



**REPUBLIC OF KENYA.**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA.**

**CIVIL SUIT NO. 46 OF 2004.**

**PATRICK SITATI KISAKA.....PLAINTIFF**

**VERSUS.**

**THOMSON NAMUNYU NJIBWAKALE.....1<sup>ST</sup> DEFENDANT**

**SAMUEL WAMALWA KUCHIKHI.....2<sup>ND</sup> DEFENDANT**

**R U L I N G.**

[1] A notice to dismiss this suit for want of prosecution was issued by the court on 1<sup>st</sup> July, 2015. It was served on the advocates for the parties on record. For the Plaintiff the notice was served on Waswa & Company the applicants advocate on record. Mr. J.S. Khakula who is now on record for the applicant in place of Waswa & Company argues that the dismissed notice was served on Waswa & Company and not themselves. That the case was heard on 1/7/2017 and not 2/7/2017 as the notice indicated. He argues that in the interests of justice the dismissal of the suit should be set aside.

Mr. Olonyi for respondent opposed the application. He argued that this is 2004 matter. That it has been in the court for 13 years. Counsel annexed the notice for dismissal that was served on them. He argued that the reinstatement of the case was prejudicial to his clients. He argued that, the fact that the case was not indicated on Mr. Khakula's diary does not mean much because Counsel May have overlooked to indicate the case in his diary.

[2] That the case had earlier been dismissed by the court on 25/7/2013. It was only reinstated on terms. Having considered the arguments of both counsels, I am of the view that the notice issued by the court was to show cause why the suit should not be dismissed. The chance was accorded to the applicant when he came to argue this application. There was no cause shown to the satisfaction of the court why there was such a long delay. It did not matter that the case was fixed for 2<sup>nd</sup> and then heard on 1<sup>st</sup> of July 2015 or whether it was served on a different advocate provided, a chance to show cause was accorded to the applicant. A chance was truly afforded in this case. The court determined the case under order 17 rule 2. The court then became functus official since under that rule there is no provision for setting the order aside. There was no application for review of the order filed and/or pending in court.

The delay herein was inordinate. This application therefore cannot be granted. The application herein is therefore dismissed with costs to the respondents.

Judgment read in Open Court before M/s Wanjala.

**Dated at Bungoma this 4<sup>th</sup> day of October, 2017.**

**S. MUKUNYA**

**JUDGE**

In the presence of:

Court Assistant: Chemutai/Joy

Miss Wanjala for Khakula for the Applicant

Firm of Areba for the Applicant