

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 221 OF 2010

JAVAN NICHOLAS ONDEKO OMOLO.....1ST PLAINTIFF

SHADRACK AMAKOYE BULIMO.....2ND PLAINTIFF

VERSUS

EVANS M. IJESA.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

The applicants filed this suit on 10/5/2010 seeking a declaration that the 1st Plaintiff is the legal owner of the piece of land known as Umoja Innercore Plot No. B 52 Sector 1 NCC USAID Housing Scheme, Nairobi (“the Suit Property”) on the grounds that the 2nd Defendant had approved allocation of this property to the 1st Plaintiff vide the letter of allotment Ref No. PD/XIX/1123 dated 31/8/1978, who in turn sold it to the 2nd Plaintiff.

The 1st Defendant did not enter appearance. The 2nd Defendant filed a statement of defence dated 14/6/2010 denying the Plaintiffs’ claim.

The suit was dismissed on 18/03/2015 under order 17 Rule 2(1) of the Civil Procedure Rules. Following the dismissal, the Plaintiffs’ filed the application dated 7/7/2018 seeking to set aside the orders of 18/03/2015 which dismissed the suit for want of prosecution and to reinstate it for hearing *inter partes*. They also seek an order to preserve the Suit Property pending hearing and determination of the suit.

The application was premised on grounds that the Plaintiffs had been actively pursuing the matter, but the suit was dismissed for want of prosecution in the absence of counsel for the Plaintiffs who was not served with the Notice to show cause why the suit should not be dismissed. The application was supported by the affidavit of the 2nd Plaintiff who deponed that he bought the suit land from the 1st Plaintiff herein through a power of attorney and that he took possession of the Suit Property. He deponed further that while he was making efforts to have the Suit Property registered in his name, he discovered that the 2nd Defendant had fraudulently purported to allocate the same plot to the 1st Defendant and backdated the date of the allocation to 03/03/2008. He filed this suit to protect his interest in the Suit Property but the matter stalled and his advocate informed him that this was because the court file was missing. Dissatisfied with his advocate’s answer, he decided to change his advocates. However, his new advocates could not trace the file at the registry. He averred that this prompted him to approach the office of the Judiciary Ombudsman in August 2016 to lodge his complaint about the missing file under ticket number 1024292. He also deponed that he finally discovered that the suit was dismissed without his knowledge and without his previous advocate’s knowledge. He stated that he will have been condemned unheard if the suit is not reinstated, which would be an injustice to him because he has a good case with a probability of success. The 2nd Defendant did not attach any evidence to his affidavit in support of the averments over the loss of the court file and the complaint he says he lodged with the Ombudsman of the Judiciary.

The 2nd Defendant opposed the application through the replying affidavit sworn by its Acting County Attorney, Mr. David Oseko who deponed that on 14/5/2010 the Plaintiffs were granted leave to serve the 1st Defendant with summons to enter appearance and other pleadings in this matter by way of advertisement in the *Daily Nation* but the Plaintiffs have not effected service to date. He further deponed that the delay in prosecuting the suit was occasioned by the Plaintiffs’ failure to serve the 1st Defendant, and their lack of interest in the matter. He also deponed that counsel for the Plaintiffs was served with the notice for dismissal of the suit, and that the application was brought three years after the suit was dismissed without any compelling reason to warrant an order to reinstate the suit. He urged the court to dismiss the application.

The court has considered the application, affidavits and annexures filed as well as counsels’ oral submissions. This suit was dismissed on 18/03/2015. The court notes that there is a Notice to show cause that was issued under Order 17 Rule 2(1) & 4 of the Civil Procedure Rules dated 3/3/2015. When the matter came up in court for notice to show cause on 18/03/2015, both parties were absent. The court proceeded to dismiss the matter. The courts have stated that it is not mandatory to serve a notice for dismissal upon the parties. The notice must be given, but not necessarily served. In **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR**, the court stated that a notice under Order 17 rule 2 of the Civil Procedure Rules is deemed to have been given by the court when it is placed in the official website of the Judiciary or in the cause list. The court took the same position in **Jason Mungai Kamau V Jane Kamau & 4 Others [2008] eKLR**. By the time the matter was dismissed in 2015, the Plaintiffs had not taken any step to have the suit set down for hearing. The application for reinstatement was filed in 2018, three years after the suit had been dismissed. In the court’s view, the delay in bringing this application is inordinate and has not been satisfactorily explained by the Plaintiffs.

The Plaintiffs have not been keen to prosecute this case. The court declines to grant the orders sought in the application dated 7/7/2018.

Dated and delivered at Nairobi this 20th day of May 2019

K.BOR

JUDGE

In the presence of: -

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs and the Defendants