



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**LAND AND ENVIRONMENT CASE NO. 48 OF 2014**

**PETER MWANGI THUMBI .....PLAINTIFF**

**VERSUS**

**WALTER WANJALA .....DEFENDANT**

**RULING**

[1] The applicant filed this notice of motion under Order 12 rule 7 and Order 15 rule 1 and under Section 1A, 1B and 3 of the Civil Procedure Rules.

The applicant prays among other prayers that the order made on 21/10/2015 be set aside and/or reviewed and the suit be reinstated for hearing.

[2] The basis of the application is that this case was fixed for hearing on 19/10/2015. That on that day the court was not sitting and the case was scheduled for hearing on 21/10/2015. The applicant states that he was not informed of that hearing date though he attended the court on 19/10/2015. He states that for that reason he did not attend the court and the court then dismissed the suit under Order 12 Rule 3.

[3] The respondent opposes the application and states that the case was fixed for hearing on 19/10/15. He states that all the parties attended and were told by the court clerk that the court was not sitting but the case would be heard on 21/10/2016. That the applicants were present. That the applicant and his client never attended the court on 21/10/2016 and that therefore, the suit was dismissed under Order 12 rule 3(1) of the Civil Procedure Act. He argues that this application has no merits and that the same should be dismissed.

[4] My perusal of the court record shows that truly this case was fixed for hearing on 19/10/15. It also shows that the court did not sit. The next record in the court file was 21/10/2015 when the case was dismissed under Order 12 rule 13(1)

There is nothing to show how the date of 21/10/15 was taken though counsel for the respondent Mr. Were told the court on that date that the parties to the suit were advised to come for hearing on 21/10/2015.

Mr. Were for the respondent might just as well be telling the truth. However, the court registry ought to have noted that communication on the court file like they note when cases are fixed for hearing. Such note herein that would have cleared the air as to how the 21<sup>st</sup> day was taken and whether or not all the parties were present. This issue is unfortunately disputed. That leaves the word of the applicant against that of the respondent.

[5] In the interests of justice, the orders of 21/10/2015 and all consequential orders are set aside. The case shall be reinstated for hearing and a fresh hearing date be fixed for hearing on merits. The costs of this application shall be in the cause.

**Dated, signed and delivered this 27th day of July 2016**

**S.MUKUNYA - JUDGE**

**In the presence of**

Gladys Court Assistant

Mr. Were for the defendant/respondent

Mr. Athunga for the plaintiff – Mr. Juma holding brief