



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 348 OF 2005**

**HOUSING FINANCE COMPNAY OF KENYA LTD.....PLAINTIFF**

**-VERSUS-**

**CHARLES KINGORI MUREITHI.....1<sup>ST</sup> DEFENDANT**

**HELLEN MUTHONI NJIRU.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**STEPHEN WAWERU MURIUKI.....4<sup>TH</sup> DEFENDANT**

**HELLEN WANJIRU MURIUKI.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The **Notice of Motion** Application before the court is dated 9<sup>th</sup> December 2015 filed by the Plaintiff. The application seeks that the suit, which was dismissed for want of prosecution on 16<sup>th</sup> June 2015, be reinstated.
2. The application is premised on the grounds set out therein and is supported by affidavit of Nancy Wangari Karanu sworn on 9<sup>th</sup> December 2015.
3. The Applicants case is that the court on its own motion dismissed this matter for want of prosecution on 17<sup>th</sup> June, 2015. The matter was listed for dismissal on 16<sup>th</sup> June, 2015 and when the Plaintiff's Advocate attended court on the said date, the matter was not listed on that day's cause list, upon enquiry at the registry the Plaintiff were directed to come to court on 18<sup>th</sup> June, 2015. On 18<sup>th</sup> June, 2015 the Plaintiff attended court when the matter was listed before Justice Otieno but the same was stood over to 24<sup>th</sup> June, 2015. On 24<sup>th</sup> June 2015 the Plaintiff attended court. However the matter was not listed in the cause list and their attempts to have the file taken to court were futile as the court file could not be traced from the registry.
4. Following this, the Plaintiff's Advocate wrote to the Deputy Registrar on 1<sup>st</sup> September, 2015 enquiring the whereabouts of the file.
5. The Plaintiff was surprised when they received a Notice dated 17<sup>th</sup> June, 2015 indicating that the matter was dismissed on the even dated for want of prosecution. The Plaintiff's case is that it is not clear how the matter was dismissed since on 18<sup>th</sup> June, 2015, the matter was listed before Justice Otieno who stood over the matter to 24<sup>th</sup> June, 2015. The plaintiff's case is that it is in the interest of Justice that the Application herein be heard on priority.
6. The application is opposed by the Defendant/Respondent vide Grounds of Opposition filed herein on 7<sup>th</sup> March 2016. The Respondent's case is that the Application is frivolous, vexatious and an abuse of the court process; that the Application is fatally defective and bad in law; that the Application is unmeritorious; ill-conceived and is brought in bad faith; that the Application lacks merit and is incompetent; that the balance of convenience lies in favour of the 4<sup>th</sup> and 5<sup>th</sup> Defendants; that the Plaintiff/Applicant is guilty of delay as this matter was last in court on 13<sup>th</sup> December, 2013 and the Plaintiff failed to take any steps to prosecute the same for two (2) years; that the Applicant did not bring sufficient grounds and/or evidence to merit the orders sought; that Equity aids the vigilant not the indolent, and that it is in the interests of justice that the Plaintiff/Applicant's application be dismissed.

7. I have carefully considered the application to reinstate the suit. While I have believed the Applicant's submissions that they could not access the court file for a long time leading to the dismissal of the suit on 17<sup>th</sup> June 2015 for want of prosecution, still the uppermost issue in my mind, which I raise in this matter for the determination by this court, is whether or not the plaintiff was given notice that the suit would be dismissed for want of prosecution. I have looked at the record. The only record on file is that on 17<sup>th</sup> June 2015 the suit was dismissed under order 17 Rule 2 of the Civil Procedure Rules. On that day there was no attendance by either the Plaintiff's or the Defendants' counsel. Further there is no evidence on record that the notice to show cause was served upon the parties. It is a cardinal rule of justice that a suit cannot be dismissed without letting the Plaintiff know about the process. In this matter, apart from the fact that I believe the Plaintiff tried its best to access the file but failed, the fact that there is no evidence that the notice to show cause was served upon the Plaintiff is an additional satisfaction that the application must be allowed to affirm the rule that under Order 17 Rule 2 of the Civil Procedure Rules a Notice to show cause why a suit should not be dismissed for want of prosecution must be served upon the Plaintiff. In the absence of such notice a dismissal under the said Order, if challenged, must be set aside.

8. For the foregoing reasons, the Plaintiff's application herein dated 9<sup>th</sup> December, 2015 is allowed with no orders as to costs.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 19<sup>th</sup> DAY OF MAY 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Wilson for Plaintiff

No Appearance for Defendant 1 – 3<sup>rd</sup>

No Appearance for 4<sup>th</sup> and 5<sup>th</sup> Defendants

Teresia – Court Clerk