



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**HCCC NO.609 OF 2010**

**NATIONAL CEREALS AND PRODUCE BOARD.....PLAINTIFF/APPL.**

**VERSUS**

**ABERDARES MAIZE MILLING CO. LTD.....1<sup>ST</sup> DEFENDANTS/RESP.**

**PATRICK KINYUA MUNYITO.....2<sup>ND</sup> DEFENDANTS/RESP.**

**JANE MUTONI KINYUA.....3<sup>RD</sup> DEFENDANTS/RESP.**

**R U L I N G**

This is a ruling on Notice of Motion dated 15<sup>th</sup> May 2017 brought under Articles 48 and 159 of the Constitution of Kenya, 2010 and Order 51 Rule 1 of the Civil Procedure Rules 2010. It seeks to set aside the order made on 22<sup>nd</sup> March 2017 dismissing this suit and subsequently the suit be reinstated and application dated 1<sup>st</sup> March 2017 be set down for hearing.

Grounds on the face of the application are that when this matter came up for Notice to Show Cause why it should not be dismissed on 20<sup>th</sup> February 2017, the Advocate for Plaintiff explained to Court the difficulties it was experiencing serving the Defendants with hearing notice as the firm of Kamau Kuria and Kiraitu Advocates had ceased acting for the Defendants; that the notice to show cause was extended to 22<sup>nd</sup> March 2017 when the matter was dismissed for non-attendance by Counsel for the Plaintiff; the Advocate who was holding for Counsel for the Plaintiff was held up before Justice Ochieng in Civil Suit No.272 of 2013.

The application is supported by Affidavit sworn by Julian Ochoki Advocate on 28<sup>th</sup> March 2017. She averred that on 22<sup>nd</sup> March when matter came up she had another matter before Justice Ochieng Hccc No.272/2013 which was listed no.2 in the cause list and this one which was listed no.11 in the cause list. She averred that the matter before Justice Ochieng took longer than she had anticipated and by the time she came to attend to this matter, it had been called out and dismissed for no-attendance by Plaintiff's Advocate who was required to show cause why this matter should not be dismissed for want of prosecution. She averred that dismissal of suit for non-attendance was through inadvertent mistake on part of its Advocate which is highly regretted. She averred that this application has been made expeditiously and Plaintiff's Counsel is not guilty of inordinate delay which is inexcusable. She averred that the Plaintiff will suffer irreparable consequences if the suit is not reinstated and that it will be in the interest of justice to allow this application.

The Defendants failed to file response to this application and failed to attend Court on 2<sup>nd</sup> October 2017 when this application came up for hearing. Counsel for the Plaintiff restated the averments in the supporting Affidavit. He added that matters No.1 to 9 in the cause list before me on 22<sup>nd</sup> March 2017 were interested and were dealt with together making this matter no.3 in calling out thus being reached earlier than anticipated by Counsel holding brief for the Plaintiff. He submitted that the Plaintiff has already filed all the documents and prayed that the suit be reinstated with conditions to set down for hearing the earliest date possible.

In response the Defendants filed Replying Affidavit sworn by the 1<sup>st</sup> Defendants director Patrick Kinyua Munyito on 29<sup>th</sup> June 2017. He averred that the allegation that the Defendants cannot be traced is frivolous; that the Plaintiff has not been keen in prosecuting this matter from 2010 up to 22<sup>nd</sup> March 2017 when the matter was listed for notice to show cause. He averred that there has been a long inaction from Plaintiff demonstrating that it has lost interest in this suit; that the delay is inexcusable and inordinate. He averred that failure by the Plaintiff to appear in Court to show cause is lack of due diligence on part of the Plaintiff's Advocate. He averred that the Plaintiff has not given reason for failure to prosecute. He averred that the Plaintiff's intention is to continuously harass the Defendants. He urged Court to dismiss the application.

The Defendants filed skeleton submissions together with Replying Affidavit.

This matter was scheduled for highlighting written submissions on 2<sup>nd</sup> October 2017. Counsel for the Defendants failed to attend Court for highlighting if submission. The date was taken by consent. I have however noted that the Defendants had attached skeleton submissions to the Replying Affidavit. Mr. Odera for Plaintiff while highlighting written submission restated the averments by Ms. Ochoki. He submitted that this matter was dismissed for non-attendance by Counsel as Ms. Ochoki had another matter before Justice Ochieng; that this matter which was listed as no.11 before my Court and was reached earlier than she expected. He said matters listed no 1 to 9 were mentioned together as they were related. He submitted that the Plaintiff has filed all the documents and prayed that the suit be reinstated with a condition to set it down for hearing the hearing time possible.

Defendants in the skeleton submissions filed, submitted that Ms. Ochoki has not explained why there is nothing on record to explain the delay. That the matter has been pending over the Defendants head for 7 years.

Defendants further submitted that the Plaintiff has not satisfied the requirement in the notice to show cause as there is no explanation in the Ms. Ochoki's Affidavit as why the matter has not been prosecuted for 3 years since 12<sup>th</sup> February 2014; that the Plaintiff has been complacent and casual in the manner they have handled this suit. Defendants submitted that the Plaintiff has not demonstrated that the Court exercised its discretion improperly by dismissing the suit for non-attendance and prayed that the application be dismissed.

I have considered submissions by both parties. I wish to consider sufficient reasons have been advanced by the Plaintiff to warrant reinstating this suit. On nonattendance by Counsel for Plaintiff to show cause why the suit should be dismissed I have perused the attached cause list and confirm that it is true matters listed from no.1 to 9 are related; the parties are one law firm against Blue Shield Insurance. Ordinarily under such circumstances one file may be mentioned and the orders made apply to subsequent files. That could explain the Plaintiff's allegation to the effect that the file was reached earlier than the Advocate anticipated.

I am satisfied with the Counsel for the Plaintiff's explanation for non-attendance on 22<sup>nd</sup> March 2017 for notice to show cause.

I now wish to consider whether the Plaintiff has given sufficient explanation for failing to prosecute this suit. In the Affidavit supporting the application, Counsel for the Plaintiff averred that after the firm of Kamau Kuria ceased acting, the Defendants failed to appoint another Advocate to represent them.

He added that they made numerous attempts to serve the Defendants but documents send were returned; that the Plaintiff and the process server have been unable to physically trace the Defendants for purposes of service.

I have perused the Court file and confirm that the firm of Kamau Kuria and Kiraitu Advocates were granted leave to cease acting for the Defendants on 12<sup>th</sup> February 2014. On 6<sup>th</sup> August 2014, the Plaintiff fixed a mention for 17<sup>th</sup> September 2014. There was no appearance by Defendants on the mention day. No other date was taken by the Plaintiff until 20<sup>th</sup> February 2017 when the matter was scheduled for notice to show cause. Plaintiff requested for time to file response to notice to show cause. Plaintiff was granted 7 days to file response. On 22/2/2017 the matter was adjourned on ground that the Plaintiff had difficulties serving the Defendants. On 22/3/2017 none of the parties attended Court. This matter was dismissed for want of prosecution. I also note from the Court record that the Plaintiff sought to serve Defendants by way of advertisement and was allowed on 24/4/2017. An advert in respect of this application was done in the newspaper dated 15<sup>th</sup> June 2017. I have also seen letter dated 17<sup>th</sup> June 2016 forwarding copy of mention notice to the Defendants. Mention notices for 23/10/2014, 24/10/2014, 29/7/2015, plus certificate of postage have been annexed to the Affidavit in support of application.

Record show that the Defendants appointed the Advocates who are currently on record on 20<sup>th</sup> June 2017; this is after service by advertisement was done by the Plaintiff. From the forgoing it is evident that the Plaintiff had difficulties reaching the Defendants after their Advocate ceased acting. Delay in prosecuting this suit is not entirely on the part of the Plaintiff. It is evident that delay by Defendants in engaging Advocates contributed to the delay in prosecuting this suit as they could not be reached for service. I therefore find it appropriate to reinstate this suit so that the issues between parties herein may be disposed of on merit. I do reinstate this suit on the following conditions:

- That the suit be set down for hearing within 30 days from today's date.
- That the Plaintiffs pays the Defendants thrown away costs of Kshs. 20,000 within 14 days from today's date.
- Failure to comply with any of the above conditions the suit to stand dismissed.

**Dated and Delivered at Nairobi this...24<sup>th</sup> ...day of...October.....2017**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT

.....COUNSEL RESPONDENT