

176/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 11 OF 2009

1. GREGORY KITEMA KITONGA

2. NANCY MUTINDI MUTUA (suing as legal and personal representatives of the estate of
PETER MUTOEWA GREGORY THOMBO (DECEASED))

.....PLAINTIFFS

VERSUS

FESTUS MUASA

NDONYEDEFENDANT

RULING

1. In an application dated **12th June, 2013**, the Applicants/Plaintiffs seek this court's order reinstating their suit that was dismissed on the **17th September, 2012** for non-attendance.
2. The application is premised on the grounds that failure to attend court was occasioned by counsel who held brief for the advocate who was acting for them; a mistake that should not be visited upon them and failure to prosecute the case would result into suffering irreparable loss.
3. The application is supported by an affidavit sworn by **Agnes Mutunga** an advocate retained by the plaintiffs who depones that she had instructed one **Musembi Kitindio** Advocate to hold her brief on the material date but he mistook the matter to be in the Lower Court. As result it was dismissed.
4. A further affidavit in support of the application was sworn by **Kitindio Musembi** the advocate who held brief in the matter who depones that he inadvertently recorded the matter as **CMCC No. 11/2009** in his diary. He checked the cause-list and the matter had not been listed on the cause-list. He conveyed the message to the applicant's counsel. It was later that he learnt that the matter was in the High Court and had been dismissed.
5. The application is unopposed. The applicants have demonstrated that the mistake was made by their advocate. It will be unjust for them to be punished for a mistake they did not contribute to. In the circumstances I do set aside the order dismissing the suit.
6. Accordingly it is reinstated as prayed.
7. No orders as to costs.

DATED, DELIVERED and SIGNED this **23rd** day of **JANUARY, 2014**.

L.N. MUTENDE

JUDGE