



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. NO. 59 OF 2017 (FORMELY CIVIL SUIT NO. 59 OF 2012)**

**JOHN ROBERT MCTOUGH.....PLAINTIFF**

**VERSUS**

**WILLIAM ROMAN MC TOUGH.....1<sup>ST</sup> DEFENDANT**

**AIRPORT HOUSING CO-OPERATIVE SACCO.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF TITLES.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. John Robert Mctough, the Plaintiff, filed the notice of motion dated 13<sup>th</sup> May 2016 seeking to have the order of 11<sup>th</sup> May 2016 dismissing the suit for want of attendance and reinstating of the suit for hearing. The application is based on the three (3) grounds on its face; that the Plaintiff and his advocate knew the hearing was for 20<sup>th</sup> May 2016 and not the 12<sup>th</sup> May 2016; that the Plaintiff and his advocate had attended the court on all previous dates and that the application has been brought without undue delay. The application is supported by the affidavit of Thomas Agimba, counsel for the Plaintiff, sworn on the 13<sup>th</sup> May 2016 among other deponing that his clerk had erroneously indicated the hearing date as 20<sup>th</sup> May 2016 instead of 12<sup>th</sup> May 2016.

2. The application is opposed by William Roman Mctough, the 1<sup>st</sup> Defendant, through the grounds of opposition dated 28<sup>th</sup> July 2016.

3. The application came up for hearing on the 13<sup>th</sup> July 2016 when directions on filing and exchanging written submissions were given. The learned counsel for the Commissioner of Lands and the Registrar of titles, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants, indicated that they would not participate in the hearing of the application. Consequently, the counsel for the Plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> Defendant filed their written submissions dated 25<sup>th</sup> July 2016, 12<sup>th</sup> August 2016 and 19<sup>th</sup> August 2016 respectively.

4. The following are the issues for court's determinations;

**a) Whether the Plaintiff has established a reasonable cause why he did not attend the hearing on the 12<sup>th</sup> May 2016 when the order dismissing the suit was issued.**

**b) Who pays the costs of the application.**

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence, grounds of opposition, written submissions and come to the following determination;

a) That as accepted by counsel for the Plaintiff, the hearing of 12<sup>th</sup> May 2016 had been fixed by his representative and that of counsel for the 1<sup>st</sup> Defendant on the 9<sup>th</sup> December 2015.

b) That the failure to attend court on the 12<sup>th</sup> May 2016 by the Plaintiff and his advocate has been clearly explained through the supporting affidavit by counsel, and the explanation is reasonable and is accepted.

c) That as the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had attended court on the 12<sup>th</sup> May 2016, they are entitled to thrown away costs

to be determined by the court.

6. The Plaintiff's notice of motion dated 12<sup>th</sup> May 2016 has merit and is allowed in the following terms;

a) That the order of 12<sup>th</sup> May 2016 dismissing the suit for non- attendance is hereby set aside and the suit reinstated.

b) That the Plaintiff do pay the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Kshs. 5000/= (Five thousands) each as thrown away costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 26<sup>th</sup> DAY OF September 2018**

**In the presence of:**

Plaintiff Absent

Defendants Absent

Counsel Mr. Onyango for 2<sup>nd</sup> Defendant and holding brief for Odeny for 1<sup>st</sup> Defendant.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**