



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 320 OF 2011**

**JOHN ELIAS KIRIMI.....PLAINTIFF**

**VERSUS**

**MARTIN MAINA NDERITU.....1<sup>ST</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT**

**MARGARET WANJIRU NGARACHU.....3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

On 27<sup>th</sup> June, 2017, this suit was fixed for hearing on 25<sup>th</sup> January, 2018 in the presence of the advocate for the plaintiff and the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. When the matter came up for hearing on 25<sup>th</sup> January, 2018, only the advocates for the 1<sup>st</sup> and 3<sup>rd</sup> defendants turned up in court. The advocates for the plaintiff and the advocates for 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants did not attend court for the hearing. The plaintiff and, the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants' witnesses were also not in attendance. On application by the advocates for the 1<sup>st</sup> and 3<sup>rd</sup> defendants, the suit was dismissed for non- attendance.

What is now before the court is the plaintiff's application dated 12<sup>th</sup> March, 2018 seeking the setting aside of the said orders that were made on 25<sup>th</sup> January, 2018 and the reinstatement of the suit for hearing on merit. The application was brought on the grounds that the plaintiff's advocate was not aware that the suit was coming up for hearing on 25<sup>th</sup> January, 2018 although the date was taken in court in his presence. The plaintiff contended that when the date was taken, his advocate did not have a diary for 2018 and as such he did not enter the date in the diary. The plaintiff contended further that he had an arguable case with good chances of success and that it would serve the interest of justice if the suit was reinstated for hearing on merit. The plaintiff contended that he stood to suffer irreparable loss if the suit was not reinstated.

The application was opposed by the 3<sup>rd</sup> defendant through grounds of opposition and replying affidavit of Grace Gacambi Ngarachu, the attorney of the 3<sup>rd</sup> defendant both dated 11<sup>th</sup> September, 2018. The 3<sup>rd</sup> defendant contended that no good reason had been given to warrant the exercise of this courts discretion in favour of the plaintiff and that the plaintiff's advocate's negligence that led to the dismissal of the suit was inexcusable. The 3<sup>rd</sup> defendant contended that after the dismissal of the suit she invested further in the suit property and as such she stood to suffer huge financial losses if the suit was reinstated. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants did not oppose the application.

The application was heard on 29<sup>th</sup> January, 2019 when Mr. Kamunde appeared for the plaintiff, Mr. Munga for the 2<sup>nd</sup> defendant and Mrs. Kuria for the 3<sup>rd</sup> defendant. I have considered the plaintiff's application together with the two affidavits filed in support thereof. I have also considered the 3<sup>rd</sup> defendant's grounds of opposition and replying affidavit filed in opposition to the application. The power to reinstate a suit dismissed for non-attendance is discretionary. I have considered the reasons given by the plaintiff and his advocate for their failure to attend court on 25<sup>th</sup> January, 2018 when this matter was fixed for hearing.

I am in agreement with the 3<sup>rd</sup> defendant that failure on the part of the plaintiff to attend court on 25<sup>th</sup> January, 2018 was as a result of the negligence of the plaintiff's advocate. The question that I need to answer is whether I should punish the plaintiff for his advocate's negligence. In some cases, I would say that let the loss lie where it falls. In other words, a party suffering loss as a result of the negligence of his advocate should look to the advocate for recompense and should not be allowed to inconvenience other litigants and the court with applications like the one before me. In this case however, I am of the view that justice would not be done if the plaintiff is asked to look for a remedy from his advocate. I have considered the plaintiff's claim and I am in agreement that the same is arguable. I have also considered the general conduct of the plaintiff in these proceedings and I have noted that the plaintiff has never attempted to delay the hearing of the suit

by seeking adjournment or otherwise. Due to the nature of the subject matter of the dispute, the plaintiff may not recover adequate compensation from his advocates on record.

The 3<sup>rd</sup> defendant had contended that she would be exposed to possible loss if the suit is reinstated for hearing on merit. The 3<sup>rd</sup> defendant did not place before the court evidence of further expenses that she incurred after the dismissal of the suit. I am not satisfied that the 3<sup>rd</sup> defendant who has opposed the application would suffer loss which cannot be compensated in costs if the application is allowed.

Due to the foregoing, I find merit in the Notice of Motion application dated 12<sup>th</sup> March, 2018. The application is allowed to the extent that the order made on 25<sup>th</sup> January, 2018 dismissing this suit is set aside and the suit is reinstated for hearing on merit. The plaintiff shall pay to the 3<sup>rd</sup> defendant thrown away costs assessed at Kshs.15,000/= forthwith.

**Delivered and Dated at Nairobi this 18<sup>th</sup> day of July, 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Kamunde for the Plaintiff

Mr. Dar h/b for Prof. Ojienda for the 2<sup>nd</sup> Defendant

Mrs. Kuria for the 3<sup>rd</sup> Defendant

C. Nyokabi - Court Assistant