

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANICOMMERCIAL COURTS)**

Civil Case 414 of 2007

**SARAH OLAKA.....1ST PLAINTIFF
JOEL OCHEYO2ND PLAINTIFF
CHARLES MUTHIKE GATHIGAI3RD PLAINTIFF
VERSUS
CITY COUNCIL OF NAIROBI.....DEFENDANT**

RULING

1. On 29th October 2009 this suit was dismissed under Order 16 of the Civil Procedure Rules for want of prosecution. The court on its own motion had issued a notice to show cause why the suit should not be dismissed. The defendants appeared and since there was no appearance on part of the plaintiff a no cause was shown the matter was dismissed. On 22nd April 2010 the defendant filed chamber summons under order 9(b) seeking for orders to set aside the order of 29th January 2010 and all the consequential orders including a bill of costs which was filed on 11th March 2010 by the defendants. This application is based on the grounds that there are good reasons why the suit should be reinstated. The plaintiff's claims against the defendant is substantial. Secondly, counsel for the plaintiff submitted due to the post election violence that locked the country following the 2007 general elections he had temporary lost contact with the plaintiffs who were affected. Counsel was however able to establish contact with the plaintiffs some times in July 2008. He learnt that the 2nd plaintiff was murdered during the post election violence and it was not until August 2009 that the advocate managed to get a son of the deceased plaintiff so that they could obtain interim letters of Administration to substitute the plaintiff's. Counsel made several attempts to fix the matter for hearing but the file could not be traced. He annexed a copy of the grant of letters of Administration and several letters which were written to the other advocate to attend court with a view of fixing a hearing date. It will be in the interest of justice to reinstate the suit on the part of the defendant this application was opposed. Secondly, the notice to show cause was not served upon the plaintiff's advocates. They were not aware the suit had been dismissed until when they were served with the bill of costs.

2. Counsel relied on the replying affidavit of Mr. J.M. Wambugu sworn on 10th June 2010. According to the defendant no reasonable explanation has been given why the plaintiff failed to fix the matter for hearing. He urged the court to ignore the invitation letters written to the advocate for fixing. There is no letter written to the registrar seeking to reconstruct the file or seeking the where about of the file. The notice to show cause was served upon the plaintiff and it was served upon the defendant but the plaintiff failed to attend court to show cause. Counsel asked the court to observed public policy that requires court matters to be disposed off expeditiously and dismiss this application.

3. I have taken into account the rival submissions. I have also gone through the records there is no indication by the process server that the notice to show cause was served upon the advocates for the plaintiff's. Secondly, the plaintiffs have demonstrated through the bundle of documents attached to the application that they made efforts to fix the matters for hearing. Several letters were written to court but the court file was missing. This is a perennial problem with the court whereby sometimes the files gets misplaced. The third reason and most compelling is that one of the plaintiff's Joel Ocheyo the 2nd plaintiff passed away on 21st January 2008 and it took time for the advocate to locate the next of keen and to apply for letters of administration. For those reasons I exercise my discretion and allow the application to reinstate the suit. I set aside the order of 29th October 2009 and reinstate the suit for hearing. Costs of this application will be in the cause. The plaintiff to take the necessary steps and prosecute the matter.

RULING READ AND SIGNED ON 16TH JULY 2010 AT NAIROBI.

M. K. KOOME
JUDGE