



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND COURT**

**ELC. CASE NO. 1 OF 2011**

**KIDA TRADING COMPANY LTD.....PLAINTIFF**

**VERSUS**

**SUPPLIES AND SERVICES LTD.....1<sup>ST</sup> DEFENDANT**

**SIUMA TRADERS.....2<sup>ND</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 9<sup>th</sup> July 2015 in which the Plaintiff/Applicant seeks for orders to reinstate this suit which was dismissed on 11<sup>th</sup> March 2015 by Justice Mutungi.

The Application is premised upon the grounds appearing on its face together with the Supporting Affidavit of James Nyakundi, the Advocate having conduct of this matter on behalf of the Plaintiff, sworn on 9<sup>th</sup> July 2015. He averred that he filed this suit on 3<sup>rd</sup> January 2011 but later sought to amend it to enjoin the State. He further averred that he filed an Amended Plaintiff on 17<sup>th</sup> April 2015 at the Commercial and Admiralty Registry. He further averred that he filed a bundle of documents at the same registry on 27<sup>th</sup> April 2015 and served the same upon the Defendants. He added that on 20<sup>th</sup> May 2015, he presented a questionnaire in terms of **Order 11 of the Civil Procedure Rules, 2010** at the same registry but was advised that the file was ready for hearing and he should invite the other party to take a date for hearing. He added that on 18<sup>th</sup> June 2015 when the hearing date was to be taken, his clerk was advised that the file was missing. He further averred that upon following up on the file, he was advised by the staff at that registry that the files on land matters had been transferred to the ELC Registry. He added that upon going to the ELC Registry, the file was nowhere to be found. He further stated that on 6<sup>th</sup> July 2015, they were told that the matter was dismissed on 11<sup>th</sup> March 2015 by Justice Mutungi for want of prosecution. He stated that they were not notified to show cause why this matter should not be dismissed nor were there any notices on the file to show that notices were issued or served upon the advocates on record. He added that he is prepared to have this suit heard expeditiously should the court

reinstate the suit.

The Application is opposed. Leo Masore Nyangau, the advocate having conduct of this matter on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, filed his Replying Affidavit sworn on 11<sup>th</sup> March 2016 in which he averred that this court's Notice To Show Cause dated 25<sup>th</sup> February 2015 was served upon his firm on 4<sup>th</sup> March 2015. He added that the said Notice indicated that it was also to be served upon the Plaintiff's Advocates. He added that the Affidavit of Service shows that the Plaintiff's Advocates were served. He further stated that the Plaintiff has been indolent in prosecuting this suit and this court rightfully dismissed their suit for want of prosecution.

In response thereto, James Nyakundi filed his Further Affidavit sworn on 14<sup>th</sup> March 2016 in which he averred that the Notice To Show Cause dated 25<sup>th</sup> February 2015 was never served upon him. He added that the said Notice was missing from the court file when he perused it at the ELC Registry. He further added that there was no Affidavit of Service on the court file showing that he had been served with the Notice. He further stated that the copy of Notice To Show Cause dated 25<sup>th</sup> February 2015 which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants annexed does not show the mode of service used and that the address indicated thereon does not belong to the his firm. He further asserted that because no notice was served upon him, there is no way he would have known the matter was coming up for hearing on 11<sup>th</sup> March 2015. He further added that the matters involved in this suit are so weighty and the court needs to determine the suit on evidence presented for the sake of justice.

The Plaintiff filed their written submissions.

The issue I am called upon to determine is whether to reinstate this suit which was dismissed by Justice Mutungi on 11<sup>th</sup> March 2015. The applicable law is Order 17 Rule 2(1) which provides as follows:

***"In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."***

My decision on the Plaintiff's request revolves around the question of service of the Notice to Show Cause dated 25<sup>th</sup> February 2015 upon Plaintiff's counsel. It is conceded that there is no copy of the said Notice on the court file. The only copy available is the one produced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Counsel which he annexed to his Replying Affidavit. This being the only copy available to the court, the court shall make deductions based thereon. It is noteworthy that the said Notice was addressed both to the Plaintiff's counsel Nyabena Nyakundi & Co. Advocates as well as the advocates on record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants being Masore Nyangau & Co. Advocates. I note that this Notice was served upon the firm of Masore Nyangau & Co. Advocates as their stamp of receipt is affixed thereon. They were served on 4<sup>th</sup> March 2015. However, there is no evidence on this Notice that service was actually effected upon Plaintiff's counsel Nyabena Nyakundi & Co. Advocates. There is also nothing in the nature of an affidavit of service available on the court file to prove that indeed that Notice was served upon the Plaintiff's counsel. That being the position, I arrive at the finding that the Plaintiff was not served with the Notice to Show Cause. They could not therefore have been aware that the Notice to Show Cause was listed for hearing on 11<sup>th</sup> March 2015 when Justice Mutungi dismissed the suit. This being my finding, I allow this Application. Costs shall be in the cause.

I further direct as follows:

***a) That the Plaintiff do file and serve all the necessary papers and pleadings, including witness statements and documents they intend to rely upon in this case within 21 days from today's***

**date.**

***b) That the Defendants do file and serve all the necessary papers and pleadings including witness statements and documents in support of their case within 21 days of receipt of the Plaintiff's documents.***

***c) That the court do allocate a date for a pre-trial conference.***

It is so ordered.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2016**

**MARY M. GITUMBI**

**JUDGE**



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