



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**CIVIL CASE NO. 121 OF 2005**

**THE ARCHBISHOP**

**DR. ABEDNEGO MATHEW AJUOGA.....1<sup>ST</sup> PLAINTIFF**  
**WILLIAM OPOT.....2<sup>ND</sup> PLAINTIFF**  
**DICK OCHIENG.....3<sup>RD</sup> PLAINTIFF**  
**BISHOP HABAKKUK O. ABOGNO.....4<sup>TH</sup> PLAINTIFF**

*[Suing as officials of the Church of Christ in Africa]*

**VERSUS**

**JOHN HENRY TULU.....1<sup>ST</sup> DEFENDANT**  
**ISAYA ADAGI AWINO.....2<sup>ND</sup> DEFENDANT**  
**CLARKSON ODHONG.....3<sup>RD</sup> DEFENDANT**  
**NELSON OCHIENG.....4<sup>TH</sup> DEFENDANT**  
**MESHACK MBASA.....5<sup>TH</sup> DEFENDANT**  
**ROSALIA ANYUMBA.....6<sup>TH</sup> DEFENDANT**  
**JESCA OUKO.....7<sup>TH</sup> DEFENDANT**  
**SAMUEL NGURE.....8<sup>TH</sup> DEFENDANT**  
**JOSHUA OLOO.....9<sup>TH</sup> DEFENDANT**  
**WASHINGTON OBAT.....10<sup>TH</sup> DEFENDANT**  
**WILKISTA OGOLA.....11<sup>TH</sup> DEFENDANT**  
**WELLINGTON LWEYA ACHARA.....12<sup>TH</sup> DEFENDANT**

**RULING**

The application dated 8<sup>th</sup> October 2018 was brought by the defendants, seeking the setting aside, review or variation of the Judgment delivered on 30<sup>th</sup> September 2016.

1. It is the request of the defendants that the whole case be re-opened so that it can be heard de novo.
2. The court has been informed that the Plaintiffs had prosecuted their case in the absence of the Defendants.
3. The reason advanced by the Defendants for their absence from the trial was that their advocates never notified them that the case was coming up for hearing.
4. It is common ground that the Defendants were, at the material time, represented by the Law Firm of **ABOGE & COMPANY ADVOCATES**.
5. The proprietor of that Law Firm was Advocate **ALOYS OBUNGA ABOGE**.
6. The said advocate fell ill and finally passed away in the year 2018.
7. The Defendants told the court that their advocates never informed them about the trial dates. It was because they were unaware of the said trial dates that the Defendants failed to attend court when the Plaintiffs were prosecuting their case.
8. It was the Defendants' contention that the Defence which they had lodged in court, raised triable issues.
9. Therefore, the Defendants asked this court to enable them have their day in court, so that when the case was being determined, the court would be doing so when giving due consideration to the evidence tendered by all the parties.
10. The court was reminded that when one party was not given an opportunity to be heard before the court made its decision, the said party would have been condemned unheard.
11. As it was their advocates' failure to communicate the trial dates that led to the Defendants' absence from court during the trial, the defendants submitted that they deserve to be excused.
12. In response to the application, the Plaintiffs pointed out that the Defendants were represented by two Law Firms, being **ABOGE & COMPANY ADVOCATES** and **IDRISS & COMPANY ADVOCATES**.
13. Therefore, it was the Plaintiffs' view that the Defendants were not justified to use the misfortune which befell Advocate Aboge as an excuse for their failure to attend court during the trial.
14. The Plaintiffs emphatically stated that a litigant ought to take reasonable steps to find out the progress of his case. He cannot keep silent and then blame his advocate later.
15. I am in agreement with the Plaintiffs, about the fact that every litigant has an obligation to constantly and consistently keep in touch with his case, whether or not the litigant had engaged an advocate.
16. In this case, the Plaintiffs said that the Defendants had been given several chances at the stage of the Defence case, but they had failed to attend court.
17. That contention is founded upon the fact that on several occasions, Mr. Aboge Advocate attended court when the case was scheduled for hearing.
18. It cannot be wished away nor denied that Advocate Aboge attended court on several occasions.
19. But it is equally true, as indicated in the affidavit sworn by the 1<sup>st</sup> Plaintiff, The Archbishop Dr. Abednego Mathew Ajuoga, that on 25<sup>th</sup> May 2016, Advocate Aboge told the court that his original contact amongst the Defendants, had left the church.
20. Advocate Aboge informed the court that a Mr. Agwambo had told him that he (Agwambo) would get the 3<sup>rd</sup> Defendant (Clarkson Odhong) to testify on behalf of the Defendants.
21. In my considered view, the Plaintiffs appear to be confirming the Defendants' assertion concerning the lack of contact between the Defendants and Advocate Aboge.
22. I find that it was because the person who had connected Advocate Aboge to the Defendants had left the church that the Defendants lost contact with their advocate.
23. Neither the Defendants nor the advocate can take responsibility for that development.
24. The Plaintiffs suggested that the Defendants could have used the services of M/s Edris & Company Advocates.
25. However, the Plaintiffs did not show the court that they had notified that Law Firm about the hearing dates. Perhaps if the said Law Firm had been duly notified of the hearing dates, it may have been difficult for the Defendants to have feigned knowledge of the said dates just

because Advocate Aboge had not provided them with that information.

26. Having given due consideration to all the submissions herein, I find that justice demands that the Defendants be accorded one opportunity to put forward their case.

27. Therefore, I do now set aside the Judgment which was entered on 30<sup>th</sup> September 2016, together with all the consequential orders.

28. The case will start de novo.

29. As regards costs of the application I hold the considered view that the Plaintiffs cannot be liable for the same, as they did not play any role which was not lawful or regular when they prosecuted their case.

30. The disconnect between Advocate Aboge and his clients is a matter that the Plaintiffs were not a party to.

31. The Defendants will thus bear their own costs of the application.

32. Furthermore, the Defendants are ordered to pay the thrown away costs relating to the date of the trial as well as the extraction of the Decree and the process of execution.

**DATED, SIGNED and DELIVERED at KISUMU This 28<sup>th</sup> day of March 2019**

**FRED A. OCHIENG**

**JUDGE**