



**Wekhomba v Nasipwondi (Miscellaneous Application
113 of 2014) [2024] KEHC 8316 (KLR) (26 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS APPLICATION 113 OF 2014**

REA OUGO, J

JUNE 26, 2024

BETWEEN

WYCLIFF NJALA WEKHOMBA APPLICANT

AND

SELINA SIMBUKU NASIPWONDI RESPONDENT

RULING

1. In Notice of Motion dated the 20th November 2023, Wycliffe Njala Wehomba the applicant seeks that the order made on the 4th November 2019 dismissing the applicant's case for want of prosecution be reviewed and or set/ aside and the same be reinstated for hearing and determination. That the parties be directed to file submissions and be granted leave to highlight the same if need be to enable the court to write and deliver its decision
2. The application is supported by 11 grounds on the face of the application plus a supporting affidavit of the applicant dated the 20th November 2023. The applicant depones as follows; his case and that of the respondent were heard and their respective cases closed. The court thereafter directed that the parties' advocates file written closing submissions. His former counsel on record wrote and filled the written submissions on the 9th of March 2019 but due to a typical error that occurred he wrote case number 113 of 2014 and thus the same was misfiled. Before the judgment was written the trial judge was transferred. His former advocate then ventured into politics and continued giving him misleading information on the status of the matter. The matter was thereafter irregularly placed before the new judge on the 4th of November 2019 for dismissal for want of prosecution. He was never served with the notice to show cause on why his case should not be dismissed for want of prosecution as required in law. He has been advised by his counsel that the dismissal of the matter when it was due for judgment is a mistake apparent on the face of the record. The estate of the deceased stands to suffer a miscarriage of justice hence irreparable loss and damage if the application is not allowed. The mistake of a counsel



and/or judicial staff ought not to be visited upon a litigant/ applicant seeking justice. The application was brought timely and with utmost good faith.

3. Counsel for the respondent Counsel through Mr. Juma who was holding his brief informed the court that the respondent died on 3.2.2023 and that he sought time to substitute the respondent.
4. In response Miss Olando for the applicant stated that Mr. Kiveu was granted time to substitute the respondent and that an application was made at Kimilili court to substitute the respondent and the application was allowed.

Analysis & Determination

5. I have carefully perused the entire court file to help me make an informed decision on the application before me. On 16.2.2015 the petitioners/ respondent's case was heard by Justice Abida Aroni (as she then was). The last made was that the parties file written submissions. Thereafter, the DR sitting in Kakamega issued a Notice for dismissal for want of prosecution under order 17 rule 2 (1) of the Civil Procedure Rules. The notice was dated the 2nd August 2012 and another dated 19.7.2019 which was to be heard on 4.11.2019. The notice was addressed to the firm of Bulimo & Co. Advocates and Selina the respondent. After the said notice, the suit was dismissed by Justice Riechi on 4.11.2019, after both parties failed to appear to show cause why the suit should not be dismissed.
6. It is evident that the parties had testified, closed their cases and were to file submissions. Indeed, what was left was a date for Ruling after the parties filed their written submissions. In my view, it was an error for the court to serve a notice to show cause on the parties for want of prosecution as the parties had been heard and what was left were written submissions that the parties were to file. It could have been an oversight on the part of the court to issue the notice to show cause, what was left whether submissions were filed or not was a Ruling date.
7. Succession matters are very emotive, and it would be best to give the parties a ruling in the matter. Indeed, courts have held that a party should not be punished for the acts of their counsels. Though the application was filed in 2023, 4 years after the dismissal order, I will allow the application dated 20.11.2023 as follows;
 - a. The court order made on the 4th November 2019 dismissing the applicant's case for want of dismissal is set aside and the suit is reinstated for hearing and determination.
 - b. The parties are directed to file written submissions within 21 days from the date of this Ruling.
 - c. Parties to highlight their submissions before High Court No. 1 on 22.7.2024 in High Court No. 1.
 - d. Costs of this application shall be in the cause.

DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JUNE 2024.

R.E.OUGO

JUDGE

In the presence of:

Miss Wesonga -For the Applicant

Respondent - Absent

Wilkister/ Diana - C/A

