



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Case 72 of 2008**

**EDWARD WAFULA YANDA.....PLAINTIFF**

**VERSUS**

**BOAZ MUSUKHA WAKHWAKU**

**MARK MUFUMU WAKHWAKU**

**MOSES MWAMI WAKHWAKU.....DEFENDANTS**

**RULING**

In an application dated 6<sup>th</sup> December 2011 brought by way of notice of motion, the applicant seeks to set aside the order dismissing their suit issued on 28<sup>th</sup> May 2010. The dismissal was at the courts instance. They have stated grounds in favour of the application on its face. The gist of it is that the notice of dismissal was never served upon them. Their second limb of the argument is that the order of dismissal was not endorsed by the judge and thus it is invalid.

The respondent is opposed to the application and has filed a replying affidavit. They argue the application has been brought after inordinate delay; no sufficient reasons have been adduced why the orders ought to be set aside and that the notices for dismissing the suit were properly served. The respondent has also submitted that the applicants counsel on record are not interested in prosecuting this matter as they had filed an application to cease acting.

Courts do exercise its discretion in setting aside exparte orders/judgments in order to avoid hardship/injustice where there is excusable mistake or error, inadvertence (Shah vs. Mbogo & another, 1967, E.A. 116 as page 123). There was no affidavit of service filed by the court process server that they actually served the applicants counsel. The respondent does not also indicate how they received the notice of dismissal of suit. It is my finding that this was an inadvertence of the part of the court to have dismissed the suit when there was no proof of service upon the applicant or his counsel. Although the applicant's counsel sought to cease acting, the application has not been determined therefore they are properly on record to prosecute this application. It is therefore not right/correct submission by the respondent that this can be used against them in determining the application for setting aside.

Finally if the order for dismissal was not signed then there is no order.

However, if the deputy registry signed the order then such order is valid as it the deputy registrar who signs all orders issued by judge on his/her behalf.

I allow the application, set aside the dismissal order issued by the court on 28<sup>th</sup> May 2010. The costs to abide the outcome of the main suit. The applicant to take necessary steps to set the suit down for hearing.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 19<sup>TH</sup> day of MARCH 2013.

**A. OMOLLO**

**JUDGE.**