

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 5168 OF 1993

FRANCIS M MULWAPLAINTIFF

VERSUS

COAST BUS COMPANY.....DEFENDANT

R U L I N G

1. This is an application seeking to review and set aside the order of 17th November 2011 (Waweru, J). By that order the Plaintiff's suit was dismissed for non-attendance under **Order 12, rule 1** of the **Civil Procedure Rules, 2010** (the **Rules**).
2. The grounds for the application given on the face thereof are –
 - (i) That the Plaintiff has a plausible claim in this suit and has overwhelming chances of success.
 - (ii) That the order sought is in the interests of justice.
3. There is a supporting affidavit sworn by the Plaintiff's advocate, **Kennedy Asinuli**. He has deponed, *inter alia*, that on 29th September 2011 the case was taken out of the hearing list at the call-over because the Plaintiff had not complied with pre-trial procedures; that he was subsequently surprised to learn that the suit was dismissed on 17th October 2011; that the Plaintiff has since complied with pre-trial requirements; that he is ready to prosecute the suit without any further delay; and that it is only fair that the order of dismissal be set aside and the suit reinstated for hearing and determination on the merits
4. The Defendant was served with the application. No papers in response were filed, and there was no appearance for it at the hearing.
5. I have had occasion to comment in other matters that proceedings at call-over ought to be reflected in the files being called over. But apparently this is still not done. If a matter is taken out at call-over or some other order is made, surely this ought to be reflected on the file concerned! Otherwise how will anyone know that a certain order (for taking out for instance, as been claimed in the present application) was made in a file?
6. The possibility cannot be excluded that indeed this suit was taken out of the hearing list of 17th November 2012 by an order made in the call-over of 29th September 2011. At any rate there is no reply filed by the Defendant to gainsay the Plaintiff's claim in that regard.
7. I will in the circumstances allow the present application and set aside the order of dismissal of 17th October 2011. This suit is hereby reinstated for hearing. The Plaintiff should take a date for pre-trial directions as soon as possible. Costs of the application shall be in the cause. Those will be the orders of the court.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2014

H P G WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2014