



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 50 OF 2013**

**RUPHAS MAKOKHA OTINGA ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**MTAKAYA SORE ::::::::::::::::::::::::::::::::::: DEFENDANT**

**RULING**

1. The applicant filed notice of motion dated 14/5/2014 in which he seeks among other orders an order setting aside this court's order of 9/4/2014 dismissing the applicant's suit with costs to the respondent. The applicant contends that when the suit herein came for hearing on 9/4/2014 neither he nor his advocate were in court. The suit was therefore dismissed with costs to the respondent. He contends that he was not notified of the hearing of 9/4/2014.
2. The applicant contends that his advocate then did not notify him of the hearing date and that the mistakes of his advocate should not be visited upon him and that in any event no prejudice will be suffered by the applicant if this court's orders of 9/4/2014 are set aside and the suit reinstated.
3. The application was opposed by the respondent through replying affidavit the respondent sworn and filed in court on 11/6/2014. The respondent contends that it is the applicant's advocate who took the hearing date and that there is no explanation from the advocate as to why he did not attend court. The respondent also contends that reinstating the suit will be a waste of judicial time as the suit was filed by an advocate who was not allowed to practice in 2013. The respondent further contends that the applicant has not demonstrated any vigilance in proceeding with his case.
4. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. This suit was dismissed for want of prosecution on 9/4/2014. This is after the plaintiff and or his advocate failed to attend court. The advocate for the defendant was present and is the one who called for its dismissal. A look at the court record shows that the hearing date had been taken by a representative of the plaintiff on 4/2/2014. When the case was called out for hearing on 9/4/2014, the plaintiff and his advocate were not present hence the dismissal.
5. The power to set aside orders of dismissal are discretionary. If the court is to set aside the dismissal order, the same should be done based on grounds which go to show that it was not the plaintiff's fault not to be in court during the dismissal. In the present case the date for hearing was taken by a representative of the plaintiff's counsel. The applicant is alleging that his then advocate (he now has another one) did not inform him of the hearing date. If this is the case, it would have been prudent that the applicant gets an affidavit from his former advocate confirming that he did not notify the applicant of the hearing date and why he did not do so. Regrettably, this has not been done. We cannot excuse the applicant when there is no explanation from his former advocate as to why he did not notify the applicant of the hearing date.
6. Another disturbing revelation is that the applicant's former advocate was not allowed to practice in the year 2013. This is confirmed from an extract from the Law Society of Kenya annexed to the respondent's replying affidavit which shows that his advocate was not allowed to practice for year 2013. There was no affidavit to dispute this. This explains why the applicant's former advocate could not offer any explanation in form of affidavit as to why he did not inform the applicant of the hearing date.

7. In the absence of a convincing reason as to why the plaintiff and his advocate could not be in court on 9/4/2014, I do not find any reason as to why I should exercise my discretion in favour of setting aside the dismissal order. The upshot of this is that I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 23rd day of September, 2014.

**E. OBAGA**

**JUDGE**

**In the presence of Mr Yano for Plaintiff/Applicant and M/S Nyakibia for Mr Ingosi for defendant/respondent.**

**Court Clerk – Kassachoon.**

**E. OBAGA**

**JUDGE**

**23/9/2014**