



**Malombe & another (Suing as the Legal Representatives of the Estate of Barnabas Malombe Mutua - Deceased) v Kavusi & another (Suing as the Legal Representative of the Estate of Willy Muema Isika) (Civil Suit 127 of 2015) [2022] KEHC 10532 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10532 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL SUIT 127 OF 2015  
RK LIMO, J  
JUNE 22, 2022**

**BETWEEN**

**ESTHER KALUMU MALOMBE ..... 1<sup>ST</sup> PLAINTIFF  
DISMAS MUTHUI MUTINDA ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF BARNABAS  
MALOMBE MUTUA - DECEASED**

**AND**

**PHYLIS KAVUSI ..... 1<sup>ST</sup> RESPONDENT  
MUNYALO ISIKA ..... 2<sup>ND</sup> RESPONDENT  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILLY  
MUEMA ISIKA**

**RULING**

1. Before me, is an application brought in by way of Notice of Motion dated 26th January, 2020. The applicants are seeking the following orders namely;
  - i. That the suit be reinstated for hearing.
  - ii. That the matter be transferred from this court to Chief Magistrates Court, Kitui.
  - iii. Costs of this suit (should have been application).
2. The applicants have listed the following grounds as the basis of this application namely;
  - a) That the dismissed suit arose from a road traffic accident that occurred on 1<sup>st</sup> November, 2003 involving plaintiff's motor vehicle and defendants motor vehicle Registration No. KAK 980H.



- b) That the applicants had instructed the firm of Katunga Mbuvi & Co. to file a suit in Machakos High Court which they did vide Machakos High Court Civil Case No.98 of 2006.
  - c) That they changed advocates to T.M. Kuria & Co. Advocates and that the matter was transferred to this court and registered in the current Suit No. (127 of 2015).
  - d) That on 17<sup>th</sup> September, 2019 they approached Musili Mbiti & Associates to take up the matter because the advocates on record reportedly failed to represent them well.
  - e) That the advocates on record filed an application dated 5.11.2019 for transfer of this case to the lower court owing to enhancement of monetary jurisdiction of the magistrates courts.
  - f) That when filing the application for transfer, the Counsel discovered that the suit had been dismissed.
  - g) That they were unaware of a notice to dismiss the suit for want of prosecution.
  - h) That they have a good case and have filed this application expeditiously.
  - i) That the applicants are desirous of prosecuting the suit up to its conclusion and the respondent would not suffer any prejudice.
3. This application is supported by an affidavit sworn on 26.1.2020 by the applicants' Counsel now on record. The Counsel has majorly reiterated the above grounds. He avers that his firm was instructed on 17th September, 2019 by the applicants upon which they filed the application dated 5.11.2019. He claims that when he was in the process of filing the said application he became aware that the suit had been dismissed for want of prosecution.
  4. He further avers that upon learning about the same he expeditiously filed this application. He however, does not state where he disappeared from November 2019 to 12th February, 2020 when he filed this application but will get back to that shortly.
  5. The respondent has opposed this application vide a replying affidavit sworn by their counsel Martin G. Mwaniki on 21<sup>st</sup> January, 2022.
  6. The Respondents have pointed out that the present suit was filed way back in 2006 and the same to date has never been prosecuted by the plaintiffs and that they have offered no plausible explanation for that inaction.
  7. The respondents further aver that the court issued a hearing notice dated 17/10/2018 for hearing on 22/11/2018 and that on that date, the plaintiff were absent and the suit got dismissed.  
The respondents state that the plaintiffs' counsel took almost a year to file notice of change of advocates.  
They aver that the application dated 5.11.2019 was never filed nor served on them. They have faulted the applicants for indolence and have urged this court to dismiss the application to revive the suit.
  8. This court has considered this application and the response made. The applicants have invoked the discretion of this court under the provision of Order 12 Rule 7 of the Civil Procedure Rule.
  9. This court indeed has a discretion to set aside a dismissal Order made as consequences of non-attendance. The reason for non-attendance must however be explained adequately. This is more so when the court is dealing with an old matter which has been pending in court for a while. As clearly



pointed out by the respondents the suit herein was filed on 19th September, 2006 in Machakos. It has therefore, been lying in court for the last 16 years.

10. The record of proceeding show that the suit was transferred to this court on 23rd September, 2015. The matter did not take off for one reason or the other but mainly due to failure by the plaintiff to prosecute their case which led to the suit being dismissed on 22.11.2018 for want of prosecution after due notices to both counsels on record were issued.
11. From 22.11.2018 when the suit was dismissed and file closed, there was no further activity until 23.09.2019 when the current counsel on record filed a Notice of Change of Advocate.
12. Thereafter, there was further inactivity until 12.2.2020 when the current application was filed.
13. The counsel for the applicants has not given reasons for this inactivity from September 2019 to February, 2020 which is around 5 months.

If it is true that they discovered in September 2019 that the suit had been dismissed, what prevented them from filing this application? Why did they opt to instead prepare an application to transfer a suit that was dismissed almost a year before?

14. The applicants in their estimation state that there was no delay in bringing this application but they are wrong. Their past conduct is a further indictment on their indolence and inaction.

This is evident from the way they failed to turn up in court on 7.10.2020 for hearing and though this court indulged them on that occasion, it does not mean that this court as Court of Law should condone indolence on the part of litigants who file cases in court and fail to prosecute them leading to unnecessary backlog and blame the courts for delaying cases.

15. The applicants' main ground to invoke the discretion of this court is that their former advocate failed to effectively represent them due to negligence but this court does not buy that ground especially given that the applicants have not demonstrated the action taken against the former advocates if the accusation on negligence is in good faith. In my view the most often cited ground for inaction by litigants which is "mistake of Counsel" and has been abused to cover mischief on the part of litigants/advocates who simply fail to diligently prosecute their cases in court. In view of the professional indemnity cover taken by advocates to cover them when they fail in their professional duty owing to negligence on their part, they should be put to account.

A party who comes to court invoking discretion of the court due to inaction, negligence or "mistake of Counsel" must do so with clean hands and as part of demonstrating good faith in that regard, they should at least show how they have expressed their displeasure to the advocates being accused of "mistake of Counsel". That way, a court may consider not penalizing him or her on account of "mistake of Counsel" but in circumstances such as the one obtaining in this instance, there is no basis to revive this matter in court. The matter ended in 2018 and it is too late now 4 years later to revive. The suit was filed in court in 2006 and as correctly pointed out by the respondents, I find no plausible reasons to explain the inaction for those many years the matter was pending in court.

In the premises, this court finds no merit in the application dated 26.1.2020, the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 22<sup>ND</sup> DAY OF JUNE, 2022.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

