



**REPUBLIC OF KENYA**

**IN THE ELC COURT OF KENYA**

**AT MERU**

**ELC MISC APPLICATION NO. 9 OF 2018**

**STEPHEN KINJA M' KIAIRA.....APPLICANT**

**-VS-**

**JOSEPH MICHUBU BIRITHIA.....RESPONDENT**

**RULING.**

1. This matter was filed on 14/3/2018 as an urgent miscellaneous application. The same was presented before the Judge the following day on 15/3/2018, where directions were given for the same to be heard on 9/4/2018 inter-partes. It appears that Applicants effected service and hence, their opponents were in court while applicant and his counsel were absent. The application was therefore dismissed. This prompted the applicant to file the present application dated 10<sup>th</sup> April 2018 for reinstatement of the previous application.

2. The Application is supported on the grounds on the face of it and on the affidavits sworn by two advocates, Kirimi Munene and Hosea Mutembei. Mr. Mutembei avers that he sought the assistance of his colleague, Munene Kirimi to prosecute the matter. According to Mr. Kirimi, he realized that he had checked the matter in the addendum cause list hence the confusion.

3. The Application was opposed by the Respondent via his Replying Affidavit filed in court on 7<sup>th</sup> May 2018, in which he deposed inter alia that on 9<sup>th</sup> April 2018, him and his advocate were in court while there was no appearance for his opponent, and therefore it was in order for his counsel to apply for the dismissal of the earlier application.

4. I have carefully considered this Application and the rival contentions by the parties and their submissions. The advocate for the applicant is shouldering the mistake, but avers that such mistake should not be visited upon the litigant. In the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] Eklr.** It was stated as follows;

***“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter”.***

5. I have perused the cause list of 9/4/2018 where by this matter was listed as no. 2 in the main cause list. However, there was indeed an addendum cause list containing several matters. Perhaps applicant's counsel did indeed look at the addendum instead of the main cause list. I have also taken into account that the present application was filed expeditiously, two days after the dismissal of the earlier application. This is also a case of 2018 and it has not marked time for long before this court. Against this background, I will exercise my discretion in favour of the applicant.

6. The application dated 10/4/2018 is hence allowed but with costs to Respondent.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 8<sup>TH</sup> NOVEMBER, 2018**

**IN THE PRESENCE OF:-**

C/A: Janet

Ashaba holding brief for Mutembei for applicant

Nkunja for respondent

Respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**