



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE NO.127 OF 2003**

**IN THE MATTER OF THE ESTATE OF KITHUA KIRUNDO (DECEASED).**

**мбака киринга .....APPLICANT**

**VERSUS**

**IMMACULATE MURINGO MBUKO.....1<sup>ST</sup> RESPONDENT**

**FAITH MUTHONI KITHINJI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The matter for determination before this court is the summons general dated 22.02.2021 in which the applicant seeks to set aside the dismissal orders made on 3.09.2018 and that the said suit be reinstated.
2. The application is based on the grounds on its face supported by an affidavit sworn by Mbaka Kiringa in which she depones that upon realizing that her suit had been dismissed due to want of prosecution, she instructed a new advocate to come on record and pursue her matter. She further argues that she had previously instructed the firm of Eddie Njiru Advocates to prosecute her matter and that she had been in constant communication with the said firm but nonetheless, when the suit was dismissed for want of prosecution, the said firm of advocates never informed her.
3. She has urged this court to reinstate the suit so that all the parties can have a fair hearing and the suit be fully determined on merits since she stands to be disinherited thereby occasioning her great injustice and irreparable harm.
4. The respondent in her replying affidavit deposed that the application is an abuse of court process since the applicant seeks to set aside the dismissal orders on the same grounds which were considered by the magistrate's court before the same was dismissed and orders given by the court. That the applicant is guilty of inordinate delay in presenting the application currently before the court in a guised attempt to resurrect the suit that had been previously dismissed.
5. That the said firm of advocates previously representing the applicant was properly on record and that the records before court indicates that the counsel on record was served but failed to appear hence the dismissal of the suit due to want of prosecution. That the applicant has been completely disinterested in prosecuting her suit.
6. Order 17 Rule 2(1) which governs dismissal of suits for want of prosecution states as follows:

***In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its dissatisfaction, may dismiss the suit.***

7. The application herein seeks to reinstate the suit that has since been dismissed for want of prosecution. It is trite the decision on whether this suit should be reinstated for trial is a matter for judicial discretion and it lies solely on the facts of each case. In ***Ivita v Kyumbu [1984] KLR 441***, the court laid down the principles that this court adopts in order to deal with the application at hand. They are as follows: the reasons for delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay. In equal breath, the court will consider if the application brought before it is frivolous, vexatious and an abuse of the court process.
8. The applicant submitted that the advocate on record despite them being in constant communication, failed to inform her of the progress of her suit until she discovered by herself the dismissal due to non-attendance on 3.09.2018 and further learnt of the status of the aforementioned application when her cousins were served with an eviction notice by Giant Auctioneers who had been instructed by the 1<sup>st</sup> respondent.

9. The suit was dismissed on the 3.09.2018 and the application was filed on the 11.07.2005; a period of thirteen years of inactivity. Equally, the applicant has not demonstrated the steps she took to follow up the matter after she had filed it. The court in the case of **Charles Wanjohi v Githinji Ngure & Another [2006] eKLR** pronounced itself that:

*It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter.....*

10. In regard to whether justice can be done despite the delay, it is trite that justice is justice even unto the respondent and more so having been dragged to court, it was incumbent upon the applicant to expedite the hearing of the matter. The constitution in Article 47 provides that :

*Article 47 (1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*

11. This is a fairly old matter and litigation should come to an end. From the court record, it shows that the matter was fixed for hearing by consent but thereafter, the applicant never appeared in court until when the matter was dismissed.

12. In regard to whether the application before this court is scandalous and an abuse of the court process, the matter coming up before the court after a period of five years of inactivity from the last time it was before the court. The court was informed that the applicant was served with the notice to show cause but she did not show up to defend the suit. The respondent argues that this application has been brought before the court, three years after dismissal with absolutely no cogent reason to persuade the court to reinstate the suit.

13. In my considered view, the applicant had several opportunities to prosecute this matter but instead failed. In the same disinterest, the applicant clearly does not even live in the suit land and correctly puts it that the dismissal of the suit was further brought to her attention when her cousins who live on the suit land were served with an eviction notice.

14. In my view, this application is clearly necessitated by attempts to resurrect Civil Cause 125 of 2013 which was determined by the magistrate's court.

15. In view of the foregoing:

*(i) I find that this application is bereft of any merit.*

*(ii) I dismiss it with costs to the respondent.*

16. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF NOVEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent