

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 111 OF 2014

JOHN MALOGO NDIRITU.....PLAINTIFF

VERSUS

EMILIO KIBUI MWANGLI.....DEFENDANT

RULING

Before this Court is the Notice of Motion dated **16th October 2018** in which **JOHN MALOGO NDIRITU** (the Plaintiff/Applicant) seeks the following Orders:-

- “1. THAT the order of the Honourable Lady Justice Maureen Odera made on the 11th October 2018 dismissing the suit filed herein on 24th March 2014 together with all other consequential orders be reviewed, varied and/or set aside.**
- 2. THAT the Plaint dated 24th March 2014 be reinstated and allowed for hearing.**
- 3. THAT the costs of this application be provided for.”**

The application which was premised upon **Sections 3A and 80** of the **Civil Procedure Act Cap 21, Order 45 Rules 1 and 2** of the **Civil Procedure Rules** and all other enabling provisions of the law, was supported by the Affidavit sworn on **16th October 2018** by **MARTIN MBICHIRE**, an Advocate of the High Court of Kenya.

The application was not opposed as the Defendants despite being properly served did not file any reply thereto.

This is a matter in which a Notice to Show Cause (**NTSC**) why the suit should not be dismissed under **Order 17 Rule 2** dated **4th October 2018** was served on the parties. The **NTSC** was to come up for hearing in Court on **11th October 2018**.

On that hearing date there was no appearance for the Plaintiff but **MS NDUNG’U** who appeared for the Defendant urged the court to dismiss the matter. The suit was accordingly dismissed on that date.

Counsel for the Plaintiff submits that his failure to attend court on **11th October 2018** was not deliberate. He avers that on the same day he was before the Court of Appeal in **Civil Application No.129 of 2017 EDWARD KAMITI KAHIU –VS- HENRY NJOROGE KAMAU**, where he acted for the Respondent. Upon finalizing in the Court of Appeal at 10.00a.m Counsel rushed to the High Court only to find that the suit had already been dismissed in his absence.

I have considered the submissions filed by the Plaintiffs in this matter. I am satisfied that counsel did intend to be in court during the hearing of the Notice to Show Cause. Matters in the Court of Appeal do take priority over matters in the High Court. I note that this application was filed barely five (5) days after the suit was dismissed thus there was no delay.

For the above reasons I am inclined to exercise the discretion to reinstate this suit favourably. The error or mistake lay with Counsel and not with the litigant himself. The Court ought not turn away a party who has indicated a desire to pursue his claim. It is also noteworthy that the application is not opposed.

Accordingly I do allow this application. I set aside the Court’s orders of dismissal made on **11th October 2018**. The suit is hereby reinstated. The Plaintiff to set down the suit for hearing within 90 days failing which the same will stand dismissed with no further reference to the Plaintiff.

Dated in Nairobi this 24th day of July 2019.

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Justice Maureen A. Odera