

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 77 OF 2017

HENRY NGALUKA MUSAKI.....PLAINTIFF

VERSUS

MOVIES FOR YOU LIMITED.....DEFENDANT

RULING

1. In the Notice of Motion dated 18th July, 2019, the Plaintiff is seeking for the following orders:

a. That this Honourable Court be and is hereby pleased to set aside its orders issued on 16th July, 2019 dismissing this suit.

b. That this Honourable Court be and is hereby pleased to order reinstatement and determination of the suit on merit.

c. That the costs of this Application be provided for.

2. The Application is premised on the grounds that the failure by the Plaintiff's advocate to attend court on 16th July, 2019 was innocent; that the advocate's diary read that the matter was coming up on 17th July, 2019, on which day the advocate appeared in court, and that it was after all the matters had been called out that he was informed that the matter had been dismissed for want of prosecution the previous day.

3. The Plaintiff's advocate deponed that he has been diligent in prosecuting the matter; that it is only fair that the matter be reinstated and determined on merit and that reinstating and determining the suit on merits is in line with the Court's policy not to drive a litigant from the seat of Judgment without a hearing.

4. The Application was not opposed.

5. The Record shows that this suit came up for hearing on 16th July, 2019. On the said date, neither the Plaintiff nor his advocate were in court. The court, on its own Motion, dismissed the suit for want of prosecution.

6. The Plaintiff's advocate is seeking for the reinstatement of the suit on the ground that he had diarized the matter for 17th July, 2019 instead of 16th July, 2019. Counsel has informed the court that he indeed attended court on 17th July, 2019 when he discovered that the matter had been dismissed the previous day.

7. I have considered the depositions of the Plaintiff's advocate. I have also perused the extract of the Plaintiff's advocate diary for 16th July, 2019 and 17th July, 2019 and noted that he diarized the matter for 17th July, 2019 instead of 16th July, 2019.

8. The reason that counsel has given for his failure to attend court on 16th July, 2019 is plausible. Indeed, the failure to diarize the date of 16th July, 2019 on the part of counsel is an excusable error made out of a *bona fide* mistake.

9. For those reasons, I allow the Application dated 18th July, 2019 with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020.

O.A. ANGOTE

JUDGE