



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 63 OF 2015**

**FRANCIS ARITHI MWORIA.....PLAINTIFF**

**VERSUS**

**THE PRINCIPAL SECRETARY**

**MINISTRY OF LAND, HOUSING,**

**& URBAN DEVELOPMENT.....1<sup>ST</sup> DEFENDANT**

**THE PRINCIPAL SECRETARY**

**MINISTRY OF FINANCE.....2<sup>ND</sup> DEFENDANT**

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

**THE HON. ATTORNEY GENERAL .....4<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Application dated 22<sup>nd</sup> March, 2017, the Defendants are seeking for an order setting aside the orders and directions of this court issued on 24<sup>th</sup> November, 2016 and to allow the Defendants file their Defence.
2. In support of the Application, the Defendants' counsel has deponed that he was not aware that the Application dated 3<sup>rd</sup> August 2016 was slated for hearing on 24<sup>th</sup> November, 2016; that on the said date, he was before Okong'o J in Nairobi ELC No. 537 of 2008 and that after filing his documents, he discovered that he had not filed and served the Defence.
3. The Defendants' counsel deponed that in Machakos High Court Misc. Civil Application No. 356 of 2009, between the Plaintiff and the 1<sup>st</sup> Defendant, the court found that the Respondents did not have a claim over the suit land.
4. In response, the Plaintiff's advocates filed Grounds of Opposition in which they averred that the Defendants only filed the Memorandum of Appearance after two years since the Plaint and Summons to enter appearance were served and that the delay in filing the Defence is inordinate, in excusable and prejudicial to the Respondent's right to pursue justice.
5. In his Replying Affidavit, the Plaintiff deponed that he is the registered proprietor of L.R. No. 21990

and 21991 and that the Defendants' Application has come too late in the day.

6. Both the Plaintiff's advocate and Defendants' advocate filed lengthy submissions which I have considered. I have also read the filed authorities.

7. Although this suit was filed on 2<sup>nd</sup> March, 2015, the Defendants did not file their Defences within fourteen (14) days pursuant the provisions of Order 7 Rule 1 of the Civil Procedure Rules.

8. According to counsel, their efforts to file a Defence was thwarted by the absence of the court file, until when they were served with the Application dated 3<sup>rd</sup> August, 2016 for entry of Judgment.

9. I have perused the court file and found that indeed the Deputy Registrar of this court declined to enter default Judgment. Instead, the Deputy Registrar directed that the matter should be set down for hearing.

10. Consequently, there is no Judgment that this court ought to set aside.

11. The Defendants' draft Defence shows that the suit land was set aside for public purpose.

12. In view of the said draft Defence, and considering that the Plaintiff has not shown the prejudice he will suffer if the Defendants are allowed to file their Defence out of time, it is in the best interest of the public that the Defendants be allowed to defend the suit.

13. In the circumstances, and to allow the Defendants file their Defence, the proceedings of this court of 20<sup>th</sup> March, 2017 and 24<sup>th</sup> November, 2016 should be set aside, and the matter be fixed for hearing after the closure of pleadings.

14. For those reasons, I allow the Defendants' Application dated 22<sup>nd</sup> March, 2017 in the following terms:

*a. The proceedings of this court of 20<sup>th</sup> March, 2016 and 24<sup>th</sup> November, 2016 be and are hereby set aside.*

*b. The Defendants to file and serve their Defence within fourteen (14) days from the date of this Ruling.*

*c. Each party to bear his/its own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**