

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 345 OF 2013

SAMSON KIPKOSGEI CHEPKONG'A.....PLAINTIFF/RESPONDENT

VERSUS

CHEPKONG'A CHEBIEGO.....DEFENDANT/APPLICANT

RULING

The application is dated 2.3.2018 and seeks that the court varies, vacates, reviews and sets aside directions issued on 1.3.2018. According to the applicant, the matter was coming up for hearing of the defendant's application on 1.3.2018. The application was served upon the Plaintiff on the 24.2.2018 which was a Saturday and was received under protest. The plaintiff was not able to respond to the application due to time constraints. The applicant states that though he was in the court premises on the hearing date, he was not aware of the date because the matter was not diarized. The fault was due to the advocate and not the plaintiff/applicant.

The respondent filed a replying affidavit stating the suit was dismissed for want of prosecution. The date for the hearing of the application was taken by consent of counsel. The applicant has never filed the response in the application for dismissal for want of prosecution. There have been no negotiations between parties as alleged.

I have considered the application and heard submissions by both counsels and do find that the application for dismissal of the suit for want of prosecution was filed on 23.1.2017 and served on 24.2.2017, more than 12 months after it was filed. The application is deemed as having been served on 26th February, 2018 on the date it was supposed to be heard. On the 26.2.2018, the matter was adjourned as there was no evidence of service. The applicant herein was required to file the response within 3 days of service. The third day fell on the date of hearing the application and therefore, the applicant cannot be faulted for having failed to respond in time to the application for dismissal as required by law.

I do agree with Mr. Koros, learned counsel for the applicant that mistake of counsel should not be visited on the party when he states that the matter was not diarized by counsel who came to court on the 26.2.2018. I do further find that failure by the applicant to respond adequately to the application dated 23.1.2018 was due to late service of the said application. Conversely, the respondent has not explained to this court why he filed the application on 23.1.2017 and served the same on 26.2.2018, more than one year after filing the application. The reason advanced by the applicant's counsel for failure to attend court on the scheduled date was hardship caused by inadvertence due to failure by the representative of the applicant's counsel to diarize the hearing date, which is excusable. Though the application is not properly drafted as it seeks to set aside directions instead of vacating orders made on 1.3.2018, this is an error that can be corrected by the oxygen principle and Article 159 of the Constitution of Kenya, 2010 to enable the ends of justice meet.

The upshot of the above is that the application is allowed and that the orders made on 1.3.2018 are hereby vacated. The applicant to respond to the application dated 23.1.2018 within 3 days. The application to be heard on 18.4.2018. Costs to the applicant. Orders accordingly.

Dated and delivered at Eldoret this 12th day of April 2018.

A. OMBWAYO

JUDGE