



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 104 OF 2010

EZEKIEL KIRWA

MZEE ARAP KITUR (*on their own behalf and*

***on behalf of 13 Others.....*PLAINTIFFS/APPLICANTS**

VERSUS

MICHAEL KIPRUTO MISOI.....1ST DEFENDANT/RESPONDENT

NIXON KIPSANG.....2ND DEFENDANT/RESPONDENT

JONATHAN SERONEI.....3RD DEFENDANT/RESPONDENT

JOSEA KAPTICH KIRWA.....4TH DEFENDANT/RESPONDENT

JOSEPH CHERUIYOT KUTUNY.....5TH DEFENDANT/RESPONDENT

NOAH K. BARNG'ETUNY.....6TH DEFENDANT/RESPONDENT

RULING

1. This is a ruling on the application dated **14th February, 2019** which was filed in court on **15/2/2019**. That application has been brought by the plaintiffs seeking orders that the plaintiffs' suit be re-instated for hearing and determination on merit. They also ask for costs of this application be provided for and in any event the same be in the cause.

2. The grounds on which the said application is made are that this suit came up for Notice To Show Cause why the suit should not be dismissed on **7th February, 2019**; that the matter was erroneously listed as a hearing and was thus called out at **9.00 a.m.** when the plaintiffs' advocate was not in court yet mentions are in practice called out at **12.30 pm** by which time he was already in court ready to represent the plaintiffs in showing cause why the suit ought not be dismissed; that the suit was thus dismissed without giving the plaintiffs a hearing; that the plaintiffs had valid reasons for delay in fixing the matter for hearing as they had been pursuing administrative channels to stop the defendants from obtaining titles using unscrupulous means while others were unwell leading to delay in giving their advocates sufficient instructions for timely prosecution of the case; that the plaintiffs are ready, able and willing to prosecute the matter within such period as the court shall direct; that the plaintiffs are ready and willing to abide by any conditions or terms to be set by the court for the grant of the orders sought; that the plaintiffs stand to suffer irreparably as they will have been driven away from the seat of justice without being given a hearing notwithstanding the valid claims they have against the defendants who have unscrupulously, fraudulently and illegally hived off huge portions of their land and sold it to strangers to their detriment; that the **Constitution of Kenya (2010)** enjoins the court to seek to attain substantive justice in determining matters before it without paying undue regard to procedural technicalities and that the application has been brought in good faith and without undue delay.

3. The application is supported by the affidavit of **Amos K. Magut** counsel for the applicants sworn on **14/2/2019**. The said deponent reiterates the grounds earlier set out hereinabove in detail.

4. In his reply to the application, the defendants filed replying affidavit dated 25/2/2019 sworn by the 1st defendant. That affidavit and indeed the applicant's application set out many matters that will be of relevance only if this court reinstates the suit as prayed and sets it down for the hearing of the notice to show cause. It is not proper for the parties to act as if the matter has already been reinstated. This court will only consider matters relevant to the reinstatement orders sought.

5. As to the issue of reinstatement I consider that the application has raised good grounds in that the matter was called out on the appointed

date at an hour when it would be least expected by the counsel to be called out; as a result he was absent and the notice to show cause was not heard and the suit was dismissed. It is on the record that Mr. Magut appeared at a later hour on the same date of dismissal, and asked this court to mention the matter and set aside the dismissal order upon his oral application, and the court declined to do his bidding and this refusal was only for purpose of maintaining orderliness than any other ground. Mr. Kiarie for the defendants was also present at that hour.

6. This court is minded to do substantive justice to the parties regarding the dispute as to whether the suit should be dismissed for want of prosecution and it finds it necessary to set aside the dismissal order that was made out of inadvertence.

7. I find that the application dated **14/2/2019** has merit, and I grant **prayer No. 2** thereof but only to the extent that the parties shall appear before this court on a date to be fixed by consent to justify why this suit should not be dismissed for want of prosecution. The costs of that application shall be in the cause.

Dated, signed and delivered at Kitale on this 13th day of March, 2019.

MWANGI NJOROGE

JUDGE

13/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Magut for plaintiffs

Mr. Kiarie for defendants

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

13/03/2019