

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 53 OF 2004

PHILIP. K. TOROITICH.....PLAINTIFF/APPLICANT

VERSUS

PAULINA CHEPKORIR MISOL.....DEFENDANT /RESPONDENT

RULING

1. The application by the plaintiff dated **25th April 2009** prays that the orders by this court dated **7th July 2008** dismissing this suit for want of prosecution be set aside and the suit be revived and set down for hearing. The application is supported by the sworn affidavit of **Elizabeth Chunge** counsel for the applicant and sworn on **8th June 2009**.

2. The application is not opposed despite the respondent being served. The applicant basic reason is that they were not notified of the intended dismissal as per the provisions of **Order XVI rule 2 of the Civil Procedure Rules**. In other words, neither he nor the advocate were invited to attend court.

3. The said affidavit contains several correspondences between the counsels for the applicant and the courts registry and it appears that as at the time the suit was dismissed the applicant had already complied with discoveries and all that remained was to set the suit for hearing. Apparently from the correspondence it appears that getting dates from the registry was difficult and that may explain why the matter was not fixed for hearing.

4. The court has perused the court file but has been unable to get the proceedings that dismissed the suit. The only proceedings are those on the file folder. There are no notes to indicate what transpired between **3rd November 2004** and **16th March 2021** when the matter was brought to the attention of this court.

5. Having stated so this court finds the reasons for dismissal not plausible for the court should have issued notice to the parties. The respondent has not attended court to oppose or otherwise explain her position.

6. On the face of it the applicant is the holder of the title for land parcel number **Kericho /Olenguruone/Kiptagich /100**. He alleges that the respondent encroached on it and he had been unable to settle. That claim ought to in the interest of justice and devoid of all technicalities be determined to its logical conclusion.

7. In the premises, the application is allowed as hereunder;

a. The orders issued on 7th July 2008 dismissing this suit are set aside and the suit is hereby reinstated.

b. This being a land matter and the same not having been heard is hereby transferred to the Land and Environment Court at Nakuru for hearing and determination.

c. The costs shall await the outcome of the main case.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 23RD DAY OF SEPTEMBER 2021

H. K. CHEMITEI

JUDGE