



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

**Civil Suit 310 of 2002**

**SIMON WAITI KIMANI ..... 1<sup>ST</sup> PLAINTIFF**  
**JAMES KIMARI KIMANI ..... 2<sup>ND</sup> PLAINTIFF**  
**ROBERT KIMOTHO KABABU ..... 3<sup>RD</sup> PLAINTIFF**  
**JANE WANJIRU NDUATI SUING AS THE PERSONAL LEGAL REPRESENTATIVE OF JOSEPH**  
**NDUATI KIMEMIA (DECEASED) ..... 4<sup>th</sup> PLAINTIFF**

**VERSUS**

**EQUITY BUILDING SOCIETY .....DEFENDANT**

**RULING**

**1.** On 18<sup>th</sup> September 2009 this suit came up for the hearing of the notice to show cause why the suit should not be dismissed for want of prosecution. No cause was shown and the suit was dismissed under order the provisions of rule 16 of the Civil Procedure Rules for want of prosecution. None of the parties appeared to show cause. On 26<sup>th</sup> May 2010, the plaintiff's applicants filed this chamber summons under order 9 (b) Rule 8 of the Civil Procedure Rules seeking to set aside the order of 18<sup>th</sup> September 2009, and the suit be reinstated for hearing on merit. This is on the grounds that the claim in the suit is in respect of land which was charged to the defendant and the plaintiff had already paid an aggregate sum of Ksh.4.995,887.50 towards the settlement of the loan.

**2.** Secondly, the advocates who are on record for the plaintiff that is Messrs Cerere Mwangi & Co. advocates failed to send a representative to court to show cause why the suit should not have been dismissed. This application is supported by an affidavit of **Fredrick Collins Omondi** sworn on 26<sup>th</sup> May 2010. The deponent is an advocate, he states that the plaintiffs were informed by a clerk of Mr. Cerere Mwangi & Co. Advocates that he ceased to practice sometimes in 2004 and relocated to the United States of America. That is when Mr. Omondi visited the court registry on 15<sup>th</sup> March 2010 and noticed the suit was dismissed for want of prosecution. The advocates did not attend court and the mistake of counsel who was on record should not be visited on an innocent client.

**3.** This application was opposed, firstly it was faulted citing the wrong provisions of the law, Order 9(B) deals with the situation where the party did not attend court and where judgment was entered or suit was dismissed for non attendance but the present application should have been made under

the provisions of Order 16 Rule 6 which allows the plaintiff to file a fresh suit subject to the law of limitation. There is no provision for reinstating the suit which is dismissed by the court on its own motion. It is contended that the plaintiff's advocate left the country in 2004, while this application was made after inordinate delay on 26<sup>th</sup> May 2010. In essence the plaintiff admits that they took no steps for 6 years to prosecute this matter.

4. The courts have discretion generally to reinstate a suit which is dismissed for non attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay. This suit was filed on 12<sup>th</sup> March 2002 and since 29<sup>th</sup> November 2004 no steps were taken to prosecute it. It is the court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the year 2004. The plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years.

5. Even if this court were to exercise its discretion in favor of the plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the court dismissed the suit for want of prosecution. According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation. In this case I am not satisfied with the reasons given by the plaintiff. Accordingly I decline to reinstate the suit and the application is dismissed with costs to the defendant.

**RULING READ AND SIGNED ON 9<sup>TH</sup> DAY OF JULY 2010 AT NAIROBI.**

**M.K. KOOME**  
**JUDGE**