



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**ENVIRONMENT AND LAND CASE NO. 164 OF 2013.**

**(Former BUNGOMA CMCC NO. 898 OF 2011)**

**JOSEPH MASINDE BUSURU.....PLAINTIFF**

**VERSUS.**

**PLAYTON LEONARD WEKESA.....1<sup>ST</sup> DEFENDANT**

**PAUL KITUI NGOSIA.....2<sup>ND</sup> DEFENDANT**

**RULING.**

[1]. This is an application for setting aside the Judgment brought under order 10 rule 11 and Section 3 and 3A of the Civil Procedure Act.

The application is supported by the Affidavit of the applicant. The applicant alleges that he was in court the whole morning but did not see his file being called and that he did not see the plaintiff testify at all. He said that he was in court up to 4 p.m.

[2]. The respondent filed a replying affidavit. Stated that his advocates J.O. Makali who invited the defendants to attend the court to file the case for hearing on 15/5/2015 and the defendant never attended. The case was then fixed for hearing on 23/9/2015 with a hearing notice to issue. A copy of the hearing notice was issued to the defendants. The same is dated 16/5/2015 and was served on the advocates for the defendant on 18/5/2015.

The respondent states that the counsel for the defendant and the defendant were in court on the day fixed for hearing on 23/9/2015. That they later left before the case could be heard.

The respondent annexed to his affidavit the plaint in PM CC No. 27/2010 (now pending in court) filed on 9/2/2010 by the applicant against Lawrence Simiyu Nandasaba, Judith Wafula Simiyu and Meshack Nandasaba claiming a refund of the purchase price of one (1) acre out of Ndivisi/Ndivisi/1725 the suit property herein. The respondent therefore argues that there is no privity of contract between him and the applicant and that therefore the applicant is using his land illegally.

[3]. After perusing this application, I find no merits in it. The coram shows that this case started at 3.30 on 23/9/2015. Three witnesses gave evidence. The applicant and his counsel were duly invited for fixing a hearing date. They did not attend. They were served with a hearing notice. During the hearing on 23/9/2015 neither the applicant nor his counsel was present. It cannot be true that the applicant was in court up to 4 p.m. There is no explanation why his counsel did not attend the court either.

There has been no denial that the applicant had earlier filed a case in the Magistrates Court at Webuye claiming for a refund of the purchase price. A case that was pending when this case came for hearing. The said case in the Magistrates court was filed before the suit herein. That is the case the applicant should pursue.

I find no merits in this application which I hereby dismiss with costs to the respondent.

Ruling read in Open Court in the presence of Mr. Murunga and Mr. Were.

**DATED** at **BUNGOMA** this **11<sup>th</sup>** day of **May**, 2017.

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Coram: Hon. S. Mukunya - Judge

Gladys: Court Assistant

Mr. Murunga for Plaintiff/Respondent

Mr. Were - Holding brief for Mr. Omukunda for the Applicant.