



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2012 OF 2008

IN THE MATTER OF THE ESTATE OF JOYCE NYAMBURA MBUGUA. (DECEASED)

PAUL KIGUAH WAMBUGU.....APPLICANT

VERSUS

SAMUEL KURIA GICHINA.....1ST RESPONDENT

JIDRAPH MBUGUA NYAMBURA.....2ND RESPONDENT

RULING

1. The Application coming for consideration in this Ruling is the one dated 5.3.2018 seeking the following orders;

(i) SPENT

(ii) THAT this Honorable Court be pleased to set aside and or review its order dismissing the Application dated 6.10.2014.

(iii) THAT Costs of this Application.

2. The Application is supported by the Affidavit of the Applicant herein sworn on 5.3.2018 in which he has deposed that the Application dated 6.10.2014 was dismissed due to non-attendance by his former Advocates.

3. The 1st Respondent filed a Replying Affidavit to the Application in which he deposed that the Applicant was in Court when the Court gave directions for the Case to proceed by way of oral evidence and that he cannot fault his former lawyer and further that the Applicant has not proffered any reasons for non-attendance.

4. The parties filed written submissions which this Court has considered. I find that the dismissal of the Application dated 6.10.2014 due to the non attendance by the Applicant's counsel.

5. The test for dismissal of a suit for want of prosecution is stated in the case of **Ivita -v- Kyumbu (1984) KLR 441**. The test was expressed as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

6. In that case the Court also said as follows;

"Keeping the foregoing test in mind, we are cognizant of the decisions of this Court on mistakes by counsel. In Phillip Chemowolo & Another -v-Augustine Kubede (1892-88) KAR 103 at 104, Apaloo, JA observed that it does not follow that “because a mistake has been made a party should suffer the penalty of not having his case heard on merit; that courts exist for the purpose of deciding rights of the parties and not the purpose of imposing discipline.” In Belinda Murai & Others - v- Amos Wainaina (1978) LLR 2782 (CALL) Madan, JA stated that “the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better.”

7. I find that the Respondent has not demonstrated that he will suffer any prejudice by the reinstatement of the application and further, I find that to disallow this application seeking to reinstate the Application dated 6.10.2014 would be tantamount to punishing a party for the mistakes of his Counsel.

8. I accordingly allow the application dated 5.3.2018 and I direct as follows:

(i) THAT the order dismissing the Application dated 6.10.2014 be and is hereby set aside.

(ii) THAT the Application dated 6.10.2014 be and is hereby reinstated.

(iii) THAT the said Application to be prosecuted within 30 days of this date.

(iv) THAT the Costs of this Application to abide in the Cause.

Orders to issue accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 8TH DAY OF FEBRUARY, 2019

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI