



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 109 OF 2001**

**ALHAJJ MOHAMED OMAR MASUMBUKO ..... 1<sup>ST</sup> PLAINTIFF/APPLICANT**

**FREIGHT CONTRACTORS SERVICES LTD..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**VERSUS**

**SAM AOLA OOKO .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE EDITOR AGNECE FRANCE PRESSE..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AGENCE FRANCE PASSE ..... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**KENYA BROADCASTING CORPORATION.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before me is dated 26<sup>th</sup> April, 2016. It seeks the following orders:-

(i) Spent;

(ii) That this Honourable court be pleased to set aside the orders of this Honourable Court delivered on the 7<sup>th</sup> day of July, 2015 dismissing High Court Civil Case No. 109 of 2001 for want of prosecution;

(iii) That this Honourable Court be pleased to reinstate High Court Civil case No. 109 of 2001 at Mombasa and have the matter heard and determined on merits;

(iv) That the Honourable Court may grant any other relief that it deems fit to do justice in the circumstances; and

(v) That costs of this application be provided for.

2. The application has been brought under section 1A, 1B and 3A of the Civil Procedure Act, orders 12 and 51 of the Civil Procedure rules 2010, Article 159(2) (d) of the Constitution of Kenya, 2010 and all enabling provisions of the law. The application is supported by the grounds on the facts on the face of the record and the supporting affidavit of Alhaji Omar Masumbuko, the plaintiff.

3. Ms Rajab for the plaintiffs/applicants submitted that the application in issue seeks reinstatement of the suit which was dismissed on 7<sup>th</sup> July, 2015 as there was no personal service of the notice to show cause

why the suit should not be dismissed. The said dismissal, she stated, was done during the justice at last week. She submitted that it is a constitutional principle that matters be heard on merit and the plaintiffs are desirous to having their day in court. She prayed that the application be allowed.

4. A process server that had been instructed to effect service on the defendants'/respondents' counsel on record by the applicants' counsel filed an affidavit of service on 27th July, 2016 showing that service was effected on a representative of the 4<sup>th</sup> respondent. The said process server was not successful in effecting service on the other respondents.

## **DETERMINATION**

5. The issue for determination is if the suit should be reinstated for hearing. The applicants' deponent in his supporting affidavit dated 26<sup>th</sup> April, 2016 deposes that despite notice to show cause having earlier been given, his Advocate Swaleh & Company Advocates failed to attend court on 7<sup>th</sup> July, 2015, to show cause why the matter should not be dismissed for want of prosecution.

6. It is worth noting that the plaintiffs' Counsel's submissions contradict the deposition of the applicants in that she states that there was no personal service. The deponent on his part, states that a notice to show cause had been given. It is my view that it matters not whether the Notice to show cause was issued to Swaleh & Co. Advocates who was the applicants' Advocates on record or personally to the applicants.

7. In this case, the plaint was filed on 6<sup>th</sup> March, 2001. On 30th October, 2012 the parties were granted 30 days to file and serve witness statements, bundles of paginated documents and issues ready for trial. After those orders were granted, the plaintiff took no action to list the matter for hearing for over two and a half years which led to dismissal of the case on 7<sup>th</sup> July, 2015 for want of prosecution.

8. In the case of **Mary Chelimo vs Mutinda Ngari** [2014] eKLR, in dismissing an application seeking reinstatement of a suit, the court cited with approval the case of **Alice Mumbi Nganga vs Danson Chege Nganga & Another** [2006] eKLR where Kimaru Judge stated thus:-

***“This court has unfettered discretion to set aside any order which was entered exparte. This discretion however, has to be exercised judicially. The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence. .... In the first place, she cannot blame her Counsel who was then on record for failing to attend court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant, not his Advocate. It behoves the litigant to always follow up his case and seek its progress. He cannot come to court and say that he was let down by his Advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his Advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of Counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant.”***

9. In the case of **Et Monks & Company Ltd. vs Evans** [1985] KLR 584, Kneller J.A held as follows:-

***“ If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its Advocate for negligence unless it has caused or consented to the delay which has resulted in the case being dismissed for want of prosecution. Advocates for most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own Advocates.”***

10. In my considered view, the dismissal of Mombasa High Court Civil case No. 109 of 2001 was well deserved for indolence on the part of the plaintiffs. They slept on their rights to be heard for 21/2 years. In the said circumstances, I decline to set aside the orders issued on 7<sup>th</sup> July, 2015 dismissing the suit for

want of prosecution, it therefore follows that I decline to reinstate the said case. The upshot of the foregoing is that the application dated 26<sup>th</sup> April, 2016 is dismissed with costs to the defendants/respondents.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 7<sup>th</sup> day of October, 2016.**

**NJOKI MWANGI**

**JUDGE**

**Delivered in the presence of:-**

Ms Murage for the applicants

No appearance for the respondent

Mr. Oliver Musundi Court Assistant