

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 318 OF 2011

HEZRON OBADIAH.....PLAINTIFF

VERSUS

1. ALPHONSE OLADIPO

2. TUBMAN OTIENO.....DEFENDANTS

RULING

1. On 2nd December 2014 the Court (Mbogholi, J) dismissed the Plaintiffs’ suit herein for non-attendance of the Plaintiff or his advocate at hearing.

2. The Plaintiffs then filed this **Notice of Motion dated 2nd December 2014** seeking an order to set aside the dismissal and reinstatement of the suit for hearing. The application is brought under **Sections 80 and 3A** of the **Civil Procedure Act** (the **Act**); **Order 51** and **Order 12, rule 7** of the **Civil Procedure Rules** (the **Rules**) which rule bestows on the Court an unfettered discretion to vary or set aside such orders of dismissal “upon such terms as may be just”.

3. The main ground for the application appearing on the face thereof is that, the failure to attend the hearing of 3rd March 2011 by the Plaintiffs and/or their advocates was due to an honest mistake and omission on the part of the advocates which should not be visited on the Plaintiff. The honest mistake and omission is explained in the supporting affidavit and supplementary affidavit sworn on **2nd December 2014** and **26th March 2015** respectively by the Plaintiff’s advocate, **Akoth Lumumbah**.

4. The explanation is that the hearing date issued to the advocates at the registry was 4th December 2014 and yet the matter came up for hearing on 2nd December 2014; that the order was made through no fault of the Plaintiff which thus should not be visited upon him; that the Plaintiff is keen on prosecuting the suit and towards that end actively pursued getting a hearing date; that when it was realized that the matter had been inadvertently diarized for the 4th December 2014 instead of 2nd December 2014, he rushed to court only to find that it had been called out and order for dismissal made; that there is no delay in filing this application; that the Plaintiff stands to suffer great prejudice hence is it only fair and in the interest of justice that the order be set aside and the suit reinstated.

5. The Defendants have opposed the application by replying affidavits sworn by its Counsel, **Charles Gomba** on **18th March 2015**. The grounds of opposition emanating therefrom are that the Plaintiff’s Advocate’s excuse for failing to appear at the hearing of the suit is insufficient and a mere afterthought; that there is no evidence tendered to support the claim that the advocates mistook the date for 4th December 2014; that the non-attendance is thus inexcusable.

6. After perusal of the court record it is clear that the case had been fixed for hearing by consent of the parties for 18th October 2012 but apparently it was taken out of the hearing list due to shortage of judges. It was again mentioned on 6th February 2013 where pre-trial directions were taken and the Plaintiff was urged to comply with all pre-trial requirements. After it was confirmed that the suit was

ready for hearing on 27th February 2013, the case was fixed for hearing for 2nd December 2014 by a representative of the Plaintiff.

7. The Plaintiff has all along shown willingness to prosecute the suit. The reason given for failure to attend court on 2nd December 2014 is not peculiar or improbable; on the contrary, it is eminently possible for an advocate's court clerk to diarize a case on the wrong date especially in firms handling numerous matters. The explanation is credible.

8. Given the nature of this case, it is in the best interest of justice that it be heard and determined on merit. The application is therefore allowed. The order of dismissal of 2nd December 2014 is hereby set aside and the suit reinstated for hearing. Each party shall bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 21st Day of May, 2015.

A.MBOGHOLI MSAGHA

JUDGE