



**Kivai v Kivai & 4 others (Civil Suit 20 of 2018)
[2023] KEHC 17964 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 17964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL SUIT 20 OF 2018
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

CATHERINE KIGASIA KIVAI PLAINTIFF

AND

ERNEST OGESI KIVAI 1ST DEFENDANT

PAMELA NJOKI KARANJA 2ND DEFENDANT

KAVUCA HOLDINGS LIMITED 3RD DEFENDANT

KCB BANK KENYA LIMITED 4TH DEFENDANT

**BENJAMIN KISOI SILA T/A LEGACY AUCTIONEERING
SERVICES 5TH DEFENDANT**

RULING

1. On November 26, 2021, I delivered herein a ruling, where I allowed an application by the plaintiff, dated April 12, 2021, and reinstated her suit, which I had dismissed, for want of prosecution, on March 22, 2021. The reinstatement was on 2 conditions: one, that throwaway costs be paid to the 4th defendant, within 30 days; and two, that the matter be fixed for hearing within 21 days. In default, the reinstatement order was to lapse. I directed that the Deputy Registrar gives a date for the hearing of the matter on priority basis.
2. I am now called upon to determine a Motion, dated February 21, 2022, which arises from the said orders. That application is brought at the instance of the plaintiff. She seeks to be permitted to deposit the throwaway costs in court. Her case is that she was unaware that the ruling, which was initially earmarked for delivery on October 15, 2021, was to be delivered on November 26, 2021, hence she did not attend court when it was delivered, and was unaware of the delivery until January 10, 2022. She



raised the amount to be deposited, and a cheque, in that amount, was forwarded to the 4th defendant, through Advocate, but the payment was declined.

3. Directions were given for disposal of the application by way of written submissions. Both sides have filed written submissions, some complete with supporting case law. I have read through the same and noted the arguments made.
4. The matter is fairly straightforward. The plaintiff's suit was reinstated, on her own application, on certain conditions. She did not meet those conditions. She says that she was not aware that ruling was to be delivered on November 26, 2021, as there was no notice, and she did not become aware until January 2022, hence her failure to comply within time. The suit belonged to the plaintiff. It was her case. She is the one who sought reinstatement, and it was incumbent upon her to follow up the matter, so that when ruling was not delivered on October 15, 2021, when it was scheduled, she should have sought to know when it was to be delivered next. It was delivered in November 2021, and she says she did not discover that it had been until January 2022, when she stumbled on that information, after she visited the court registry on other business. She should have diligently followed up on the matter. I agree with the 4th defendant, there was indolence on her part, and equity does not come to the aid of the indolent. The suit was dismissed for want of prosecution, which was a display of indolence. The same indolence was at play when it came to the reinstatement of the suit.
5. I gave 2 conditions, pay throwaway costs within 30 days and fix the matter for hearing within 21 days, none of which were complied with. I had ordered that upon default, the reinstatement order would lapse. That order kicked in when the 2 conditions were not met. The plaintiff did not seek extension of the timelines, to enable her comply. By the time the application of February 21, 2022 was being filed, the reinstatement order had lapsed. There would be no basis for seeking to meet the 2 conditions, for they lapsed, and the suit stood dismissed upon the lapse of the timelines. The orders being sought relate to a suit which no longer exists.
6. There is no merit in the application, dated February 21, 2022, and I hereby dismiss it, with costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 2ND DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Amasakha, instructed by Amasakha & Company, Advocates for the plaintiff.

Ms. Kadenyi, instructed by Emily & Company, Advocates for the 1st defendant.

Mr. Ativa, instructed by Mukele Moni & Company, Advocates for the 4th defendant.

