

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 1039 OF 2015

JOHN NGIGI WOTHIRU.....PLAINTIFF

=VERSUS=

SMITH MUTURI KIRATU.....DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 11th May, 2018 seeking setting aside of the Court's orders of 3rd May, 2018 dismissing the Plaintiff's suit for non-attendance. The Applicant contends that on 15th February, 2018 he was present in Court when the case was due for hearing. The case could however not be reached due to pressure of work on the part of the Court. The case was adjourned to 3rd May, 2018 but the advocate who was holding brief for the Applicant's advocate recorded the case as having been set down for hearing on 23rd May, 2018.

2. The Plaintiff/Applicant could not attend Court on 3rd May, 2018 as he had been informed that the case had been adjourned to 23rd May, 2018. The Applicant only came to learn that the case had been dismissed for non-attendance from his neighbour who heard the Respondent bragging around how the Applicant's suit had been dismissed. The Applicant immediately contacted his lawyer who came to Court and perused the Court file where he confirmed that indeed the case had been dismissed for non-attendance on 3rd May, 2018. He states that the non-attendance was not deliberate.

3. The Respondent opposed the Applicant's application based on a Replying Affidavit sworn on 3rd November, 2018. The Respondent contends that the affidavit by the Applicant is contradictory and that the Applicant should have preferred an appeal against the dismissal instead of coming for setting aside the dismissal orders.

4. I have considered the Applicant's application as well as the opposition to the same by the Respondent. The only issue for determination in this matter is whether the orders of 3rd May, 2018 should be set aside. In an application of this nature, the Court has discretion either to set aside its own order or reject to set aside. The discretion of the Court is to help parties with honest mistakes but not to assist those who are out to take the Court for a ride.

5. In the instant case the Applicant has given the reason for failure to attend Court. I have looked at the Court record which shows that he has never missed Court at any single time other than 3rd May, 2018. This is a person who deserves exercise of discretion of the Court. I notice also that the Respondent had a counter-claim which was not addressed during the dismissal of the Plaintiff's case. I therefore allow the Applicant's application and set aside the orders of 3rd May, 2018 dismissing the Plaintiff's suit. The suit is hereby reinstated for hearing.

Cost of this application shall be costs in the cause.

Dated, Signed and delivered at Nairobi on this 10th day of April, 2019.

E.O.OBAGA

JUDGE

In the presence of Mr. Maina for Plaintiff and Defendant in person.

Court Assistant - Hilda

E.O.OBAGA

JUDGE

10.4.2019