REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 158 OF 2013

JOSEPH MACHARIA NJUGUNA::PLAINTIFF

VERSUS

PENTECOSTAL HOLINESS CENTRE HURUMA::DEFENDNT

RULING

The application herein is dated 3rd November 2015 where the plaintiff prays for set aside of the orders of dismissal granted on 5th June 2015 and all consequential proceedings. Basically the plaintiff prays that the suit be reinstated and parties heard on merit.

The application is based on grounds that the plaintiff was not aware of the hearing date of 5th June 2015 and learnt of the orders when he visited his the advocates office. Moreover, that the plaintiff has been condemned unheard contrary to the rules of natural justice and that no prejudice will be suffered by the defendant.

The application is supported by the affidavit of Josephat Macharia Njuguna who states that he instructed the firm of M/s. A.G.A. Etyang & Company to institute the grant on his behalf and for some time he had not heard from them and visited them on 22nd October 2015. He was told that his advocate had been given work by the county government of Busia and that his case had been transferred to another advocate. He called his advocate on phone who instructed his secretary to take the plaintiff to court to CONFIRM the position of the case. At the court registry, he was informed that the case had been dismissed with costs on 5th June 2015 for non attendance. Mr. Etyang informed him that he had left active practice and was an employee of Busia County. The plaintiff decided to seek services of another advocate who brought this application, he claims that he was not informed of the hearing of the suit hence the mistake was not his but of his advocate.

The defendant filed a replying affidavit stating that most of the adjournments in the matter have been caused by the plaintiff. According to the defendant, no good reason has been given for the plaintiff inability to attend court on the scheduled date and that the applicants affidavit is full of falsehoods as Mr. Etyang had not sworn any affidavit. He contends that the inaction of the plaintiff and his advocate should not be visited upon the defendant.

I have considered the application and further submissions of both parties and do find that it is evident that the plaintiff was represented by AGN Etyang all through until he sought for employment with the county government of Busia. It is not contended that the plaintiff's counsel abandoned him and sought for employment into the said county government. It is trite law that no litigant should be made to suffer for the mistakes of the counsel. To fail to reinstate the same is to punish the plaintiff without affording him a hearing as the plaintiff ought to have a date at the seat of justice. This court has judicial discretion to set aside an order earlier made dismissing a suit in the interest of justice and on grounds that the applicant has come to court timeously. It is trite law that such discretion should not be exercised capriciously. I do find that the reasons given by the applicant for the reinstatement of the suit are valid.

The application is allowed, the firm of Chepseba Lagat and Company Advocate is allowed to come on record and that the orders of the court made on 5th June, 2015 are hereby set aside and the suit herein is reinstated for hearing on merit. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF MAY, 2016.

JUSTICE ANTONY OMBWAYO

ENVIRONMENT AND LAND COURT AT ELDORET