



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 2233 OF 1999**

**GATI KAGO ..... PLAINTIFF**

**VERSUS**

**STEPHEN NJOROGE KIGOCHI ..... DEFENDANT**

**RULING**

The court's order of 26th March, 2003 was made by Rawal, J. She dismissed the suit for non-appearance of counsel for the plaintiff in court.

The application to set aside the dismissal order was filed by the plaintiff's counsel who gave the reason for his failure to attend court as a mistake from their office.

The supporting affidavit was sworn by Daniel Kioko Musyoka, advocate. It is dated 23rd September, 2003. The reason given for failure to attend court was their belief that the case was taken out of the hearing list of 26th March, 2003 at the call over.

Counsel for the defendant swore a counter affidavit in reply, to refute the claim by the plaintiff's counsel. Both advocates made detailed submissions and quoted cases showing instances where the court's had exercised discretion and set aside ex parte orders. I have read through the cases quoted.

I have also considered the points raised in the replying affidavit of Dominic Njuguna Mbigi dated 5th November, 2003, at paragraph 5 particularly, where he alluded to an earlier suit filed in the Magistrate's court at Kiambu, being RMCC No. 134 of 1994 (O.S). He also referred to the appeal which was filed from the Kiambu suit, which appeal is still pending in this court. In view of this, he termed this Originating Summons "resjudicata".

I have considered all issues raised in this application. Though I do not find the reasons given for failure to attend court on 26th March, 2003, satisfactory, I nevertheless feel that given the fact that it was the plaintiff's advocates, and not the plaintiff himself who was responsible for the plaintiff's failure to attend court by the "mix up" in their offices, I have decided to exercise my discretion in favour of the plaintiff, and allow him a chance to put his case, so to speak, to a Judge to decide. He is claiming land by adverse possession in the Originating Summons.

Issues have been raised in the replying affidavit of earlier or other suits related to this Originating Summons. I feel that all these issues should be decided by a competent court of Law. For these reasons, I have decided to set aside the court's order of 26th March, 2003, dismissing the suit. Counsel for the plaintiff will, however, pay thrown away costs of Kshs.7,000/= Counsel will also pay costs of the application to the defendant, though I have set aside the order of 26.3.2003.

Dated at Nairobi this 5th day of May, 2005.

**JOYCE ALUOCH**

**JUDGE**