



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 355 OF 2012**

**PHILIP NYAMASYO KAVISI .....PLAINTIFF**

**VERSUS**

**SECRETARY OF THE PARENTS TEACHERS ASSOCIATION OF ATHI**

**KAMUNYUNI PRIMARY SCHOOL .....1<sup>ST</sup> DEFENDANT**

**CHAIRPERSON OF THE PARENTS TEACHERS ASSOCIATION ATHI**

**KAMUNYUNI PRIMARY SCHOOL .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 20<sup>th</sup> January, 2017, the Defendants are seeking for the following orders:
  - a. That the Honourable Court be pleased to set aside and or review the orders made on the 8<sup>th</sup> December, 2016.*
  - b. That the Honourable Court be pleased to admit the evidence of the Land Adjudication and Settlement Officer.*
  - c. That the Honourable Court be pleased to re-issue summons to the Land Adjudication and Settlement Officer Kibwezi to appear and testify on the dispute before the Honourable Court.*
  - d. That in the alternative, the Respondents be granted leave to file their Defence and Witness Statements to the Plaintiff dated 24<sup>th</sup> September, 2012 and filed on even date.*
  - e. That the costs of this Application be in the cause.*

2. The Application is premised on the grounds that the underlying subject matter of the suit is a boundary dispute; that the dispute falls within the mandate of the Land Adjudication and settlement Officer, Kibwezi and that although the court had *Suo Moto* ordered for the issuance of the summons to the Land Adjudication Officer, the said summons were never extracted and served

3. According to the depositions of the Defendants' counsel, when this matter came up for hearing on 8<sup>th</sup> December, 2016, the counsel on record was of the mistaken belief that summons to the Land Adjudication and Settlement Officer, Kibwezi had been extracted and served; that the failure to extract the summons was an inadvertent mistake on the part of the counsel and that the Defendant is desirous of defending the suit.

4. The Defendants' advocate deponed that he has since received instructions from the Land Adjudication and Settlement Officer; that the instructions reveal that the acreage for parcel of land number 54 and 1464 demarcated from Kitengei "A" Settlement Scheme is 49.51 and 33.06 acres respectively and that the said evidence will influence the outcome of this matter.
5. Counsel has deponed that the Defendants will suffer irreparable loss and damage if the new evidence is not adduced in court; that there is no error or default that cannot be put right by payment of costs and that the Defendants have a plausible Defence which raises triable issues.
6. In response, the Plaintiff's advocate deponed that the Defendants were served with Summons to Enter Appearance on 28<sup>th</sup> September, 2012; that Pre-trial directions were undertaken on 14<sup>th</sup> November, 2013 and that although the Defendants were granted leave to file their documents and statements, they did not do so.
7. The Plaintiff's advocate deponed that in any event, the draft Defence does not address the allegations raised in the Plaint and that the Defendants do not have a good Defence.
8. The advocates for the Plaintiff and the Defendants appeared before me on 7<sup>th</sup> February, 2017 and made oral submissions which I have considered.
9. It is not in dispute that the Summons to Enter Appearance were served on the Defendants on 28<sup>th</sup> September, 2012. The Defendants filed a Memorandum of Appearance through the office of the Attorney General on 9<sup>th</sup> October, 2012. However, a Defence was never filed.
10. The record shows that the matter came up on several occasions for Pre-trial directions.
11. Indeed, when the matter came up on 14<sup>th</sup> November, 2013 for Pre-trial directions, the Defendants' counsel sought for leave to file a Defence out of time. The court granted to the Defence leave to file the Defence and documents within thirty (30) days and slated the matter for a Pre-trial Conference on 28<sup>th</sup> January, 2014.
12. When the matter came up for mention on 4<sup>th</sup> June, 2014, the Defendants had neither filed a Defence nor documents.
13. The matter remained in abeyance until 28<sup>th</sup> September, 2016 when it came up for hearing.
14. When the counsel for the Defendants applied for adjournment on the ground that they needed time to file a Defence, the court declined to allow the Application because no plausible reason had been given why the Defence had not been filed since the year 2013 when leave to file the Defence within thirty (30) days was granted.
15. Although the Defendants claim that they have a good Defence, and that the evidence of the Land Adjudication and settlement Officer is important in this matter, I find that the Defendants have not placed before the court evidence to show the error apparent on the face of the record, or sufficient reason or the discovery of new and important matters or evidence which was not within their knowledge to enable this court review the orders of 28<sup>th</sup> September, 2016.
16. Indeed, the issues that have been raised in the current Application were raised by the Defendants' counsel on 28<sup>th</sup> September, 2016 when he sought for an adjournment.
17. In any event, the issue of who owns Plot No. 1464 and 54 are the issues that were supposed to be pleaded and proved by the parties herein. The report of the Land Adjudication Officer cannot conclusively address that issue as alleged by the Defendants' counsel.

18. In the absence of a good reason as to why this court should set aside the orders of 8<sup>th</sup> December, 2016, I dismiss the Defendant's Application dated 20<sup>th</sup> January, 2017 with costs.

**DATED AND DELIVERED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**