



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 18 of 2012**

**EMILY CHEPNG'ENO RUTO suing as the legal representative of the**

**estate of DAVID KIPLANGAT RUTO .....1<sup>ST</sup> PLAINTIFF**

**RICHARD K CHEPKWONY.....2<sup>ND</sup> PLAINTIFF**

**PETER K. CHEPKWONY.....3<sup>RD</sup> PLAINTIFF**

**EDWARD CHEPKWONY.....4<sup>TH</sup> PLAINTIFF**

**ERIC CHEPKWONY.....5<sup>TH</sup> PLAINTIFF**

**LEONARD CHEPKWONY.....6<sup>TH</sup> PLAINTIFF**

**WILLY CHEPKWONY.....7<sup>TH</sup> PLAINTIFF**

**VERSUS**

**DAVID KIPRONO KOSKE.....DEFENDANT/APPLICANT**

**RULING**

This Ruling is in respect of the Application dated 24<sup>th</sup> November, 2016. The said application is brought pursuant to **Order 12 Rule 7** and **Order 51 Rule I** of the **Civil Procedure Rules** and **sections 1A, 1B** and **3A** of the **Civil Procedure Act**. The Defendant/Applicant seeks to set aside the order striking out the defendant's defence on 24<sup>th</sup> October, 2016 and to have the said defence reinstated so as to allow the defendant to defend this suit.

The application is supported by the defendant's affidavit sworn on the 24<sup>th</sup> November, 2016 in which he explains the events leading to the striking out of his defence the gist of which is that his advocate was sick over a period of time hence he failed to attend court and pay the adjournment costs ordered by the court.

The application is opposed by the Plaintiff and even though he did not file any Replying affidavit, his advocate filed his submissions in which he states that the defendant's defence was struck out for non-compliance with the courts orders. He further submits that the applicant is merely attempting to forestall the conclusion of this matter. He eventually submits that in the event the dismissal is set aside, the defendant should be ordered to pay thrown away costs for the inconvenience caused to the plaintiff.

The main issue for determination is whether the defendant is entitled to the orders sought.

The principles governing the exercise of the court's discretion to set aside interlocutory judgments/dismissals are laid out in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** as per **Duffus P** who stated as follows:

*“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed, it means as SHERIDAN J put it “a triable issue”, that is, an issue which raises a prima facie defence and which should go to trial for adjudication”*

Counsel for the Plaintiff has submitted that the defendant's defence is a mere denial. With respect, I do not agree. The justice of this case, being a land matter requires that both parties be heard on the merits. From the explanation given by the defendant, which is uncontroverted, it is clear that his advocate did not deliberately fail to attend court as he was prevented from doing so due to a long period of illness. This is a reasonable explanation. In any event it is trite law the mistakes of an advocate should not be visited on his client.

I am further guided by the decision in **Maina V Muriuki ( 1984 KLR 407)** which held that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.

I am persuaded that the circumstances of this case fall within the parameters set out in the above cited authorities. I therefore set aside the order dismissing the defendant's Defence and direct that the suit be set down for hearing within the next 60 days. The Defendant shall however pay thrown away costs of Kshs. 20,000 for the inconvenience occasioned to the Plaintiff.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JUNE 2017.

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**J. M ONYANGO**

**JUDGE**

**IN THE PRESENCE OF:**

Miss Koech for Koske for the Applicant

N/A for the Respondent

Mr. Rotich – court assistant