

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CIVIL APPEAL NO. 37 OF 2017

ABDI MOHAMMED KAHIYA.....PLAINTIFF

VERSUS

FATUMA HAJI KASIM.....DEFENDANT

RULING

What is before is the Notice of Motion dated 11th July, 2018. It is brought under Sections 1A, 1B, 3A CPA order 12 Rule 17 and Order 51 Rule 1 CPR as well as Article 159 of the Constitution of Kenya, 2010.

The appellant is seeking to set aside the orders of this Honourable Court issued on 10th July, 2018 dismissing this suit for want of prosecution. The application is supported by grounds shown on the body of that application and an affidavit of Mutundu W. Chege Advocate sworn on 11th July, 2018. In his supporting affidavit, the Learned Counsel deposed that the matter which had been fixed for hearing on 10th July, 2018 was wrongly diarized as coming up for hearing on 9th July, 2018 instead of 10th July, 2018. The lawyer having the conduct of the matter came to court on 9/7/2018 but was informed that the case was fixed for hearing the following day on 10/7/2018. The lawyer then wrote a letter requesting that the matter be adjourned to another date but the letter was not placed in the court file. The Learned Counsel stated that his failure to attend court during the hearing on 10/7/2018 was not deliberate but a genuine mistake which should not be visited upon the plaintiff.

The application is not opposed as no replying affidavit or grounds of opposition were filed and served despite service having been duly effected.

I have considered the application dated 11th July, 2018 together with the supporting affidavit. An application to set aside a dismissal order is a discretionary power which can be exercised upon being satisfied that there is a good reason for failing to attend court. The advocate for the applicant has given reasons that he diarized the hearing of this case wrongly and wrote a letter to the court requesting for adjournment of the case. That explanation in my view is satisfactory. In **PATEL –VS- EA CARGO HANDLING SERVICES LTD (1974) EA 75**, the court was faced with a similar application and held that the discretion of the court is not limited.

In the result, I find the application dated 11th July, 2018 merited and the same is hereby allowed. I make no order as to costs.

Read, Delivered and Signed in the open court this 25th day of September 2018.

E. C. Cheronu

ELC JUDGE

In the presence of;

1. M/s Dindi holding brief Chege
2. Ijabo – Court Clerk