



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL CASE NO. 165 OF 1998**

**PHILIP KIPSOIMO KURGAT .....**  
**..... PLAINTIFF**

**VERSUS**

**REGINA J. MALAKWEN .....**  
**..... DEFENDANT**

**R U L I N G**

This is an application by way of a Notice of Motion taken out under the provisions of section 3, 3A and 63 (e) of the Civil Procedure Act and Order L rules 1, 2 and 3 of the Civil Procedure Rules and all enabling provisions of the Law. The prayers therein are for the setting aside of the court's suit dismissal orders made on the 27<sup>th</sup> April, 2005 and that the suit be reinstated and heard and determined on its merit, and the warrants of arrest now in force against the applicant be lifted and the costs for the application be provided for.

The grounds upon which the application is based are that the applicant's suit was dismissed without his knowledge and he was therefore condemned unheard. The applicant adds that he has been greatly prejudiced by such dismissal which was caused by the mistakes of his then advocate and that now it is in the interest of justice and fair play that the orders sought be granted. The other ground is that neither the plaintiff nor his counsel took part in the proceedings of assessing the Bill of Costs and hence the application must succeed.

In his supporting affidavit Philip Kipsoimo Kurgat the applicant herein swears that his then advocates M/s K.K. arap Sego & Co. never invited him to the hearing of the suit and that he was all along under the impression that the suit was still pending in court until 11.2.2008 when he was served with a Notice to Show Cause why execution should not issue. Thereafter he was not able to get in touch with his previous advocate and he instructed the present one to represent him. He adds that even his previous advocate was never served and that is why the case was dismissed for non attendance. He further depones that this is a land case which must be determined on its merits. He states that he is advised that the mistakes of counsel should not be visited upon him and he brought the application without undue delay and in good faith and that he would suffer loss and damage if the application is not allowed.

Arguing the application for the applicant learned counsel Mr. Choge submitted that even the Replying Affidavit by the respondent acknowledged that the hearing notice was served when the office of the advocate for applicant was closed. He added that the applicant's counsel did not inform his client that he was closing his offices so that the client (applicant) could have looked for the services of a new advocate.

There was a Replying Affidavit sworn by the advocate of the respondent in which it was stated that before the court dismissed the case on 27.04.2005 upon the respondent's application, the court must have satisfied itself that service had been effected on the plaintiff's counsel and who together with the plaintiff failed to attend court on the date the case was fixed to be heard. The said affidavit adds that pursuant to the dismissal the party and party costs were assessed and execution ensued. The instant application is described by the respondent as an afterthought brought in bad faith and after a very long delay and should

be dismissed.

Learned counsel Mrs Were for the respondent submitted that there was inordinate delay in bringing the application and the respondent will suffer prejudice in having a suit that was dismissed being revived.

I have given this application due consideration. Suit herein was initially filed on 8<sup>th</sup> September, 1998 and an amended plaint was filed on 13<sup>th</sup> July, 1999. Suit was fixed to be heard on 27/4/2005 and due to the absence of the plaintiff and his counsel the same was dismissed for non attendance. I have seen the Affidavit of Service in respect of the Hearing Notice for the suit. Upon finding the offices of K.K. arap Sego & Co. Advocates closed, the process server swears that the Hearing Notice was sent by registered Post to the last known address of the said advocates and as at the time of swearing the affidavit of service the said Hearing Notice had not been returned unclaimed. The court that was set to hear the suit was satisfied that that service was proper, and so am I. Service by registered post to the advocates offices was good service. It was the business of the plaintiff to keep in constant touch with his advocate. Suit was dismissed during 2005 and reviving it five years later would definitely occasion prejudice to the defendant who now knows that the case that was hanging over her head five years ago is in her distant past. To revive it this late would not serve the ends of justice and that justice cuts both ways, for the plaintiff as well as for the defendant. Litigation must come to an end and it matters not that that litigation relates to land. For these reasons I find that the justice of this application requires that the same be dismissed. The Defendant did all that was required of her to do and the plaintiff has himself and his client to do for the consequences that followed their non-attendance at court when the plaintiff's case was fixed to be heard. The present advocate for the applicant is unprocedurally on record and the applications is non-starter on that score. The application is without merit and it is accordingly dismissed with costs.

It is so ordered.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF DECEMBER 2010.**

**P.M. MWILU  
JUDGE**

**In the presence of;**

Advocate for Plaintiff/Applicant

Advocate for Defendant/Respondent

Court Clerk

**P.M. MWILU  
JUDGE**