



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Suit 28 of 2004

HERBERT AKUMA GESIMBA PLAINTIFF

VERSUS

NATHAN NYACHIEO OGATI DEFENDANT

RULING

On 15th June 2009 when this suit came up for hearing neither parties nor their respective advocates were in court and consequently the suit was dismissed for want of prosecution. The hearing date had been fixed by consent of the advocates for the parties through their respective court clerks.

On 8th July 2009 the plaintiff filed an application seeking to set aside the orders made on 15th June 2009 so that the suit can be reinstated to hearing. The application was supported by an affidavit sworn by the plaintiff as well as one Robert Ongera, a court clerk working with Zablon Mokuia and Company Advocates who are on record for the plaintiff. The court clerk deposed that when he took the hearing date he made a mistake and wrote in his diary that the case was to come up for hearing on 16th June 2009 instead of 15th June 2009.

The plaintiff also stated in his affidavit that he had been informed by his advocate that the case was to be heard on 16th June 2009. When he came to court on that day together with his advocate they realized that the matter had been dismissed on the previous day. He urged the court to allow the application, considering that it was a land claim based on the doctrine of adverse possession.

The defendant opposed the said application and stated that the same was bad in law as it had been brought by way of a notice of motion instead of a chamber summons. He further stated that there was undue delay in filing the same, the suit having been dismissed on 15th of June 2009.

I have considered the brief submissions made by Mr. Mokuia for the plaintiff and Mr. Soire for the defendant.

Considering that the plaintiff's application was brought under various provisions of the law which include **order IXB rules 1 & 17, sections 3 & 3A** of the **Civil Procedure Act** the plaintiff rightly brought the application by way of a notice of motion.

As concerns the merit of the application, I have no reason to doubt the averments made by the plaintiff and Mr. Mokuia's court clerk. The said court clerk was candid that he made a mistake in diarizing the hearing

date. That the plaintiff's failure to attend court on 15th June 2009 was due to the wrong information that had been given to him by his advocate's office. This is a land matter which ought to be determined on its merits.

Consequently, I allow the plaintiff's application and set aside this court's orders issued on 15th June 2009. The plaintiff shall however bear all thrown away costs of the suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MARCH, 2010.

**D. MUSINGA
JUDGE.**

24/3/2010

Before D. Musinga, J.

Mobisa - cc

N/A for the Plaintiff

N/A for the Defendant

Court: Ruling delivered in open court on 24th March, 2010.

**D. MUSINGA
JUDGE.**