REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 153 OF 2009 (O.S)

SAMUEL KIMANI NGANGA ……..…. PLAINTIFF/APPLICANT

VERSUS

JOHN KISEMEI NDICHU alias

JOHN MBUGUA NDICHU ……...…… DEFENDANT/RESPONDENT

R U L I N G

The application dated 11/10/2011 seeks orders that the order of dismissal dated 23/6/2010 be set aside and this suit be reinstated for hearing.

The background facts are set out in the supporting affidavit sworn on 11/10/2011.

The failure to attend court on the date the suit was dismissed is attributed to a wrong entry that was made in the diary by the advocate's clerk. The advocate's diary reflected the hearing dated as 23/9/2010 while the court's record reflected 23/6/2010. The court's diary for year 2011 was filed up within a very short time and the Applicant's advocate learnt of the dismissal order while he was waiting to fix the case in the year 2012 diary.

According to the Applicant, he stands to suffer substantially if the suit is not reinstated as the Respondent is desirous of selling the land.

In opposition to the application, the Respondent swore a replying affidavit on 6/12/11. The Respondent's stand is that the hearing date for 23/6/2010 was taken *ex parte* by the Applicant who thereafter failed to attend court. The Respondent lamented that the clerk who fixed the hearing date in question has not sworn an affidavit to explain the circumstances. The Respondent blamed the Applicant for filing the application after inordinate delay. The Respondent's prayer is that the suit herein together with the application be dismissed.

The application was canvassed by way of written submissions which I have duly considered.

The failure by the advocate's clerk to diarize the hearing date is in my view an excusable mistake. A perusal of the court record does not reflect lack of interest in this suit by the Applicant as it has been fixed for hearing by the Applicant several times.

As stated by the Court of Appeal in **Philip Chemnolo & Another –vs- Augustine Kebende (1982 – 1988) KAR**;

"Blunders will continue to be made from time to time and it does not follow that because a

mistake has been made that a party should suffer the penalty of not having his case heard on merits….

I think the broad equity approach to this matter, is that unless there is fraud, or intention to overreach, there is no error in default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purposes of imposing discipline."

Having considered the circumstances of this case, I am inclined to exercise this court's discretion and reinstate the suit. Consequently, I allow the application with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 27th day of June 2013.

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B. THURANIRA JADEN

JUDGE