiff that the suit was initially HCCC No. 7 of 2005 before being given ELC No. 61 of 2017 is not supported by the court record.

b) That through Counsel for the Plaintiff's affidavit at paragraph 3 gave the reason of their absence as **"...I inadvertently diarized the matter for hearing on 11<sup>th</sup> May 2018 instead of 11<sup>th</sup> April 2018..."** and went on to annex copies of the diary for those dates marked **"RNI (a) and (b),"** the cases or suits on the copies do not include this suit, that is ELC No. 61 of 2017 or its former number HCCC No. 79 of 2012. That there are only two cases on the copy of the diary of 11<sup>th</sup> May 2018 being;

· **Kisumu CMCC 207 of 2018 and,**

· **Kisumu HCCC No. 689 of 2009, "AFC vs George Ojwando & 6 Others."**

That whereas the reference **"AFC- vs George Ojwando & 6 Others"** may be taken to be a reference to the parties in this suit, the case number referred to is different, both in the number and also the year of filing.

c) That before the hearing of 11<sup>th</sup> April 2018 was fixed, the matter had come up for hearing on the 17<sup>th</sup> October 2017 when Counsel for the Plaintiff applied for **"last adjournment"** which he called the **"last opportunity to see whether I will be able to avail the Plaintiff's witnesses during the next hearing date"**. That the court made the order that **"By consent, the Plaintiff granted last adjournment and to pay today's costs to the six Defendants in court and their Counsel and court adjournment fee. Hearing on 11<sup>th</sup> April 2018."** That whereas there is nothing to confirm whether the six Defendants and their Counsel's costs has been paid, the court adjournment costs has not been paid to date. That further, when the matter was called for hearing on the 11<sup>th</sup> April 2018, the record shows that 1<sup>st</sup>, 3<sup>rd</sup> to 7<sup>th</sup> Defendants, and their counsel, were in court while the Plaintiff and their Counsel were absent. That the Defendants Counsel moved the court at about 10.25a.m. to have the Plaintiff's suit dismissed for non- attendance. The court granted the oral application and dismissed the suit with costs.

d) That the dismissal of a suit for non- attendance of Plaintiff is provided for under **Order 12 Rule 3 (1) of Civil Procedure Rules** which states;

**"3 (1) If on the date fixed for hearing after the suit has been called on for hearing outside the court, only the defendants attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court."**

e) That **Rule 7** of the said order gives the Court discretion to set aside such an order. The Rule provides;

**"7. Where under this order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just"**.

f) That whereas it appears the Plaintiff and their counsel may not have had a good cause or reason for not coming to court on the hearing date of 11<sup>th</sup> April 2018, as the case reference in the copy of the diary of 11<sup>th</sup> May 2018 is different to this case, the fact that the parties under that case appear to be similar to those in this case makes the court find that the overriding objectives of the court under **Sections 1A**, and the duty of the court under **Section 1B of the Civil Procedure Act** will be better served by exercising the court's discretion in favour of the Plaintiff. That the superior courts have time and again appreciated that blunders by the parties and or their counsel will continue to be made resulting to situations where suits are dismissed. The decisions of the courts shows that where the blunders or errors can be corrected without the other party being prejudiced, the court should, in exercising its discretion, opt for the lower rather than the higher risk of injustice. The following cases are relevant;

· **Phillip K. Chemwolo & Another vs Augustine Kubende [1986] KLR 492; (1982-88) IKAR, 1036; [1986-1989] EA, 74 and**

· **Lucy Bosire V. Kehancha Divisional Land Dispute Tribunal & 2 Others [2013] eKLR.**

g) That this application was filed in about one month after the dismissal order, and the court finds the Plaintiff acted without undue delay, after getting notice of the dismissal order.

h) That as the Defendants and their Counsel had come to court prepared for the hearing on the 11<sup>th</sup> April 2018, they deserve the costs of this application in form of thrown away costs which the court assesses as Kshs. 20,000/= (Twenty thousand) to be paid within thirty (30) days from today. That the court adjournment fee ordered on the 17<sup>th</sup> October 2017 should also be paid in 30 (thirty) days from today.

5. That flowing from the foregoing, the court finds merit in the Plaintiff's notice of motion dated 10<sup>th</sup> May 2018, and filed on the 11<sup>th</sup> May 2018. That the application is allowed in the following terms;

**a) That the order of the dismissal of the Plaintiff's suit of 11<sup>th</sup> April 2018 for non-attendance be and is hereby set aside and the suit reinstated for hearing on the date to be fixed hereinafter on condition that the Plaintiff pays the thrown away costs and court adjournment fee as set out in 4 (h) above.**

**b) That should the Plaintiff fail and or neglect to comply with the payment timeline set in 4 (h) above, order 5 (a) to lapse and the dismissal order of 11<sup>th</sup> April 2018 to be reinstated automatically.**

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

DATED AND DELIVERED THIS 5<sup>TH</sup> DAY OF **DECEMBER, 2018.**

**In the presence of:**

Plaintiff Absent

Defendants Present

Counsel Mr. Bagaeda for Defendants

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**