



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC NO. 1485 OF 2013**

**FRANCIS NGIGE WAWERU..... PLAINTIFF**

**=VERSUS=**

**ONESMUS MAKAU .....1<sup>ST</sup> DEFENDANT**

**MAKOSI NDAMBUKI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed an application dated 23<sup>rd</sup> October 2020 seeking the following orders:

- a) That the Order for dismissal of this Honourable Court dated 20<sup>th</sup> February 2018 be set aside and the suit be reinstated.***
- b) Costs of the Application be provided for.***

2. The application is based on the grounds on its face and its supported by the affidavit sworn by **David Karanja Thuo, Advocate** for the Plaintiff. He deposed that he had already complied with the Court order issued on 20<sup>th</sup> February 2018 which directed him to serve the summons within 30 days failure of which the suit would stand dismissed.

3. Parties were directed file and exchange their written submissions. The Plaintiff filed his submissions dated 18<sup>th</sup> January 2021 while the Defendants never filed any submissions.

4. The Plaintiff submitted that he collected the said summons from the court as was directed by the Court's orders and was able to serve the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 19<sup>th</sup> March 2018 just within the 30 days period. He also annexed in his supporting affidavit an affidavit of service confirming that indeed both defendants were served with summons on the said day.

5. The applicant further submitted that he had complied with the court order even when the suit was dismissed. It was his contention that having complied with the order of the court, the said suit which stood dismissed ought to be reinstated.

6. It was his further submission that the delay in filing the application to reinstate the suit was excusable since the same was due to the fact that the file had been missing for a while and had even written to the Deputy Registrar of this Court requesting for her assistance in tracing the same. He also annexed the letter dated 9<sup>th</sup> October 2020 confirming the said communication. In the intervening period he had also written to the Defendants inviting them to fix the suit for hearing.

7. I have carefully considered the application as presented and the written submissions filed by counsel for the Plaintiff. In my view, the only issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the suit.

8. It is within the general discretion of the Court to set aside any order issued by the court, so long as sufficient cause has been shown for the exercise of such discretion. In

9. No response was filed by the Defendants to demonstrate any prejudice that they would suffer should the suit be reinstated. The defendant must satisfy the court that it will be prejudiced by the delay by showing that justice will not be done in the case due to the prolonged delay on the part of the plaintiff. As earlier sated, the application was not opposed by defendants and no prejudice was demonstrated. To the contrary, it is the plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing, were his application to be dismissed.

10. The foregoing being my view of the matter, I will allow the application dated 23<sup>rd</sup> October 2020 and set aside the dismissal order of 20<sup>th</sup> February 2018 and order that the suit be reinstated for hearing and determination on the merits.

11. I hereby direct that this case be fixed for hearing on a date to be issued after delivery of this ruling.

12. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2022**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**N/A for the Plaintiff.**

**Ms. Waweru for the 1<sup>st</sup> Defendant.**

**N/A for the 2<sup>nd</sup> Defendant.**

**Court Assistant; Caroline Nafuna**