



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 109 OF 2016**

**IRENE KATUMBU KIMANTHI.....PLAINTIFF/APPLICANT**

**VERSUS**

**PHILIP MWANIA.....DEFENDANT/RESPONDENT**

**RULING**

1. What is before me is the Application dated 28<sup>th</sup> September, 2016.
2. In the Application, the Plaintiff is seeking for the following orders:
  - a. The order made on 28<sup>th</sup> September, 2016 dismissing the Plaintiff's Application be set aside and the Application dated 9<sup>th</sup> September, 2016 to be reinstated and to proceed for hearing on merit.*
3. The Application is premised on the grounds that when the Application of 9<sup>th</sup> September, 2016 was called out in the morning, the Plaintiff was in court but his advocate was in the registry filing the return of service; that there was no Appearance or Replying Affidavit which had been served on the Defendant's advocate and that he was unaware that the Defendant's Advocate would be in court.
4. In response, the Defendant's advocate deponed that it is puzzling that the Plaintiff did not stand up when the matter was called out if indeed she was in court on 28<sup>th</sup> September, 2016; that is equally puzzling that the Plaintiff's advocate did not instruct an advocate to hold his brief and that it is clear that the Plaintiff and her advocate are not keen to prosecute the Application dated 9<sup>th</sup> September, 2016.
5. The parties' advocates appeared before me on 26<sup>th</sup> October, 2016 and informed me that they will rely on the Affidavits on record.
6. The record shows that on 28<sup>th</sup> September, 2016, when this matter was called out for the hearing of the Plaintiff's Application dated 9<sup>th</sup> September, 2016, neither the Plaintiff nor her advocate were in court.
7. In their absence, the Defendant's advocate applied for the dismissal of the Application for want of prosecution. The court granted the said oral Application and dismissed the Application dated 9<sup>th</sup> September, 2016.
8. The Plaintiff's advocate has filed an Affidavit in which he has deponed that on 28<sup>th</sup> September, 2016, he was in the registry filing the return of service when the matter was called out; that he walked in court when the matter had already been called and the Application dated 9<sup>th</sup> September, 2016 dismissed and

that he indeed spoke to the Defendant's advocate who was walking out of the court after the dismissal of the Application.

9. The record shows that the Defendant's advocate filed his Notice of Appointment and the Replying Affidavit on the eve of the hearing of the Application dated 9<sup>th</sup> September, 2016.

10. There is no evidence to show that on 28<sup>th</sup> September, 2016 when the matter came up for the hearing of the Application dated 9<sup>th</sup> September, 2016, the Defendant's advocate had served his colleague with the Notice of Appointment and the Replying Affidavit.

11. In the circumstances, I believe the Plaintiff's advocate's deposition that he was in the registry filing a return of service when the matter was called out.

12. The Plaintiff's advocate also filed the current Application the same day the Application was dismissed, meaning that he was in the precinct of the court.

13. In the circumstances, I allow the Application dated 28<sup>th</sup> September, 2016 as prayed.

**DATED AND DELIVERED AT MACHAKOS THIS 3<sup>RD</sup> DAY OF MARCH, 2017.**

**OSCAR A. ANGOTE**

**JUDGE**