



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**IN BUSIA**  
**LAND & ENVIRONMENTAL DIVISION**  
**ELC NO. 120 OF 2016**

**CRISPINUS OPAMO MAGINA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**CLIFFORD OTIENO MAGINA..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**FRANCIS OSODIO.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**RAPHAEL EKISA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**THE LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENFANT/APPLICANT**

**RULING**

1. The application under consideration is a Notice of Motion dated 18/1/2017 and filed on 21/3/2017. It was brought under Section 1A and 3A of Civil Procedure Act (Cap 21) and Order 10 Rules 9 and 11 of Civil Procedure Rules. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants - **FRANCIS OSODIO** and **RAPHAEL EKISA** - filed it against the Plaintiffs - **CHRISPINUS OPAMA MAGINA** and **CLIFFORD OTIENO MAGINA** - contesting an interlocutory judgement entered in their favour on 12/10/2016.

2. The prayers sought are four (4) and they are as follows:

Prayer 1: That the interlocutory judgement entered on 12/10/2016 or any other herein and all subsequent orders be and are hereby set aside.

Prayer 2: That leave be granted to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to file their defence out of time.

Prayer 3: That the defence annexed to the supporting affidavit herein be deemed duly filed and served.

Prayer 4: That costs be provided for.

3. The grounds on which the application is premised stipulate, *interalia*, that the two Defendants could

not get some relevant documents immediately; that judgement need not be entered as this was not a liquidated claim; that the subject matter is land and the Defendants have a good defence; and that the relief sought meet the ends of justice.

4. In the supporting affidavit accompanying the application; the grounds advanced are reiterated. The two Defendants then said they own land parcels Nos. S.TESO/ANGOROMO/6486 and 6487, having purchased them from one Andrew Ekalo who was the registered owner of S.TESO/ANGOROMO/5468 which was subdivided. To the Defendants, there seems to be an overlap on the ground between the parcels they own and the land the Plaintiffs claim to own. This needs to be sorted out and it is therefore necessary to hear both sides.

5. The two Plaintiffs responded vide a replying affidavit dated 10/4/2017 and filed on the same date. According to them the application is brought in bad faith and aims to defeat justice. They stated that the Defendants were duly served and even entered appearance but failed to file defence on time. They also said that the intended defence does not address their claim and should therefore be struck out with cost.

6. The Court heard the application interparties on 10/4/2017. The Defendants' Counsel, Minishi; reiterated what the application contains. The Plaintiffs' Counsel, Murunga, did the same.

7. I have considered the application, the response by Plaintiffs, rival arguments made during hearing, and the draft defence availed. The interests of justice are always best served when both sides to a case are heard. And the courts always aim to ensure that this is achieved even where one side engages in dilatory behavior that seems to cause some delay. Where, like here, a judgement is entered, the courts usually set it aside if good reasons are given. In this matter, the Defendants say they were trying to get some documents. I think it is good to give them a chance.

8. In the case of **WAIBOCI & Another vs PASHITO HOLDINGS LTD & 7 Others [2004] 2KLR 415**, OJWANG J (as he then was), when faced with an application similar to the one herein, held, *inter alia*, that an entirely regular interlocutory judgement can be set aside where the Defendants happen to have and places before court a reasonable defence on the merits. An assessment of such merits can be made from the draft defence.

9. I have already observed that the desirable end in every case is to give a judgement on the merits. In my view, the Defendants have explained themselves well. The Plaintiffs can adequately be compensated with costs. And the draft defence annexed to the application seems reasonable to me. Given all these; I allow the application. The two Defendants however will pay the costs of the application.

**Dated, signed and delivered at Busia this 19<sup>th</sup> day of July, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Plaintiff/Respondent .....

2<sup>nd</sup> Plaintiff/Respondent .....

1<sup>st</sup> Defendant/Applicant: .....

2<sup>nd</sup> Defendant/Applicant: .....

3<sup>rd</sup> Defendant/Applicant: .....

4<sup>th</sup> Defendant/Applicant: .....

Counsel: .....