

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.94 OF 2012

BEN TAPOIKA KIPENO.....PLAINTIFF/APPLICANT

VERSUS

ENKUTOTO ECO TOURISM TRUST.....1ST DEFENDANT/ RESPONDENT

EAST AFRICAN CULTURAL

EXPERIENCE LTD.2ND DEFENDANT/RESPONDENT

RULING

By a notice of motion dated 24th July 2014 the applicant seeks that the orders issued on 22/07/2014 dismissing the application dated 15/01/2015 be vacated and said application be reinstated.

The reasons for seeking the orders is that the application dated 15/01/2014 had been fixed for hearing on 22/07/2014, and the applicant's counsel requested a colleague to hold his brief and adjourn the matter as there was need to file a further affidavit in response to the replying affidavit. However the counsel who was holding brief (Mr. Musembi Ndolo) stepped out of court to pick an important call, only to return and find the application dismissed for non-attendance. It is explained that the failure to be in court was inadvertent, and it is in the interest of justice and fairness that the prayers be allowed.

The application is supported by the affidavit sworn by **MUSEMBI NDOLO** (advocate) who deposes that he was requested by Mr. Kamonjo Kiburi to hold brief in the matter which was set for hearing on 22/07/2014. Counsel also had a separate matter before court being **HCCC No.244 of 2012 [John Nganga V Eveready Batteries]**. He confirms having stepped out to pick an important call, only to find the application dismissed for non-attendance.

I have considered what is deposed in the supporting affidavit and also perused the day's cause list for 22/07/2014. I am satisfied the deponent is being truthful as to what took place on the said date. There was no response filed with regard to the application. I have also considered the nature of prayers sought in that question to confirm that applicant will be prejudiced for no fault of their own.

I believe the failure to attend court was an inadvertent and therefore excusable omission which can be remedied by granting the orders sought.

Consequently, I allow the application and set aside the orders dismissing the same. The application dated 15/01/2014 is thus reinstated and the costs of the application shall be in cause.

Delivered and dated this 13th day of August, 2014 at Nakuru.

H.A. OMONDI

JUDGE