



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**ELC NO. 135 OF 2014**

**DAVID RICHARD PERCIVAL.....PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF KILIFI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ISSA BWANA ALIAS CAPTAIN ISSA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JACOB SOLEI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**REDEEMED GOSPEL CHURCH.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**AGNES NYAMBURA.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of an application by way of Notice of Motion dated 30<sup>th</sup> September 2020 and amended on 12<sup>th</sup> May 2021 by the Plaintiff /Applicant seeking the following orders:

***a) Spent***

***b) That this Honourable court be pleased to issue orders reinstating the suit to wit Malindi ELC No. 135 of 2014.***

***c) That upon reinstatement of the said suit, this Honourable court be pleased to issue a date for directions in respect to the position of the 5<sup>th</sup> Defendant on priority basis.***

***d) That this Honourable court be pleased to issue any other orders as may be fit in the interests of justice.***

***e) That costs of this application be provided for.***

Counsel agreed to canvas the application vide written submissions which were duly filed.

**PLAINTIFF/APPLICANT'S SUBMISSIONS**

The Applicant relied on the grounds of the face of the application together with the Supporting Affidavit of David Richard Percival who deponed that when the suit came up for hearing on 8<sup>th</sup> November 2016 when the court was informed that the 5<sup>th</sup> Defendant was deceased and sought for time to join the Legal Representatives of the 5<sup>th</sup> Defendant.

The Applicant further deponed that the said beneficiaries have since refused to obtain Letters of Administration with the intention of defeating the suit against the Defendants and that he intends to file a citation against the beneficiaries.

Counsel submitted that the mistake of an Advocate should not be visited upon an innocent client and relied on the cases of **Susan Chebuso Mkanda v Eshikuku Girls Secondary School & 5 others [2020] eKLR** and **Philip Chemowolo & Another v Augustine Kubende, (1982-881) 1 KAR 103**

Counsel also submitted that the Defendants stood to suffer no prejudice since no legal right had accrued in the matter and which prejudice if any could be compensated by way of costs and cited the case of **V.K Construction Co. Limited v Mpata Investment Limited HCC 257/2003**.

On the issue of filing the application without undue delay counsel submitted that the Applicant complied by filing the application timeously and relied on the case of **Soni v Moan Dairy CA 13/1967 [1968] EA 58** where the court stated that the period of limitation for an application by a Plaintiff under Order 23 Rule 8 now Order 24 Rule 8 (2) was given by Article 178 of the Indian Limitation Act 1877 as 3 years from the date of abatement of the suit.

Counsel took issue with the Replying Affidavit sworn by Counsel Samuel Odhiambo on the grounds that it raised contentious issues which should not have been done by an advocate for a litigant and relied on the cases of **Simon Isaac Ngugi v Overseas Courier Services (K) Ltd [1998] eKLR and Kiswa Investments Ltd & others v Kenya Finance Corporation Ltd**.

It should be noted that the Plaintiff's counsel Jackson Ikua filed a further Affidavit in support of the motion on 18<sup>th</sup> November 2021 where he deponed that a clerk at their law firm failed to inform the Advocate handling the matter at that time when the notice to show cause was issued.

Counsel therefore urged the court to allow the application as prayed.

### **3<sup>RD</sup> AND 4<sup>TH</sup> DEFENDANT'S SUBMISSIONS**

Counsel for the Defendant filed a Replying Affidavit in response to the application and submitted that the Plaintiff has slept on his rights as a diligent applicant should have come to court with evidence of the filed citation. Further that this matter came up for hearing on 8<sup>th</sup> November 2016 when the court was informed of the demise of the 5<sup>th</sup> Defendant but the Plaintiff ought to have taken steps to move the court.

Counsel urged the court to dismiss the application as there has been inordinate delay in filing it and no good reasons have been advanced to warrant the reinstatement of the suit.

### **ANALYSIS AND DETERMINATION**

The issues for determination in an application for reinstatement of a suit that has been dismissed for want of prosecution are as to whether the application has been brought without inordinate delay, whether there are sufficient reasons to reinstate the suit and whether the Respondent will suffer any prejudice if the application is allowed.

In the case of **Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009**, held as follows:-

***1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the Plaintiff, the Defendant and any other third or Interested Party in the suit; lest justice should be placed too far away from the parties.***

***2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."***

This matter was last in court for hearing of the main suit on 18<sup>th</sup> November 2016 when the issue of the 5<sup>th</sup> Defendant being deceased was raised. The Plaintiff was given time to substitute the 5<sup>th</sup> Defendant with the Legal Representatives of the deceased or file a citation to enable the matter proceed.

The Plaintiff took no steps hence the matter came up for notice to show cause why the same should not be dismissed and it is on record that counsel Ms Kaguni holding brief for Mr. Okach for the Plaintiff was present in court. Counsel did not give any reason why the suit should not be dismissed for want for prosecution but only sought for more as they had not complied with the orders earlier granted.

The demise of the 5<sup>th</sup> Defendant had been raised approximately two years prior to that date and therefore the court dismissed the matter for want of prosecution. It is therefore a falsehood that counsel was not aware that the matter had been dismissed for want of prosecution during the hearing of the notice to show cause.

A party whose suit has been dismissed for want of prosecution would be eager to file an application for reinstatement as soon as such information reaches him/her, but in this case the Applicant was indolent and went into a deep slumber only to wake up after 2 years. The Applicant would like the court to exercise its discretion in his favour but equity aids the vigilant not the indolent as was held in **Fran Investment Ltd -vs- G4S Security Services Ltd (2015) eKLR**:-

***"It is well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed expeditiously.***

**which is founded upon the old adage and now an express constitutional principle under Article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff.”**

The second issue is that this matter was dismissed on 11<sup>th</sup> October 2018 and this application was filed 30<sup>th</sup> September 2020 and no explanation has been advanced why there was such a delay having known that the same had been dismissed. The reason that counsel attributed the delay on failure of the beneficiaries of the estate of the 5<sup>th</sup> Defendant to obtain Letters of Administration is not sufficient, If the beneficiaries did not take out letter for 10 years would the Plaintiff wait that long or there are other procedures provided by law in such situations.

There is a provision for filing a citation which was an option for the plaintiff which he never took up. If the Plaintiff was interested in prosecuting the suit, then he could have done so. Order 24 Rule 4 of the Civil Procedure Rules provides as follows:

***(1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the Legal Representative of the deceased defendant to be made a party and shall proceed with the suit.***

***(2) Any person so made a party may make any defence appropriate to his character as Legal Representative of the deceased defendant.***

***(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.***

The Plaintiff did not endeavor to prosecute the suit against the other 4 Defendants.

I find that the application lacks merit and is dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Rulingt has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***