



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 305 OF 2012**

**DICKSON K. YATICH.....1<sup>ST</sup> PLAINTIFF**

**RICHARD C. CHELIMO.....2<sup>ND</sup> PLAINTIFF**

**JOHNNAH KIPLAGAT.....3<sup>RD</sup> PLAINTIFF**

**JOHN C. RONO.....4<sup>TH</sup> PLAINTIFF**

**CHERONO ROTICH (representing 220 members of**  
**KIPNGOCHOCH CO.LTD).....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**OBADIAH K. KIPKORIR.....1<sup>ST</sup> DEFENDANT**

**JOHN MARK MOI.....2<sup>ND</sup> DEFENDANT**

**JAPHETH K. CHEPKERES .....3<sup>RD</sup> DEFENDANT**

**WELDON LABATI .....4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR .....5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL .....6<sup>TH</sup> DEFENDANT**

**RULING**

***(Application to reinstate a suit that was dismissed for want of prosecution; application allowed but subject to payment of throw away costs).***

1. The application before me is that dated 7 May 2018 filed by the plaintiffs. It is an application said to have been brought pursuant to the provisions of Order 12 Rule 7, Order 17 Rule 3, and Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. The principal prayer sought is that the order made on 23 January 2018, dismissing the plaintiffs’ suit for want of prosecution be varied and/or set aside and for this suit to be reinstated for hearing. The application is opposed and before I go to the gist of it, it is prudent that I provide a bit of a background so as to put this application into context.

2. This suit was commenced through a plaint which was filed on 8 June 2012 by the plaintiffs in person. In the plaint, the plaintiffs have averred that they represent all 220 members of Kipchongor Company Limited. In the suit, they sued the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as the former officials of the company, and claimed that they had wrongfully transferred the properties Solai/Ndungiri Block 1/232 and 235 (the suit properties). In the suit, they wanted a declaration that the two land parcels are the property of Kipchongor Farm Limited, cancellation of the title, and an order for these persons to vacate the property. They also enjoined the Land Registrar and the Attorney General to the suit.

3. The 1<sup>st</sup> – 4<sup>th</sup> defendants filed a joint defence vide which the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendant admitted having been directors of Kipngochok Limited whereas the 3<sup>rd</sup> defendant was its manager. They however denied having fraudulently transacted with the suit properties. It was

pleaded that the land parcel Solai/Ndungiri Block 1/235 was the property of Kipngochoch Farm and that it had a coffee crop which the company could not maintain. A decision was then made to sell the portion containing the coffee crop to the 2<sup>nd</sup> defendant's father and his father registered the land in the name of the 2<sup>nd</sup> defendant. It is averred that payment for this portion was made and the money distributed to members in August 1992 and that the company therefore has no legitimate claim to it. The 2<sup>nd</sup> defendant thus claims to have good title to this land.

4. Not much happened to the case although I have seen an application dated 30 January 2015 for injunction which came to court on 9 February 2015, but was not certified urgent and no interim orders given. The applicants were advised to take a date in the registry. No date was taken for this application but I have seen that on 15 March 2016, the law firm of M/s Letangule & Company Advocates, filed a Notice of Appointment of Advocates, and on 30 May 2016, the said firm filed the plaintiffs' list of documents. No date was taken in the matter and given the inactivity, on 30 November 2017, the parties, through their counsel on record, were informed that the case had been listed for 23 January 2018, for Notice to Show Cause, why it should not be dismissed for want of prosecution. On the said date, the plaintiffs and their counsel were absent, and only counsel for the 1<sup>st</sup> – 4<sup>th</sup> defendants appeared. The case was then dismissed for want of prosecution.

5. In this application, the plaintiffs seek to have their dismissed suit reinstated. It is claimed that what led to the order for dismissal was a mistake of counsel. It is deposed in the supporting affidavit of Robert Mutembei, an advocate practising in the law firm of M/s Letangule & Company Advocates that the advocate who was in conduct of the matter, a Mr. Charles Koech, left the firm without handing over the file. He stated that their office only came to be aware of the delay in prosecuting the case after the plaintiffs visited their office to inquire about the long delay. He has deposed that the plaintiffs are indeed keen to prosecute their case. A further affidavit sworn by one Chepsat Ruto, a director of Kipngochoch Limited, was also filed to support the application.

6. The 1<sup>st</sup>- 4<sup>th</sup> defendants have opposed the application through the replying affidavit of Obadiah K. Korir, the 1<sup>st</sup> defendant. He has deposed inter alia that the 2<sup>nd</sup> plaintiff died sometimes in the year 2015. He has pointed out that the suit was filed in the year 2012, and was last in court on 9 February 2015, about 3 years since. He has also pointed out that this application has been filed 3 months after the case was dismissed. In his view, the plaintiffs have lost interest in the matter.

7. I invited counsel to file written submissions on the application which they did, save for the State Law Office, for the 5<sup>th</sup> and 6<sup>th</sup> defendants. I have taken note of these in arriving at my decision.

8. There is no contest from the applicants that there has been inactivity in this matter and there is also no contest that their counsel on record was properly served with the Notice to Show Cause but counsel failed to appear to show cause why the suit should not be dismissed. The applicants however aver that they are still keen to prosecute the case, and they were not aware of the notice for dismissal, as counsel who was handling the file within the office of their advocates on record, left the firm without handing over the file. I have a lot of unanswered questions on this. It is not said who within the law firm accepted the Notice for dismissal of the suit; it is not said to whom this person handed over the notice to; it is not said when Mr. Charles Koech left the law firm of M/s Letangule & Company Advocates; it is not said exactly on which date, the applicants went to the offices of their advocates so as to find out the position of their file. I am thus not very convinced of the reasons given to reinstate this suit.

9. Nevertheless, I do note that the plaintiffs filed their list of documents on 30 May 2016, which may demonstrate some level of interest in the suit. What is clear to me, is that they have been let down by their advocates on record. Their advocates received the notice of dismissal and did nothing about it. There is a mistake of counsel, but it is not the mistake that counsel has tried to demonstrate in the affidavit in support of this application. That being the case, I find it harsh to punish the plaintiffs for the tardy and dilatory attitude of their counsel on record.

10. In my own discretion, I will reinstate this suit. However, this will be subject to the plaintiffs paying to the 1<sup>st</sup> – 4<sup>th</sup> defendants throw away costs, for the 1<sup>st</sup> – 4<sup>th</sup> defendants through their counsel, duly attended the date for notice to show cause, and have had every reason to resist this application. In my own discretion I assess these costs at Kshs. 25,000/=. If these costs are not paid within the next 30 days, this case will stand dismissed. However if the same are paid, the case will be reinstated to proceed on merits.

11. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of November 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr Mutembei for the plaintiff/s/applicants

Mr Mutai holding brief for Mr. Kiplenge for 1<sup>st</sup> - 4<sup>th</sup> defendants.

No appearance on the part of the State Law Office for the 5<sup>th</sup> & 6<sup>th</sup> defendants.

Court Assistants: Nelima /Carlton.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**