



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NOS.125 & 126 OF 2015 (O.S)**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF LAND PARCEL NUMBER BARAGWI/THUMAITA/1140**

**BETWEEN**

**JOSEPH KATHURI MUGO.....PLAINTIFF**

**VERSUS**

**JAMES GICOBI KARANJA.....DEFENDANT**

**RULING**

The Applicant/Plaintiff vide a Notice of Motion dated 12<sup>th</sup> June 2019 brought under **Section 3A CPA, Order 10 Rule 11 CPR** seeks an order to have this suit reinstated. The Applicant also seeks an order that the costs be in the cause. The application is supported by grounds apparent on the face of that application and an affidavit sworn by Maina Kagio Advocate sworn the same date.

The application is opposed with a replying affidavit sworn by John Ndana Advocate filed in Court on 25.6.2019. In his supporting affidavit Mr. Maina Kagio Advocate deposed that when this matter came up for hearing on 11.6.2019 he had an urgent personal issue in the morning which he expected to complete in time to attend the hearing of this case. He therefore sent an advocate to request the Court to place this matter aside but by the time he arrived in Court at 1.20 p.m. the case had been dismissed for non-attendance.

He stated that the case was allocated for hearing at 12.30pm and the advocate who held his brief one Ms Nyangati sent him a text informing him of the same. When he arrived at the Court house it was slightly past 1.00 p.m. where he met with Mr. Ndana who informed him that the matter had been dismissed for non-attendance. He proceeded to the Court registry where upon perusal confirmed that the case was indeed dismissed for non-attendance. He found his clients near the customer care desk and he asked them why they were not in Court when the matter was being called out and they told him that they were waiting for him outside the Court room. The learned counsel stated that his lateness in arriving to Court was not deliberate. In the replying affidavit, Mr. Ndana deponed that this case was called in the morning of 11.6.2019 and the parties confirmed that they were ready to proceed with the hearing of the case. The Court allocated the case for hearing at 12.30pm when the matter was called out at 1.20 p.m. The plaintiff and his advocates were absent. The learned counsel deponed that no explanation has been given why the plaintiff were not in Court on the material day.

I have considered the affidavit evidence in support of the application. I have also taken into consideration the replying affidavit in opposition thereto. An application under **Section 3A CPA and Order 10 Rule 9** are discretionary exercised judiciary and not whimsically. The advocate for the plaintiff has explained that he requested an advocate to hold his brief who indicated to the Court that the plaintiffs were ready. The defence were also ready to proceed. The matter was then confirmed for hearing at 12.30pm. Some few minutes to 1.00pm, the matter was called out and neither the plaintiffs nor his advocate was present. The learned counsel Mr. Maina Kagio has given explanations why his clients were not in court. The explanations given for failing to attend Court in my view are reasonable and indeed satisfactory. I also note that after the suit was dismissed on 11.6.2019 the plaintiffs filed the present application to reinstate the suit the following day on 12.6.2019 under certificate. I find that the application has been brought timeously. In the result I find and hold that the delay caused by the plaintiff and his advocate was not deliberate and that the inconvenience caused to the opposite party can be compensated by costs. Consequently, I allow the application dated 12<sup>th</sup> June 2019 in the following terms;

- 1. The order of this Court issued on 11.6.2019 dismissing this suit for non-attendance and want of prosecution is set aside.**

**2. This suit is hereby reinstated.**

**3. The Plaintiff/Applicant to pay the Defendant/Respondent thrown away costs of Kshs.5,000/=.**

**READ and DELIVERED in open Court at Kerugoya this 28<sup>th</sup> day of June, 2019.**

**E.C. CHERONO**

**ELC JUDGE**

**28<sup>TH</sup> JUNE, 2019**

In the presence of:

1. Ms Nyagati holding brief for Mr. Maina Kagio
2. Ms Muthoni holding brief for Mr. Ndana
3. Court clerk - Mbogo