



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO.417 OF 2016

ABDI KADIR HUSSEIN.....PLAINTIFF

=VERSUS=

MOSES KIPKURUI KOROS & ANOTHER.....DEFENDANTS

=VERSUS=

ABDI KADIR HUSSEIN & 4 OTHERS.....INTERESTED PARTIES

RULING

1. The Plaintiff /Applicant filed a Notice of Motion dated 16th December 2015, in which he sought setting aside the court's order of 27th February 2015, which dismissed his case. The applicant contends that this suit was last in court on 26th November 2014, when the same could not proceed at the instance of defendant's counsel who had attended the burial of the late Hon. Kajwang.

2. The applicant further contends that there was no service of notice upon the applicant; that the applicant had always been keen to fix the suit for hearing but his efforts were frustrated due to the missing court file.

3. The applicant's application is opposed by the first and second defendants /respondents through replying affidavit sworn on 29th July 2016. The respondents contend that the judge who dismissed the suit must have been satisfied that there was service of notice to show cause. They also contend that the applicant's advocate should have taken advantage of counsel who were present on 26th November 2014 to take a convenient date for hearing.

4. I have considered the applicant's application as well as the opposition to the same by the defendants/ respondents. The only issue for determination is whether the order of 27th February 2015, dismissing the plaintiff's suit should be set aside. The applicant's suit was dismissed pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules which provides as follows:-

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit”.

5. It is clear from the above provision that the court should give notice to the parties to show cause why the suit should not be dismissed. This notice applies to cases where either party has not taken no action for a period of one year. In the instant case this suit was in court for hearing on 28th November 2014 when it was adjourned at the instance of the defendants' counsel who had attended the burial of the late Hon. Kajwang.

6. The suit was dismissed on 27th February 2015, which was only three months after it was last in court. The parties were not given notice to show cause as required under the rules. I have perused the court file and cannot see any evidence of notice served. Even if there was to be such notice issued, this suit was not ripe for dismissal. The Judge who dismissed the suit was given a pre-filled form on which she appended her signature dismissing the suit.

7. The respondents have dwelt at length on the merits or otherwise of the suit. All these does not matter in the present application. It is clear that the dismissal of this suit was pre-mature. There was no way a hearing date would have been taken in Court on 28th November 2014 as the Judge had directed that a hearing date was to be taken at the registry in the new term. I therefore allow the applicant's application with the result that the order of 27th February 2015, dismissing the Plaintiff's suit is hereby set aside. The plaintiff's suit is hereby reinstated for hearing. Costs of this application shall be costs in the suit.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 8th day of March 2018.

E.O.OBAGA

JUDGE

In the presence of ;-

Mr Ngugi for M/s Gachuru for interested party

Mr Chebet for Mr Nailey for 1st and 2nd defendants

Mr Ndege for Mr Lakicha for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE