



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 MISOL.....**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 **6th April, 2018** and filed in court on **9/4/2018**. 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 **20th March, 2018**; that the plaintiffs' advocates were not in court as they were not served with the notice for the said date; that the suit was thus dismissed without giving the plaintiffs a hearing; that the plaintiffs had valid reasons for the delay in fixing the matter for hearing as they attempted to pursue administrative channels to stop the defendants from obtaining titles using unscrupulous means while some of them 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 it is in the interest of justice and fairness that the plaintiffs' suit be reinstated for hearing and determination on merit as they have a genuine claim against the defendant; that unless the application is allowed as drawn, the plaintiffs/applicants 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 determine matters before it without 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 **6/4/2018**. The main ground in that affidavit is that the notice to show cause was not served upon the plaintiffs. It is also averred that as at the date of the notice to show cause the plaintiffs had instructed the deponent to apply to amend the plaint, but he advised the plaintiffs to await the conclusion of the notice to show cause proceedings. The plaintiffs are said to have kept up the pressure on their counsel during the run up to the hearing of the notice to show cause.

4. In his reply to the application, **Michael Kipruto Misoi**, the **1st** defendant filed replying affidavit dated **9/10/2018**. He stated that the applicants never took any action after the ruling of **21/10/2015** dismissing the application for injunction. It is said that this suit has been overtaken by events as titles have already issued.

5. The defendants filed their submissions on **28/10/2018** but I have perused through the record and found no submissions filed on behalf of the plaintiffs.

6. I note that the instant suit was filed in the year **2010**. The application for injunction was determined in **2015**. There are reports that titles have issued in respect of parcels that resulted from the subdivision of suit land.

7. It is averred that this suit is overtaken by events but this must be weighed against the express averment that the plaintiffs wished to amend their plaint as at the time of the notice to show cause.

8. In their submissions the defendant have argued that this application requires to be treated like the application in ***Kitale ELC 131 of 2004 - Alfred Juma Wanambisi Vs Alice Naliaka*** where the court upon setting aside the order of dismissal directed that the suit be relisted for the parties to show cause as to why the suit should not be dismissed for want of prosecution.

9. In that matter it was also alleged that the notice to show cause was not served upon the advocates on the record and that their failure to attend court was not intentional.

10. It is not usual to drive a litigant from the seat of justice unheard unless he has failed to prosecute his claim without a good reason and when given a chance, he has failed to explain why he never took the chance.

11. The plaintiffs were required to demonstrate good reasons as to why they had not prosecuted their claim on **20/3/2018** but they did not and their suit was dismissed for want of prosecution.

12. They have now satisfactorily explained why they never took up the chance to argue the Notice to show cause but the notice to show cause remains unheard.

13. The court notes that the situation obtaining in this application is almost the same as that of ***Kitale ELC 131 of 2004***. This court is therefore persuaded to take the approach taken in ***Kitale ELC 131 of 2004*** in this matter so that the plaintiffs may have an opportunity to explain their non-prosecution of their claim before they are, if they will eventually be, driven from the seat of justice unheard.

14. I therefore order that the dismissal order made on **20/3/2018** is hereby set aside. The first limb of prayer 2 in the application dated 6/4/2018 is therefore granted to the extent that this suit is hereby reinstated but only for the purpose of the hearing and determination of the notice to show cause.

15. The plaintiffs are hereby ordered appear by themselves or by advocate on **29th January 2019** to show cause as to why their suit should not be dismissed for want of prosecution. The second limb of that prayer number 2 in the same application shall be determined contingent upon the determination as to whether, upon the hearing of the notice to show cause, the suit is ordered dismissed or not.

16. The costs of the application shall be borne by the plaintiffs in any event.

Dated, signed and delivered at Kitale on this 27th day of November, 2018.

MWANGI NJOROGE

JUDGE

27/11/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for the defendants

N/A for the plaintiff

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

27/11/2018