

1) *Civil Practice and Procedure*

2) *Application to reinstate suit dismissed for non attendance by plaintiff under order 9a r 4 CPR (wrong rules)*

3) Reasons

a) *The advocate for the defendant went to attend to a sick mother*

b) *Claim disputed by advocate for the defendant who stated advocate was actually in another court.*

4) Held:

i) *The litigant should not be made to suffer for the advocate's failure to attend court*

ii) *The orders dismissing suit be set aside*

iii) *Advocate to personally pay the costs.*

5) *Case law Nil*

6) *Advocates:-*

Mogeni K. Advocates for the plaintiff/applicant

Kimani A.M. Advocates for the defendant/respondent

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 1066 of 2001

EXCELATION LIMITEDPLAINTIFF
VERSUS
COMMERCIAL TRANSPORTERS LIMITED.....DEFENDANTS

RULING

When the suit was called out for hearing the advocate for the plaintiff was absent. The advocate for the defendant called for the suit to be dismissed which suit was duly so done.

The applicant/plaintiff now bring this present application dated the 14.5.04 seeking the setting aside of the said suit on grounds that the non attendance was not deliberate but was due to other matter being out of the advocates control.

His allegations did not mention his absence in court on 5.5.04 but that he went home to attend to his ailing mother on 2.5.04. He returned and sent a court clerk to adjourn the matter.

Court clerks of course have no audience in court. An advocate ought to be contacted to appear. Nonetheless no such advocate appeared to court. The one who is said attempted to do so did not wish to proceed on, according to the advocate for defendant.

Nonetheless the defendants objects to this application, as there is no truth that the mother was ill. The advocate was infact in Milimani Courts and as such, was indeed able to attend court.

I note from past decisions with special emphasis to Kneller J (as he then was), the advocate who fails to attend court at the detriment of his client should not be used to punish the litigant who is the innocent party.

I hereby rule that the orders dismissing this suit be set aside. The advocate for the plaintiff do personally pay throw a way costs of Ksh.5000/- to the advocate for the defendant before the next hearing date.

Dated this 12th day of May 2005 at Nairobi.

**M.A. ANG'AWA
JUDGE**

R.O.A Otieno & Co. Advocates for the plaintiff
A.M. Kimani & Co. Advocates for the defendant