



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL SUIT NO. 37 OF 2014**

**EAST AFRICA SEA FOOD CO. LIMITED.....1<sup>ST</sup> APPLICANT/APPELLANT**

**WILLIAM KIPYEGON PERIMOI .....2<sup>ND</sup> APPLICANT/APPELLANT**

**VERSUS**

**PETER KIPSIGE LANGAT (Suing as the Legal Representative of the Estate of**

**the Late ALBERT LANGAT (Deceased.....)RESPONDENT**

**RULING**

1. The Appeal was dismissed on 26/1/2021 for want of prosecution.
2. The Appellant subsequently filed this Application on 29/1/2021 seeking to set aside the dismissal order and to have the appeal reinstated for hearing.
3. The Application dated 29/1/2021 is based on the grounds on the face of it and supported by the Affidavit of **MUCHELA A. ONGE'NGE** in which he deposed that he was unable to file submissions in the appeal due to challenges of the e-filing system.
4. The Respondent opposed the Application date 29/1/2021 and filing a Replying Affidavit dated 18/1/2021 in which it is deposed that this appeal has been pending in Court for 7 years and further that the Respondent filed an Application dated 15/10/2014 seeking dismissal of the appeal for want of prosecution which Application is still pending.
5. The Respondent further submitted that there is no good reason to warrant the reinstatement of the appeal.
6. The parties filed written submissions in the Application dated 29/1/2021 which I have duly considered. The Appellant submitted that non-attendance on 26/1/2021 was not a deliberate decision by the Applicant's Counsel but was as a result of regrettable and unforeseen technological error.
7. I find that the Appellant has annexed their written submissions to this application.
8. It is not in the interest of Justice to punish the Appellant for the mistakes of his Advocate.
9. In *John Nahashon Mwangi versus Kenya Finance Bank Limited (2015) eKLR*, Justice Gikonyo stated as follows ***"The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial "Sword of the Dancles" which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated."***
10. I allow the application dated 29/1/2021 and I accordingly reinstate the Appeal.
11. However, the Appellant to pay the Respondent's costs of the Application to be agreed on by the parties or assessed by the Deputy Registrar of this Court.

12. The Respondents to file their written submissions within 14 days of this date.

13. This matter to be mentioned on 14/7/2021 for compliance and for a Judgment date.

**Delivered, signed and dated at Kericho this 11<sup>th</sup> day of June, 2021.**

**A. N. ONGERI**

**JUDGE**