



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 405 OF 2012 (OS)**

**MARY WANJIRU NDUNGU.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**NGUGI GIKARA NGUGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOHN KINUTHIA GIKARA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**EUNICE WAIRUMU KARUNJI (sued as the legal administrator of the Estate of**

**JOSEPH P. KARUNJI GIKARA).....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 21<sup>st</sup> March 2017 brought under Order 12 Rule 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. It seeks order:-
  - (1) *Spent*
  - (2) *That this Honourable Court be pleased to set aside, vary or dispense with it's orders made on 20<sup>th</sup> March 2017 dismissing the plaintiff's suit for non-attendance and that the same be reinstated and heard on its own merit.*
  - (3) *That the cost of this application be provided for in any event.*
3. The grounds are on the face of the application and are listed as in paragraph i to vi.
4. The application is supported by the affidavit of Richard Kimani Charagu, Advocate for the plaintiff/applicant sworn on the 21<sup>st</sup> March 2017.
5. The application is opposed. There is a replying affidavit sworn by John Kinuthia Gikara, the 2<sup>nd</sup> defendant/respondent sworn on the 10<sup>th</sup> April 2017.
6. On the 31<sup>st</sup> May 2017, the court directed that the application be canvassed by way of written submissions.
7. It is the plaintiff's/applicant's submissions that the plaintiff/applicant and her son had arrived in court at 9.00 am and waited for the advocate outside the court. The advocate was held up and by the time he arrived in court the matter had been called out and the suit dismissed. A mistake of counsel ought not to be visited on the litigant. The plaintiff/applicant pleads that she be given a chance to prosecute her case.
8. It is the defendants'/respondents' submissions that the plaintiff/applicant is not interested in prosecuting his case. They pray that the application be dismissed with costs.
9. I have considered the notice of motion and the affidavit for support. I have considered the replying affidavit and the oral submissions of counsel. The issue for determination is whether the application is merited.

10. I have gone through the court record. On 20<sup>th</sup> March 2017, Mr. Charagu for the plaintiff came to court at 10:15 am. He explained the reasons for his absence when the matter was called out. The court noted his attendance.

11. I have gone through the affidavit in support of the application. I find that Mr. Charagu has given a reasonable explanation as to why he and the plaintiff/applicant were not in court when the matter was called out. This application was filed the following day after the suit was dismissed. I find that it has been brought without inordinate delay.

12. Article 50 (1) of the Constitution guarantees every person a right to be heard. I find that the plaintiff/applicant deserves a chance to prosecute her claim. No prejudice will be occasioned to the defendant/respondent if this suit is reinstated.

13. In conclusion, I find merit in this application and grant the orders sought namely:-

*(a) That the orders made on 20<sup>th</sup> March 2017 dismissing the plaintiff's suit for nonattendance are hereby set aside.*

*(b) That the suit is hereby reinstated.*

*(c) That the cost of the application be borne by the plaintiff/applicant.*

It is so ordered.

**Dated, signed and delivered in Nairobi on this 11<sup>TH</sup> day of DECEMBER 2018.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant