



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO.30 OF 2008

REGISTERED TRUSTEES OF KIBERA SOLIDALE ITALIA SOLIDALE.....PLAINTIFF

VERSUS

MARY MUTORO SIRENGO.....DEFENDANT

RULING

1. The suit herein was dismissed with no orders as to costs on the **17th July 2016** pursuant to a Notice of Dismissal issued by the Deputy Registrar on **3rd June 2016**. The plaintiff thereafter brought an application dated **24/3/2017** seeking the following orders:-

- 1) That the Honourable court be pleased to reinstate the suit**
- 2) That the order made by the Honourable court on 19/7/2016 be set aside.**
- 3) That the costs of the application be provided for.**

2. The application is based on 8 grounds set out at the foot of the application. Chief among these is that the applicant was not aware of a Notice of Dismissal hence its absence from court on **19th July 2016** when the matter was mentioned. Due to this lack of knowledge of the existence of the Notice, the applicant even made several efforts to have the suit fixed for hearing in the year 2017. However, on **16/3/2017** when it learnt of the dismissal of the suit, the applicant brought this application.

3. The applicant avers that failure to prosecute the suit prior to **19th July 2016** was occasioned by circumstances beyond their control and therefore aver that it is in the interests of Justice that the suit be reinstated. In the supporting Affidavit the receipt of the Notice of Dismissal dated **3/6/2016** is disputed.

4. The Applicant further avers that prior to **19th July 2016** it had made several efforts to have the matter mentioned and transferred to the lower court but those efforts did not bear fruit as the file appeared to be unavailable between the years **2013-2015** and therefore no action could be taken. It is urged that the failure to prosecute the suit was not deliberate.

5. The respondent filed grounds of opposition dated **24/7/2017**. She avers that the application is incompetent, bad in law and an abuse of the court process. She states that no sufficient reasons have been adduced to warrant the grant of the orders sought. She finally states that the application has been made after inordinate delay. Only the applicant filed submissions on the application. The applicant relied on the cases of *Mwangi S. Kimenyi versus Attorney General & another 2014 eKLR*.

6. Whereas the burden of prosecuting a suit has lies on the parties, the Rules require that notice be

furnished or served upon the parties when the court, acting on its own motion desires to have the suit mentioned for the parties to show cause why it should not be dismissed.

7. The plaintiff hand positively avers that the Notice was not received by the intended addressee, the Advocate in the matter, who therefore could not appear in court to show cause why the matter should not be dismissed.

8. The defendant too was absent at the mention on **19/7/2016** when the matter was dismissed. She has not said anything regarding whether she received the Notice of Dismissal or not. She never participated in the proceedings of that day.

9. I have examined the Notice on the record and though there is reliable indication that the same was sent to the addresses mentioned therein, none of the parties acknowledge that it was finally delivered to them.

10. I am inclined to believe that the plaintiff's counsel never received the said notice. For that reason, I hereby set aside the orders of this court made on **19/7/2016**. The suit is hereby reinstated. It will be set down for hearing within **21 days** hereof failure to which it will stand dismissed.

Dated, signed and delivered at Kitale on this **24th** day of **August, 2017**.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Wafula holding brief for Mr. Arum for the Defendant

N/A for Applicant

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017