



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 243 O 2012 (OS)**

1. RICHARD KIMANI
  2. RICKY KILONZO NASON
  3. MUSYOKA DAVID MUTISO
  4. ROSE MUSEMBI
  5. EVANS ADELA
  6. AHMED OKOKO ADELA
  7. VICTOR GICHIRA KANGANGI
  8. JOSEPH MEMBA
  9. PETER NJUGUNA MUIRA
  10. TITUS KEEN MWANGI
  11. JOEL MUTURIA MUTURI
  12. ANDREW KAMAU NDEGWA
  13. SILAS MIRANDA ODERA
  14. EVERLYNE KEMNTO NYANGAU
  15. SYLVESTER JUMA
  16. JOHN NDUNGU MUREGWA
  17. DANIEL KITHOME
  18. NELSON KYALO MWIKYA
  19. JAMES MUTHEE MUREITHI
  20. JUSTUS NZIOKA MUTWIWA
  21. JONES NTHENGE MUE.....PLAINTIFFS/APPLICANTS
- =VERSUS=
- ROSEMARY B. KOINANGE.....DEFENDANT

## RULING

1. This is the notice of motion dated 31<sup>st</sup> October 2018 brought under Section 80 of the Civil Procedure Act, Order 45 Rule 1(1) (a) and (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

(1) *Spent.*

(2) *That this court be pleased to review the orders made on 15<sup>th</sup> March 2015 dismissing this matter for want of prosecution and reinstate the suit to be heard on merit.*

(3) *That costs be provided for.*

2. The grounds are on the face of the application and are set out in paragraphs (a) to (f).

3. The application is supported by the affidavit of Musyoka David Mutiso, the 3<sup>rd</sup> plaintiff/applicant sworn on the 31<sup>st</sup> October 2018.

4. The application is opposed. There is a replying affidavit sworn by Rosemary B. Koinange the defendant/respondent sworn on the 29<sup>th</sup> January 2019.

5. The application was canvassed by way of written submissions.

### **The plaintiffs'/applicants' submissions**

6. That they were never given any notice to show cause why the suit should not be dismissed and therefore condemned unheard. They have put forward the case of **Peter Kiboi Willie vs Family Bank Limited [2017] eKLR**. Further that there is no evidence that the plaintiffs were served with the said notice to show cause why the suit should not be dismissed for want of prosecution.

7. It is also their submissions that the delay is not inordinate. They have put forward the case of **Utalii Transport Company Limited & 3 Others vs NIC Bank Limited & Another [2014] eKLR**. The plaintiffs herein have been diligent and have taken steps to prosecute the matter. They were unable to trace the file and make the necessary application to set aside the dismissal and seek reinstatement of the suit.

8. The defendant has not demonstrated substantial prejudice on herself by any such delay. The plaintiffs' claim is valid and the suit ought to be determined on merit. They have put forward the case of **Mbogo & Another vs Shah**. They urge that the application be allowed.

### **The Defendant's/Respondent's submissions**

9. The honourable court correctly exercised its discretion to lawfully to set the matter down for notice to show cause. As at 13<sup>th</sup> March 2015, the said file had been inactive for 1 year and 5 months. The plaintiff's claim that their Advocates were never served with a notice to show cause by the court cannot stand. She puts forward the cases of **Fran Investments Ltd vs G4S Security Services Limited [2015] eKLR**.

10. The life of an advocate is governed by a cause list which is posted on the internet a day before the matter comes up for hearing. If the plaintiffs' advocate failed to attend court on that day as a result of not looking at the day's cause list, he was negligent and cannot gain from a favourable interpretation of the law.

11. The plaintiffs herein obtained injunctive orders to enable them to continue to trespass on the defendant's property and thereafter went to slumber. She has put forward the case of **Shah vs Mbogo [1968] EA 93; Bilha Ngonyo Isaac vs Kembu Farm Ltd & Another [2018] eKLR**. There has been unreasonable delay in bringing the application and the same ought to be dismissed with costs to the defendant.

12. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

13. I have gone through the court record. It is clear that no action was taken by the plaintiffs between 13<sup>th</sup> March 2015 and March 2017. There is no explanation offered by the plaintiffs for the delay.

14. Order 17 Rule 2 of the Civil Procedure Rules provides that:-

*2 (1) " In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."*

15. In the case of **Fran Investments Ltd vs G4S Security Services Ltd [2015] eKLR**, the court describes the phrase 'give notice' as used in Order 17 rule 2 (1) of the Civil procedure Rules as follows:-

*"Order 17 rule 2 (1) of the Civil procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of dismissal through its official website or through the cause list. And these mediums will constitute sufficient notice for purpose of order 17 rule 2(1) of the Civil Procedure Rules. But nothing precludes the court from serving notice as per order 5 of the Civil Procedure Rules."*

I am guided by the about authority in finding that the notice through the judiciary website and cause list was adequate notice to the parties.

**16.** In conclusion I find that no sufficient reasons have been advanced by the plaintiffs/applicants to warrant the reinstatement of this suit. There are also no sufficient grounds to warrant this court to set aside and/or review the orders made on 15<sup>th</sup> March 2015.

**17.** I find no merit in this application and the same is dismissed with costs to the defendant/respondent.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 25<sup>TH</sup> day of JULY 2019.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Kiama for the Plaintiffs

Ms Nduta Kamau for the Defendant

Kajuju - Court Assistant