



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL CASE NO.42 OF 2010**

**MARTIN MAURICE ODHIAMBO.....PLAINTIFF**  
**VERSUS**  
**KIPSIGIS TRADERS CO-OPERATIVE**  
**SOCEITY LTD .....1<sup>ST</sup> DEFENDANT**  
**DIRECT O. SERVICES.....2<sup>ND</sup> DEFENDANT**

**RULING**

On 19<sup>th</sup> January 2010, the Plaintiff's application dated 16<sup>th</sup> June 2010 was dismissed with costs because the Plaintiff failed to attend Court to prosecute it. This was not the first time that the Plaintiff's said application had been dismissed on account of the Plaintiff's failure to attend Court to prosecute it. On 8<sup>th</sup> July 2010, this Court had dismissed the application on account of the Plaintiff's failure to attend the court to prosecute it. It was restored on 10/11/2010.

The application to set aside the dismissal order came up for hearing again on 17/01/2011. The hearing date had been given in Court to all the parties. The Plaintiff again failed to attend Court on 17/01/2011. Mr. W. R. Kiprono, learned Counsel for the defendants, attended court on 17/01/2011 and urged the Court to dismiss the Plaintiff's application dated 16/6/2010. On 19/1/2011, the Court delivered a Ruling in which it dismissed the said application with costs.

Under a Certificate of urgency, the Plaintiff moved swiftly and filed on 20/1/2011 a Chamber Summons application dated 20/1/2011 seeking *inter alia* an order to set aside the dismissal order dated 19/1/2011. He based his application on three grounds namely,

1. that rent is fully paid and
2. that there is a dispute relating to rent which needs to be determined in the suit and
3. that it is in the interest of justice that the matter be heard and the prayers prayed for be granted as prayed.

In his short affidavit, the Plaintiff averred that the rent was fully paid and that he was in Nairobi for a Constitutional Petition No. 604 of 2009 on 17/1/2011 when the dismissed application came up for hearing. The annexure No. MM01A attached to his affidavit is a letter addressed to one Peter Otieno Bonyo and the parties to the captioned suit No. 604 of 2009 are Express Automobile (K) Ltd & 2 others and Kenya Farmers Association & 2 others. Annexure MM01D, which is a copy of the daily cause list from Nairobi Central Registry does not show that the Plaintiff was not aware of the hearing on 17/1/2011 or that he had inadvertently forgotten about the hearing. Nor does it show that the Plaintiff was a party in the litigation referred to. But more importantly, there is no evidence that he was not aware or that he did

not know that his application was coming up for hearing on 17/1/2011. Nor does it show that the applicant was prevented from attending court by reasons beyond his control. One would have thought that the fact that application had been dismissed before for non-appearance and was subsequently restored would have caused the Plaintiff to be more circumspect and more diligent in attending court to prosecute it. Nowhere in his application has the Plaintiff taken the trouble to explain why he did not attend Court to prosecute the application. The fact that he went elsewhere is not a sufficient explanation for his failure to attend Court to prosecute the application. Nor is the fact that he pays rent. The application has failed to address and establish the single most important matter, namely the reason/s which militated against the Plaintiff's ability to attend Court on 17/1/2011.

The application seeking to set aside the dismissal order dated 19/1/2011 has no merit. I so find. I accordingly dismiss it with costs to the Defendants. The interim orders for stay are hereby discharged.

**DATED at KERICHO this 23<sup>RD</sup> day of March, 2011**

**G.B.M KARIUKI, SC**  
**RESIDENT JUDGE**

**COUNSEL APPEARING**

Mr. W. R. Kiprono, Advocate, for the Defendants

Plaintiff in person

Mr. N. Bett, Court clerk