



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L NO. 83 OF 2012**

**Formerly HCC 167 of 2001**

**SUPINDER SINGH SAGOO.....PLAINTIFF**

**VS**

**KENYA COMMERCIAL BANK.....DEFENDANT**

**RULING**

The application before me is the application dated 23 April 2013 filed by the plaintiff. It is an application brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. It prays for the setting aside of the order of this court issued on 22 April 2013 whereby the plaintiff's application dated 22/4/2002 was dismissed for non-attendance on the part of the applicant. This application is supported by the affidavits J.C.Tarus Advocate and Betty Toroitich Advocate. The reasons given for non-attendance are inter alia that on the material day that the application dated 22 April 2003 was dismissed, Miss. Tarus, counsel for the applicant, had other matters in other courts and she requested a colleague to hold her brief. However, her colleague had stepped out briefly when the matter was called out. The colleague is Ms. Toroitich. Ms. Toroitich on her part has explained in her affidavit that she got instructions to hold brief for Miss. Tarus but she also had a criminal matter before the Deputy Registrar, being Eldoret Criminal Case No. 96 of 2013. She had gone to attend to the said matter when this suit was called out.

The application is opposed by Grounds of Opposition filed by the Respondent. Inter alia is averred that there was inordinate delay in prosecuting the application dated 22 April 2002 which is the application that was dismissed for non-attendance. It is also averred that the applicant is represented by two firms of advocates, and neither was there representation on the part of the second firm on the material day. It is also averred that the application that was dismissed seeks to amend the plaint to bring in a counterclaim but that counterclaim is now time barred.

Miss. Tarus, urged me to allow this application and have the dismissed application re-instated. She stated that her absence was not intentional and that her mistake ought not to be visited upon her client. She referred me to the case of *Tema Home Cares Limited vs Dismas Opande Ogot & 3 Others (2005) eKLR*. On the other hand, Mr. Kiplimo, counsel holding brief for Mrs. J.C.Chumba for the respondent urged me to dismiss the application. He stated that the applicants have had no interest in the application as the same was filed in 2003 and it remained unprosecuted even on the day that it was dismissed. He stated that there has been great delay. He distinguished the facts herein from the case of Tema Home Cares Limited as in that case, counsel had thought that the matter would not be in court as it was not cause listed for the day. In this matter, he stated that Miss. Tarus was aware that the matter was in court and simply failed to be present.

I have considered the application. I have considered the reasons given by Miss. Tarus as to why she was not present in court when the matter was called out. I am not persuaded that the reasons given by Miss. Tarus are reasons that would persuade me to exercise my discretion to set aside the order of dismissal. Miss. Tarus knew that the matter was in court. She opted to attend to other matters and left this one in the hands of another counsel who also had other matters before another court. She ought to have ensured that the advocate she had given the responsibility of holding her brief was reliable. The conduct of Ms. Toroitich is also not excusable. She was given a responsibility and if she knew she had other matters elsewhere, she ought to have declined the brief or at the very least delegated to another counsel when she went to attend to the criminal matter before the Deputy Registrar. It is abhorable practice to fail to attend

to a matter in which you have instructions. I am not persuaded that a failure by counsel to attend to a matter, because such counsel was also attending to another matter, is good reason to set aside an order of dismissal for non-attendance.

However, the applicant is entitled to a hearing and probably I ought not to visit upon the litigant the faults of her counsel in not attending to the matter. It is for this reason only, that a party is entitled to a hearing, that I allow this application.

The matter was dismissed because of the fault of counsel, who was rather careless I must say, in not being too keen on the matter. I allow the application and given the circumstances surrounding the dismissal, I award the respondent thrown away costs of Kshs. 5,000/=, which costs must be paid within the next seven (7) days and in default, the order for dismissal shall remain in force.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 10TH DAY OF JUNE 2013

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Read in open Court*

*In the Presence of:-*

*Mr. Ngumbi holding brief for Miss Tarus for the defendant/applicant*

*Mr. Mwinamo holding brief for Mrs Chumba for the Plaintiff/respondent*