



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 30 OF 2007**

**HENRY NGUMBAU SYUMA** (*legal representative of the*

*Estate of ROBERT SYUMA KALUI –deceased*).....**PLAINTIFF**

**VERSUS**

**DAMARIS KAVETE SYUMA**.....**1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KITUI**.....**2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 22<sup>nd</sup> January, 2018, the Plaintiff is seeking for the following orders:

***a. That the Honourable Court be pleased to set aside the orders dismissing the Plaintiff's suit and all other consequential orders thereto.***

***b. That the Honourable Court be pleased to reinstate the Plaintiff's suit herein.***

2. The Application is premised on the grounds that the Plaintiff's failure to attend court and prosecute this matter was not a deliberate omission; that the Plaintiff was not served with a hearing notice nor a dismissal notice and that the suit should be reinstated.

3. The Plaintiff's advocate swore an Affidavit in which he deponed that he was not aware that the matter had a hearing date of 29<sup>th</sup> March, 2017; that he was not aware that the matter had been dismissed for want of prosecution until 4<sup>th</sup> December, 2017 when he went to fix the suit for hearing and that the Application should be allowed.

4. In his Replying Affidavit, the 1<sup>st</sup> Defendant deponed that the Plaintiff's advocate was served with the hearing notice by the court; that the Plaintiff's advocate has not given reasons as to why the matter took long to be prepared for trial and that the Application should be dismissed.

5. The record shows that this matter was slated for hearing on 29<sup>th</sup> March, 2017. Indeed, the matter was slated for hearing during "*the service week*" that was conducted by different judges to reduce the backlog of cases in the station.

6. Although the 2<sup>nd</sup> Defendant's advocate attended court on 29<sup>th</sup> March, 2017, the Plaintiff and his advocate were not in court. The Plaintiff's advocate has deponed that he did not attend court on the said date because he was never served with a hearing notice.

7. The copy of the hearing notice that was purportedly served on the Plaintiff's advocates does not show when the same was posted to the Plaintiff's advocate's address or whether the same was served personally on the Plaintiff's advocate. In the absence of a copy of a Certificate of Posting showing that indeed the hearing notice was posted, it is difficult for this court to assume that indeed the hearing notice was served on the Plaintiff's advocate by the registry.

8. It is trite that where there is no evidence to show that a party was notified of the hearing of a matter, any order made subsequent to the said lapse has to be set aside *ex dibito justitiae*.

9. Considering that it is the constitutional right of every litigant to be heard in a matter, I shall allow the Plaintiff's Application dated 22<sup>nd</sup> January, 2018. The said Application is allowed on condition that the suit is set down for hearing within ninety (90) days of the date of this Ruling.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7<sup>TH</sup> DAY OF DECEMBER, 2018.**

**O.A. ANGOTE**

**JUDGE**