



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 312 OF 2012**

**KOLUNDU NTHIW'A.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BETH KITHOME .....DEFENDANT/APPLICANT**

**RULING**

1. In the Application dated 10<sup>th</sup> May, 2016, the Defendant is seeking for the following orders:

***a. That this Honourable Court be pleased to set aside its Judgment and Decree delivered on 16<sup>th</sup> December, 2014 and allow the Defendant to proceed with the hearing of its case.***

***b. That the costs of the Application be in the cause.***

2. The Application is premised on the grounds that the hearing proceeded ex-parte and judgment was delivered; that his former advocate was negligent in handling the matter and that as a result of the orders that were granted, the Plaintiff has invaded the Defendant's farm.

3. The Defendant has deponed that the failure to attend the hearing of the Application was neither calculated nor intentional; that the Application should be allowed *ex dibito-justitie* and that the Plaintiff can be compensated by way of damages.

4. In response, the Plaintiff deponed that he filed the suit to preserve the suit property which was the subject of Appeal No. 226 of 1998 to the Minister by the Respondent.

5. According to the Plaintiff, the appeal that was pending before the Minister was heard and determined and that the order of the court has now been overtaken by events.

6. In the Supplementary Affidavits, the clan elders of the Atanga clan deponed that it is the role of the Kamba elders to assist in the sub-division of land in case there is a dispute.

7. The advocates filed their respective submissions which I have considered.

8. The record shows that when the Plaintiff's Application dated 28<sup>th</sup> November, 2014 came up for hearing on 16<sup>th</sup> December, 2014, the Defendant's advocate was not in court.

9. The Application was heard and determined in the absence of the Defendant's advocate.

10. The Affidavit of Service shows that the Defendant's advocate was served with the said Application,

the order of the court and the hearing notice on 10<sup>th</sup> December, 2014.

11. The Defendant has not stated why his advocate was not in court on 16<sup>th</sup> December, 2014 when the Plaintiff's Application was heard. Considering that no reason has been given why the Defendant or his advocate were not in court on 16<sup>th</sup> December, 2014, I find and hold that the Defendant's Application has no basis at all.

12. In any event, the injunctive order that was granted by the court in respect of the suit property has since served its purpose.

13. I say so because the Minister, vide his decision in Land Appeal Case No. 226 of 1998, found that it is the Plaintiff who should continue occupying and using the suit property.

14. It is for those reasons that I find the Defendant's Application dated 10<sup>th</sup> May, 2016 to be unmeritorious.

15. I therefore dismiss the Application dated 10<sup>th</sup> May, 2016 with costs.

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

**OSCAR A. ANGOTE**

**JUDGE**