REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ENVIRONMENT AND LAND CASE NO. 5 OF 2015.

MODE OF PROCEEDINGS……..…….....……FIRST TRACK

HELLEN N. MBESI……..…….....……..PLAINTIFF

VERSUS.

WYCLIFFE MATHIAS MUNIAFU……...…….1ST DEFENDANT

EMMANUEL MUTONGWA……2ND DEFENDANT

BRAMWEL MWALAKA WAINGA……3RD DEFENDANT

RULING

[1]. The appellant brings this application under Order 22 Rule and 6 Rule 10 of the Civil Procedure Rules and under Section 1A, 1B 3, 3A and 63(e) of the Civil Procedure Act. He prays for a temporary stay of the execution herein. He also prays that the exparte judgment entered herein on 25.10.2015 and all consequential orders be set aside.

[2]. He argues that no hearing notice was served and that the 2nd and 3rd defendants were not aware of the hearing date. That he has a good defence and that the mistake of counsel should not be visited on the litigants, further that no notice of judgment was served and that the applicants stand to suffer irreparable loss and damages though they have not been heard.

[3]. The respondent filed a replying affidavit and swore that the application is barred in law, incompetent, fatally defective and an afterthought and that the same should be dismissed. Further that he is the registered owner of the suit land and that setting aside the judgment will make no difference.

[4]. During the hearing, Mr. Athung'a for the 2nd and 3rd defendant said that he did not act for the 1st defendant. That the matter should not have proceeded. He argued that all the proceedings after judgment were not served on the defendant. That the matter was not ripe for hearing. That mistake of counsel should not be visited on the 2nd and 3rd respondent.

[5]. Mr. Wattang'a for the judgment creditors opposed that application. He argued that the court should not set aside the judgment. That for the court to do so, there must be an arguable defence. That the applicant has not filed a draft defence. That the plaintiff is the registered owner of the suit property and that there is no arguable defence. That the defendants were aware of the hearing date.

[6]. I have carefully considered the application by the applicants. There is no doubt that it is made under the wrong Sections of the Civil Procedure Rules. Order 22 Rule 22 deals with a different situation. It

applies to the court in which the matter has been sent for execution. This is not the case here in this case.

Section 1A, 3 3A and 63 cannot be applied by the applicant who has ignored the appropriate Sections of Civil Procedure Rules. The Civil Procedure Rules have specific sections that apply to prayers he seeks here. Be that as it may, should I dismiss this application for that reason above? I do not think so. I should look at the application in its totality and see whether the application has any merit, and whether any life can be breathed into it. Indeed, that is what Section 1A, 1B, 3 3A are all about from the courts perspective. The overriding objective.

[7]. A close scrutiny of the memorandum of appearance dated 6th February, 2015 by Mr. Athung'a advocate reveal that he entered appearance for 2nd and 3rd defendants. The defence filed on 3rd March, 2015 was for the 2nd and 3rd defendant. There is no appearance and or defence by the 1st defendant. There is nothing to indicate that he removed himself or was ever removed from the suit. There is no judgment entered against him.

[8]. This case was fixed for hearing on 1.10.2015. The Coram for the day reads:

24.4.2015

In the High Court civil registry

(Signed) Wattanga for the plaintiff

n/a for defendant

case fixed for hearing on 1.10.2015 in the E & l court

HNTI

Signed

DR

[9]. This case was therefore fixed exparte. No hearing notice was issued to the 2nd and 3rd defendants advocate and the 1st defendant.

On the 1st of October 2015 Mr. Makokha who held brief for Mr. Wattanga told the court that Mr. Athunga had called Mr. Wattanga and said that he could not come

to court on that day since he was unwell. The court appreciated Athunga's absence due to illness but could not appreciate Mr. Athunga's client absence. So, the case proceeded for hearing on that score.

The case was therefore heard exparte and a judgment entered against all the defendants. This is the judgment the 2nd and 3rd defendants want to set aside.

[10]. There is no doubt that the 2nd and 3rd defendants were not served. The 1st defendant was not served at all and was not aware that the suit was coming for hearing. He was in person. There is no return of service in the court file for any of the defendants herein. These facts were not brought to the attention of the court. Had they had been brought to the courts attention, the case should not have proceeded for hearing. A miscarriage of justice was therefore occasioned on the defendants herein.

[11]. The applicants notice of motion dated 6th October; 2016 is therefore allowed in terms of prayer 3 of the same in that the judgment entered on 28th October, 2015 and all consequential orders arising from that judgment are set aside. This suit shall now be fixed for hearing on merits after the 1st defendant shall be

served with the orders herein. The costs of this application shall be to the 2nd and 3rd defendant applicants.

IT IS SO ORDERED.

S. MUKUNYA

JUDGE

29.11.2016