

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 916 OF 2001

ABDIKADIR SALAH PLAINTIFF
VERSUS
ADUR DUBOW DEFENDANT

RULING

This is an application to set aside an order dismissing the suit for non attendance by counsel. The applicant by an application dated 4th March 2004 supported by an affidavit sworn by the plaintiff's counsel Mr Oluoch on 4th March 2004, seeks the reinstatement of suit.

The application is opposed by way of an affidavit sworn by Rose Mbugua the learned counsel for the defendant on 23rd March, 2004.

The main ground advanced in support of the application is that :-

the advocate arrived in court late because his client is based outside Nairobi and it was necessary to take instructions from him on 1st March, 2004 and that the delay was not deliberate. The applicant's client is based in Garissa.

The main grounds raised in opposition are that the substratum of the suit has disappeared in that construction works in respect of the suit property have been completed and that the applicant's counsel has not satisfactorily explained his absence or non appearance on 1st March 2004 when the matter was called out.

I have put the reasons articulated on behalf of each party on the scales. The main ground in opposition touches on the merit of the suit and this is a matter for determination after hearing arguments from both parties. Although the reasons for non attendance by the learned counsel are not entirely satisfactory I have a wide discretion under the applicable rule to do justice. It will be in the interest of justice to allow the application so that the matter can be heard and determined on merit.

For the above reasons the application is allowed but costs are awarded to the respondent/defendant in any event.

It is so ordered.

DATED and delivered at Nairobi this 21st day of May 2004.

J G NYAMU
JUDGE