



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 311 OF 2010**

**SIMON MWANGI GITATA & 18 OTHERS.....PLAINTIFFS**

**VERSUS**

**TOWN CLERK CITY**

**COUNCIL OF NAIROBI & OTHERS.....DEFENDANT**

**RULING**

What is before the court for determination is the plaintiffs' Notice of Motion application dated 26<sup>th</sup> September 2017 seeking to review and set aside the orders that were made on 18<sup>th</sup> March 2015 dismissing the suit herein. The suit was dismissed following a Notice to Show Cause that was issued and served upon the parties under Order 17 Rule (2) (1) of the Civil Procedure Rules. None of the parties appeared when the notice to show cause came up for hearing on 18<sup>th</sup> March 2015 leading to dismissal of the suit.

The application is supported by the affidavit sworn 26<sup>th</sup> September 2017 by Karanja Karuoya advocate. The grounds upon which the application is premised are that the firm of advocates on record for the plaintiffs was instructed on 18<sup>th</sup> September, 2017 to take over the conduct of this case on behalf of the plaintiffs in place of the plaintiff's previous advocates and upon perusing the court file on 19<sup>th</sup> September 2017, they discovered that the suit had been dismissed on 18<sup>th</sup> March, 2015 for want of prosecution. The plaintiffs have contended that the mistake of their erstwhile advocates who took no action despite being served with the notice to show cause should not be visited upon them. They have averred that the application before court has been brought without unreasonable delay and that it is in the interest of justice that the application be allowed. The defendants did not file a response to the application.

The application was argued on 21<sup>st</sup> November, 2017. Mr. Gichuki advocate who appeared for the plaintiffs reiterated the averments in the supporting affidavit. The court allowed Mr. Balala advocate who appeared for the 2<sup>nd</sup> defendant to address the court although he had not responded to the application. He submitted that the plaintiffs had not explained why they did not appear in court when the matter came up for notice to show cause. He argued that the application that was brought 10 months after the dismissal of the suit was an afterthought. He argued further that the case belongs to the plaintiffs who had a duty to attend court. He contended that the suit was dismissed regularly after issuance of due notice.

I have considered the application and the affidavit filed in support thereof. The issue that I have been called upon to determine is whether the plaintiffs' suit should be reinstated. The plaintiffs have contended that the suit was dismissed for want of prosecution without their knowledge and in the absence of their former advocates Messrs G. G. Waithima & Company Advocates, who were duly served with a notice to show cause but failed to take action. From the record, the Notice to Show Cause was served upon the firm of G. G. Waithima & Company Advocates on 16<sup>th</sup> March, 2015. The said firm of advocates did not appear in court on 18<sup>th</sup> March, 2015 to show cause why the suit should not be dismissed as a result of which the court dismissed the suit for want of prosecution.

As at the time the suit was dismissed, it had remained inactive for 2 years. After the dismissal of the suit, the plaintiffs instructed the firm of Ishmael & Company Advocates to act for them in the matter. This firm of advocates appears not to have known that the suit had been dismissed as it filed applications on 3<sup>rd</sup> December, 2015 and 12<sup>th</sup> March 2016 seeking leave to amend the plaint. The plaintiffs changed advocates further and appointed the current firm of advocates on 18<sup>th</sup> September, 2017. The plaintiffs have contended that it was upon the firm of Gachugi Gichuki & Company Advocates taking over the conduct of this matter that they learnt of the dismissal of the suit. I am of the view that the plaintiffs were let down by their previous advocates. It is clear from the record that the plaintiffs were not aware of the dismissal of the suit. From the conduct of the plaintiffs after the dismissal of the suit, I am persuaded that the plaintiffs are still interested in pursuing their claims against the defendants. I am of the view that this is one of those cases in which it would be unfair to visit the mistake of an advocate upon his client. The defendants did not respond to the application. There is no evidence that the defendants would be prejudiced if the suit is reinstated for hearing on merit. From the nature of the claims by the plaintiffs, I am of the view that a fair trial can still be conducted.

Due to the foregoing, I am inclined to exercise my discretion in favour of the plaintiffs. The Notice of Motion dated 26<sup>th</sup> September, 2017 is allowed in terms of prayers 1 and 2 thereof. The 2<sup>nd</sup> defendant shall have the costs of the application.

**Delivered and Dated at Nairobi this 19<sup>th</sup> Day of July 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Gichuki for the Plaintiffs

N/A for the 1<sup>st</sup> Defendant

Mr. Kabaka h/b for Mr. Owino for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant