



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 55 OF 2011**

**PETER MUNYUA MBUGUA**

**(Suing as the Administrator Ad Litem of the Estate of**

**Patrick Ndai Munyua).....PLAINTIFF/APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF POLICE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 10<sup>th</sup> March, 2017, the court dismissed the Applicant's suit pursuant to a Notice which had been issued for the parties to show cause why the suit should not be dismissed for want of prosecution. On the said date, the Applicant did not attend court to show cause and it is his contention that he was not served with the notice to show cause and that he became aware of the dismissal later upon perusal of the file. It is because of the foregoing that the Applicant filed the Notice of Motion dated 2<sup>nd</sup> August, 2017 under the provisions of section 3A of the Civil Procedure Act and Order 12 rule 7 of the Civil Procedure Rules seeking orders that the orders made on 10<sup>th</sup> March, 2017 be set aside, the suit be reinstated and a hearing date be fixed on priority basis. The Applicant also seeks costs of the suit.

2. The application is supported by the affidavit of **JAMES XAVIER KIRONJI** the Applicant's Advocate who deponed that since the suit was filed, he had been sending his representative to the registry to file documents to comply with pretrial directions but was being told that the file was missing and could not be traced. He depones that after writing a letter dated 11<sup>th</sup> July, 2017 his representative was informed that the case had been dismissed on 10<sup>th</sup> March, 2017. The Applicant further depones that he was never served with the Notice to show Cause and that he suspects mischief as the same was served upon the Attorney General and despite his address having been well captured on the Notice, the same was never served upon him. The applicant avers that it would be prejudicial and highly unfortunate to punish the Plaintiff for a mistake which is neither his nor his advocate's but the courts mistake for failure to serve the Notice upon him. In the interest of justice he pleads to have the plaintiff allowed to prosecute his suit as the defendants will not be prejudiced in any way if the court allows the application.

3. The defendants did not file a response neither did they appear in court on 21<sup>st</sup> March, 2018 when the Application was argued.

4. The Applicant has explained that he was not served with the Notice to show cause and that is the reason he was not able to respond to the same. I have perused the file and it is true that there is no affidavit of service of the same neither is there a copy of the Notice which was received by the Applicant.

5. Order 17 Rule 2 (2) gives the court the discretion to make the appropriate orders if cause is shown to its satisfaction. It states that “(2) ***If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.***”

6. The Applicant has explained the reasons why he did not attend Court on 10<sup>th</sup> March, 2017 and this court is satisfied that the notice to show cause was not served upon him. That being the case, he could not have been aware that the suit was listed for dismissal. On the delay in prosecuting the suit, it is the Applicant’s submission that he did his best to comply with the pretrial directions but could not file the necessary documents as he was told that the file was missing from the registry. As deponed by the applicant, I find that the defendants will not be prejudiced in any way if the suit is reinstated. The defendants did not file a response to the application. The Court also notes that this is a long outstanding suit having been filed in the year 2011 and there is a need to have the same prosecuted expeditiously.

7. Therefore, the orders of this court are that the orders issued on 10<sup>th</sup> March, 2017 are hereby set aside and the suit is reinstated. The Plaintiff to prosecute the suit within the next 120 days from the date of this ruling failing which the same shall stand dismissed. A hearing date to be given on priority basis.

**Dated, Signed and Delivered at Nairobi this 10<sup>th</sup> Day of May, 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... *For the Applicant*

.....*For the Respondent*