



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 135 OF 2013**

**KIPKEMBOI KOSGEL.....PLAINTIFF**

**VERSUS**

**SAMUEL KIPKOECH .....1<sup>ST</sup> DEFENDANT**

**HILLARY KIBITOK.....2<sup>ND</sup> DEFENDANT**

**JULIUS KIPROP.....3<sup>RD</sup> DEFENDANT**

**BARNABA KIPROTICH.....4<sup>TH</sup> DEFENDANT**

**JOSEPHAT KIPTOO.....5<sup>TH</sup> DEFENDANT**

**RULING**

The application dated 20.7.2017 seeks orders that this court be pleased to set aside its proceedings of 14.7.2017 and any consequential orders made thereof and that the suit be re-opened for the defendants to cross examine the plaintiff and tender their evidence. The application is based on grounds as discerned from the supporting affidavit of Samuel Kipkoech who states that the matter was fixed for hearing on the 14<sup>th</sup> July, 2017 and all the parties were present in court including the defendants/applicants. The defendants' counsel sought for time allocation however he never turned up on the scheduled time and therefore the plaintiff/respondent proceeded ex-parte and judgment was scheduled on the 5<sup>th</sup> October, 2017.

The defendants/applicants contend that they should not be condemned by the court for the mistakes of their counsel on record and that the defendants/applicants have a good defence. The defendants are the biological sons (children) of the plaintiff/respondent and therefore the subsequent orders are likely to adversely affect them and render them destitute or homeless. According to the defendants, this is the only land which their father is holding in trust of the family and that the plaintiff/respondent became hostile and cantankerous immediately their mother died. That it is in the best interest of justice that the orders sought are granted and the applicant be given a hearing. That this application has been brought promptly and in utmost good faith.

The plaintiff filed a replying affidavit stating that the matter was duly scheduled for hearing on 13.7.2017 and that the defendants were duly served. On the date of hearing, the matter was given time allocation for purposes of proceeding at 12.00 p.m. However, when the matter came for hearing at 12.00, the defendants' advocate was not present in court. The matter was scheduled for hearing at 2.30 p.m. When the matter came for hearing at 2.30 p.m., the defendants' advocate failed to turn up hence the matter proceeded ex-parte.

I have considered the application and the response and do find that the defendants' counsel attended court for hearing and then disappeared. The defendants' counsel does not explain the failure to attend in the afternoon. The defendants' counsel is guilty of indolence; however, this is a matter where the defendants should not be punished for the mistake of counsel. In the case of **Shah –Vs- Mbogo & Another (1967) EA 116**. It was held,

**“the 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 but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.**

In the case of Patel -Vs- E.A. Cargo Handling Services Ltd, it was held,

**“in considering an application to set aside an ex parte Judgment, the nature of the action should be considered, the defence if any been brought to the notice of the court, however, irregularly, should be considered the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally it should be remembered that to deny a litigant a hearing should be the last resort of a court”.**

Following the above laid down principles, I do exercise my discretion by allowing the application thus the proceedings of 14.7.2017 and any consequential orders made thereof are hereby set aside and that the suit is re-opened for the defendants to cross examine the plaintiff and tender their evidence. Costs to the plaintiff in any event.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of November, 2017.**

**A. OMBWAYO**

**JUDGE**