



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT CHUKA**

**CHUKA ELC CASE NO 52 OF 2017**

**FORMRLY MERU ELC CASE NO.115 OF 2016**

**GRACE MARTHA MUKEMBU.....PLAINTIFF (BY COUNTERCLAIM)**

**VERSUS**

**KATHENYA RUGURU.....1<sup>ST</sup> DEFENDANT (BY COUNTERCLAIM)**

**MUKUNDI MAKEMBO.....2<sup>ND</sup> DEFENDANT (BY COUNTERCLAIM)**

**RULING**

1. The application which states that it is predicated upon Order 12 Rule (7) Civil Procedure Rules and Section 1A, 1B, 3A and 63C of the Civil Procedure Act is dated 10<sup>th</sup> October, 2017.

It seeks orders that:

- (a) The application be certified urgent and the same be heard ex-parte and on priority basis in first instance.
- (b) The honourable court be kind enough to set aside its order of 3<sup>rd</sup> October, 2017 dismissing the suit on account of non-attendance and reinstate the suit for hearing and determination merit (sic).
- (c) Costs of the application be in the cause.

2. The application has the following grounds:

- (v) Failure to attend court by the plaintiff and her counsel was not intentional but due to reasons beyond their control.
- (vi) The application is being made in good faith and without undue delay.
- (vii) The plaintiff/applicant stands to suffer great prejudice if the suit is not reinstated for hearing on merit.
- (viii) It is in the interest of justice that the suit be reinstated.

3. The application is supported by the affidavit of the plaintiff/applicant which states:

**“I, GRACE MARTHA MUKEMBU, the plaintiff/applicant herein do swear this affidavit and**

state as follows

1. That I'am the plaintiff/applicant herein competent to swear this affidavit in support of my application filed herewith.
2. That this matter was listed for hearing on 3<sup>rd</sup> October, 2017 before Hon. Ambasi C.M.
3. That, however, on Saturday 30.9.2017 my advocate Mr. Ndubi called and advised me not to travel to Chuka for the hearing of my case as he was unwell and would not be able to proceed with the matter in court.
4. That as a result I did not travel from Tharaka where I live and work for gain.
5. That, however, on 3<sup>rd</sup> October, 2017 at about 3.00pm Mr Ndubi advocate called to inform me that my suit had been dismissed for non attendance.
6. That at the same time my advocate Mr Ndubi explained to me the unfortunate circumstances surrounding the dismissal of my case among them that his office clerk had failed to abide by the instructions given to her and which explanation I verily believe to be true.
7. That indeed, therefore, failure by my advocate and myself to turn up in court on 3.10.2017 was a matter not within our control.
8. That given the nature of my suit, I stand to suffer great loss and damage if the suit is not reinstated for hearing on merit.
9. That the record will show that I have all along been keen on prosecuting my case.
10. That I plead with the honourable court to kindly reinstate my case in the interest of justice.
11. That all I have stated is true to the best of my knowledge and belief.

4. The application is also buttressed by a 2<sup>nd</sup> affidavit sworn by the plaintiff's advocate on 9<sup>th</sup> October, 2017. This affidavit states as follows:

**"I, JOSPHAT NDUBI an advocate of the High Court of Kenya do hereby swear this affidavit and state as follows:**

1. That I represent the plaintiff in this matter.
2. That the matter was scheduled for hearing on 3<sup>rd</sup> October, 2017.
3. That on the said date the matter was listed for hearing before Honourable P. Njoroge J.
4. That I was, however, not able to attend court owing to the fact that I have been unwell for a while.
5. That I had written to court through the Deputy Registrar on 2<sup>nd</sup> October, 2017 over this. A copy of the letter is annexed as "GMII".
6. That I had also called my client; the plaintiff and notified her of my condition and advised her not to travel all the way from Tharaka where she lives and works for a living.
7. That on 3<sup>rd</sup> October, 2017 I sent my office clerk one Jackline Kerubo Bikundo to have a copy of the aforementioned letter placed in the court file as well as to get a counsel to hold my brief and

request for an adjournment.

8. That, however, my said clerk for reasons not known to me failed to do so.

9. That I later learnt that the suit was dismissed for non-attendance as the said clerk sat in court and watched.

10. That I have since sent my said clerk on compulsory leave.

11. That I regret and apologize to the honourable court for my absence and that of my client.

12. That I am still not in a position to attend to my court matters as I am still sick.

13. That indeed, therefore, it was not at all intentional that the plaintiff and myself failed to turn up in court on 3<sup>rd</sup> October, 2017.

14. That I humbly pray that the suit be reinstated for hearing and determination on merit.

15. That it is the interest of justice that the orders so sought be granted.

16. That all I have stated is true to the best of my knowledge and belief.

5. On 11<sup>th</sup> October, 2017, advocate Kijaru prosecuted this application on behalf of Mr. Josphat Ndubi, the plaintiff's advocate. He told the court that he relied on the supporting affidavits, both sworn on 9<sup>th</sup> October, 2017, of the plaintiff and of his advocate. He told the court that the plaintiff's advocate could not come to court for the hearing of the case on 3<sup>rd</sup> October, 2017, because he was feeling unwell. He also told the court that it is the plaintiff's advocate who advised her not to come to court. He also postulated that an advocate's mistake cannot be visited upon his client.

6. I have considered the pleadings filed by the plaintiff in support of this application.

7. I note that a judgment was delivered in this matter. The plaintiff, Kathenya Ruguru, prosecuted his case and gave sworn evidence in accordance with the provisions of Order 12, Rule 2, of the Civil Procedure Rules.

8. Order 12 Rule 2 requires the attendance of the plaintiff. I opine that even where an advocate attends court, it is the non-attendance of the plaintiff that activates the invocation of the procedure decreed by this order.

9. In this matter, the plaintiff never attended the hearing of her suit but it is also pleaded that it is her advocate who told her not to attend the apposite hearing. I also note that the claim that the advocate had been sick on that day has not been supported by any evidence.

10. The submission by Mr. Kijaru, who was holding brief for the plaintiff's advocate, that an advocate's mistake cannot be visited on his client, whereas in some situations it may have merit, is a veritably hackneyed one. In this case, no mistake by the advocate is being visited upon his client. Order 12 Rule 2 requires the plaintiff to be in court for the hearing of his or her case. The plaintiff was not in court. One wonders how on earth suits can be heard and determined when the litigants choose not to come to court. It is squarely the mistake of the plaintiff that she did not come to court to participate in the intended hearing proceedings.

11. In the circumstances of this matter, I find that this application has no merit. I decline to set aside or vary the apposite judgment.

12. This application is dismissed with no order as costs.

13. The order that no costs are awarded to any of the parties applies only to this application.

14. It is so ordered.

Delivered in open court at Chuka this **12<sup>th</sup> day of October, 2017** in the presence of:

CA: Ndegwa

Applicant not in court.

**P.M. NJOROGI**

**JUDGE**