



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL SUIT NO.9 OF 2005 (OS)**

**IN THE MATTER OF LAND PARCEL NO. BUKHAYO/NASEWA/207**

**EDWARD ETINDI MAKABIRA.....APPLICANT**

**=VERSUS=**

**WYCLIFFE MAKOKHA  
FREDRICK JUMA OUMA**

**MARTIN WANJALA .....DEFENDANTS  
FRANCIS NYONGESA OUMA**

**R U L I N G**

The application before the court is a Chamber Summons brought by the Plaintiff, dated 11.10.2010. It seeks the setting aside of the court's Order dated 5.10.2010, which dismissed the suit herein. The application is based upon a supporting affidavit sworn by the applicant.

The applicant states that he is a watchman by profession and that his salary is not much. He was ordered to pay court and defendant's adjournment costs amounting to 3500/= which was to be paid within a prescribed time. That he was aware of the hearing date of his case on 5.10.2010 and he left Nairobi to attend court. That he was aware he had to pay the above costs before the hearing and had straineously collected the money to pay it were not for sickness which befell him in the meantime and he had to use the money just before he was due to travel to court.

The applicant explains that on the hearing date he arrived in court to find that the court file had been returned to the Court Registry for his failure to pay the adjournment fees. That he discussed the matter with Mr. Jumba, the advocate for the defendant who agreed to give him a lee-way to assemble the outstanding costs before the parties would pick a suitable hearing date. That upon such agreement, the plaintiff left the court for home.

The applicant further deponed that he later learnt with shock, that later after he had left court, the Defendant's advocate arranged with his clients and paid the adjournment fees and the file was returned to court where on being re-called, the applicant was found absent. That instead of the Defendant's advocate disclosing the agreement he had reached with the plaintiff earlier he proceeded to seek that the suit be dismissed for want of prosecution.

That indeed, in the circumstances, the court went ahead and dismissed the suit. The applicant insists that he did not deliberately refuse to obey court orders or pay court and part adjournment costs. That he is still interested to prosecute his case which is a land case and that he is ready to pay the outstanding costs and adjournment costs.

The Defendant filed a replying affidavit. He does not deny the facts alleged by the applicant that there was an agreement between the plaintiff and Defendant's lawyer to the effect that another hearing date would be fixed after plaintiff would shortly raise the outstanding costs. He does not further, deny that the plaintiff was at the court precincts when the file was returned to the Court Registry.

In the circumstances the court is persuaded that there was an agreement not to proceed with the hearing of the case that day and that the hearing that proceeded after the plaintiff had left, was contrary to their gentleman's agreement. It cannot be seriously said that it did not mislead the plaintiff to his detriment.

The court on its part is persuaded that the plaintiff would be telling the truth. I have carefully perused the file record and note that the plaintiff's conduct on the other hand, has not been impressive in the past, hence the delay in having the suit heard to conclusion. However, for the final time, the court would give him one more chance on the terms following:-

#### ORDERS:

1. The application is allowed and the dismissal of the main suit is hereby set aside.
2. The costs of this application will be in the main cause.
3. The applicant shall pay the total adjournment costs both to the court and to the defendant within 30 days, in default of which the main suit shall stand dismissed as ordered on 5.10.2010.
4. The plaintiff or defendant or both to take a fresh hearing date within 7 days of costs above being paid.
5. Costs of adjournment incurred on 5.10.2010 will go to the Defendant in any event.

Dated and Delivered at Busia on the 9th day of May 2011.

**D.A. ONYANCHA**

**JUDGE.**