



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CIVIL SUIT NO.31 OF 2009**

<b>GORDON WASWA MUNJUMA</b>	.....	<b>1<sup>ST</sup> PLAINTIFF</b>
<b>JOHN SIMIYU MUNJUMA</b>	.....	<b>2<sup>ND</sup> PLAINTIFF</b>

~VRS~

<b>WILBERFORCE MAINA MUTENDE</b>	.....	<b>1<sup>ST</sup> DEFENDANT</b>
<b>EMMANUEL OTIANGALA</b>		
<b>t/a KURONYA AUCTIONEERS</b>	.....	<b>2<sup>ND</sup> DEFENDANT</b>

**RULING**

The Applicants/Plaintiffs in their application dated 12/07/2010 prays for orders for reinstatement of their application dated 7<sup>th</sup> May 2009. The application was opposed by the Respondents/Defendants through an affidavit sworn by their counsel Mr. Simiyu Makokha. Parties herein agreed to have the application heard through the affidavits.

The facts leading to this application are that the Applicants filed an application dated 07/05/2009. It was fixed for hearing on 07/07/2010. When it was called out in the morning hours, the counsels for both parties were present. Due to pressure of work the application was given time allocation being 2.00 p.m in the afternoon. At 2.00 p.m the court and the Respondents’ counsel Mr. Makokha were ready to proceed. Mr. Sichangi for the Applicants was not present. The court waited until 2.40 p.m when the file was called out. The Respondents and their counsel were not present. The application was then dismissed for non-attendance.

In the supporting affidavit, Mr. Sichangi depones that he was under the impression that the process server was required in court during the hearing of the application. He therefore went looking for the process server and delayed. The first Defendant and his counsel Mr. Makokha in their affidavits states that he called Mr. Sichangi at around 2.00 p.m and told him to come to court because the court was ready. Mr. Sichangi did not turn up resulting in the court dismissing the matter for non-attendance at 2.40 p.m.

In the morning when the application came up for hearing, none of the parties mentioned that they required the presence of the process server. Even assuming the process server’s presence was required, arrangements ought to have been made earlier for him to be in court by 2.00 p.m. for Mr. Sichangi to say that **“he was under the impression that the process server was required in court,”** is in my considered opinion just an excuse for his absence or lateness to attend court. The court accommodated Mr. Sichangi

for forty (40) minutes which was too much of judicial time. The counsel's office is situated in Bungoma town and he had no good reason to fail to organize himself for the hearing of the application. I am not convinced that the counsel's absence from court was justified.

I remind myself that a party shall not be punished for a mistake or negligence of his counsel. The Applicants had instructed the counsel and trusted him to argue the application on their behalf. The counsel was in court in the morning and this gave the Applicants' assurance that they had nothing to worry about. The counsel was present when the matter was slated for 2.00 p.m. The counsel was expected to attend court on time which he failed to do. For the sake of the Applicants, I allow this application and order that the counsel Mr. Joseph W. Sichangi meets the costs of this application personally.

The application dated 7<sup>th</sup> May 2009 is hereby reinstated.

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**F. N. MUCHEMI**  
**JUDGE**

Ruling delivered this 8<sup>th</sup> day of June, 2011 in the presence of Mr. Onchiri for the Plaintiffs and Mr. Makokha for the Defendants.

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**F. N. MUCHEMI**  
**JUDGE**