



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL SUIT NO. 69 OF 2010.**

**1. ELIUD MUKHISA NALIANYA)**

**2. JOHN MABONGA ).....PLAINTIFFS.**

**3. EDWARD WAMBILIANGA )**

**VERSUS.**

**1. JOSEPH WANJALA FULAFU)**

**2. JOSEPH WANJALA SIMEON).....DEFENDANTS.**

**RULING.**

**[1]** The applicant brings this application under Sec. 3 3A and order 12 rule 7 and order 45 rule 1 and 2 of the Civil Procedure Rules 2010. He prays that this Court to review and set aside its order for dismissal made on 9/12/2015.

The basis for such application is that the suit was dismissed on 9/11/2015 that the Plaintiff herein died on 21/2/2015. That his death caused breakdown of communication. That the non-attendance of 3<sup>rd</sup> defendant and the 1<sup>st</sup> Plaintiff was caused by that breakdown of communication with their Counsel.

The application was opposed by the defendants. Mr Murunga learned Counsel for the respondent relied on the Replying Affidavit filed herein. He stated that the matter was set down for hearing by consent of both parties.

**[2]** That going by the death Certificate filed herein, by the time the suit was dismissed, the 3<sup>rd</sup> defendant was still alive. That the period between filing the case and fixing was 9 months. That there is no explanation why the applicants were unable to communicate over that period.

The Counsel argued that there are two other plaintiffs in this case and there is no explanation why those two never went to see the advocate or visit the court registry. Counsel argued that the case was filed in 2010 and for a period of over 5 years the Plaintiffs never attended the court. Further that Omollo Judge had on 27/5/2015 ordered that the plaintiffs to comply with Order 11 and the plaintiffs had not complied with Order 11. He urged the court to dismiss the application. There were no allegation of a new and important matter or evidence which after the exercise of due diligence, was not within the applicants knowledge. The court was not told of an error or clerical mistake on the face of the record to make the court review its orders. In other words the applicant did not show anything to warrant the court to interfere with its orders as required by order 45 rule 1 and 2.

When the suit was fixed for hearing the 3<sup>rd</sup> defendant was still alive. There was over 2 weeks before his death. There were other parties to the suit who could have pursued their Lawyer and the Court.

In all I am not satisfied with the reasons given for not attending the Court. This application is dismissed with costs.

Ruling read in open Court in the presence of the parties.

**Dated, signed and delivered on 27<sup>th</sup> September, 2016.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Court Assistant - Joy

Mr. Murunga for 2<sup>nd</sup> Respondent

Mr. Kisinya for Petitioner/Applicant