



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO.185 OF 2016**

**GEORGE MWANGI KINUTHIA.....PETITIONER**

**VERSUS**

**THE HON ATTORNEY GENERAL.....RESPONDENT**

**RULING**

1. The petitioner herein through Notice of Motion dated 12<sup>th</sup> August 2018 brought under Rule 3(1) (2) (a) (b), Rule 4(1) (2) and inherent powers of the court seeks the following orders:-

*a) The Honourable court be pleased to set aside orders of withdrawing the Application petition and all consequential orders thereto if any.*

*b) That the Honourable court be pleased to reinstate the petition.*

*c) Costs for the application abide the case.*

2. The application is based on the grounds of the face of the application thus:-

1) It would be just, expedient and in the interest of justice to reinstate the Petition.

2) The Applicant withdrew the case for not knowing the service number of Humphrey Mwangi Kinuthia (deceased) who is his father. Fortunately he was able to find it and now wishes to reinstate the Petition.

3) The Applicant has an arguable case with high chances of success.

4) The Respondents do not stand to be prejudiced in any known way if the Petition is reinstated.

3. The application is supported by supporting affidavit of the petitioner sworn on 12<sup>th</sup> August 2018.

4. The application is opposed by the Respondent. The Respondent is doing so reliefs on the grounds of opposition dated 13<sup>th</sup> February 2019; replying affidavit dated 13<sup>th</sup> February 2019 and sworn on even date. The Respondent subsequently filed a Notice of Preliminary objection dated 1<sup>st</sup> April 2019 and filed on 2<sup>nd</sup> April 2019.

5. The court directed that both the application and preliminary point of law be heard together by way of written submissions.

6. I have considered the Notice of Motion dated 12<sup>th</sup> August 2018, the grounds of opposition and Replying affidavit both dated 13<sup>th</sup> February 2019 and the preliminary objection dated 1/4/2019, counsel submissions dated 5<sup>th</sup> April 2019 and 25<sup>th</sup> March 2019, and from the above the issues arising thereto for determination can be summed up as follows:-

**a) Whether the withdrawn suit is capable of reinstatement?**

**b) Whether the petitioner has locus?**

c) Whether the Notice of Motion dated 12<sup>th</sup> August 2018 is defective and incompetent?

d) Whether the petitioner is guilty of laches?

e) Whether the petitioner has established sufficient reason to warrant reinstatement, if at all?

**A. Whether the withdrawn suit is capable of reinstatement?**

7. In the instant petition, it is on record that on 28/6/2017 the Applicant informed this court that he wished to withdraw his petition, upon which the petition was marked withdrawn with no orders to costs.

8. The Respondent contends that there is no suit capable of being reinstated in law as there is no legal provision under Kenya Law allowing for reinstatement of a withdrawn petition. Under Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, it provides for the voluntary withdrawal of court proceedings by a Petitioner. Curiously, it does not make any provision for the reinstatement of the same at a later date.

The petitioner voluntarily applied for withdrawal of his petition. He was not coerced or misled by anyone but he voluntarily decided to withdraw his petition. He has not given sufficient reason why he withdrew his petition.

9. It follows a party who withdraws his suit cannot seek to reinstate the same but a party withdrawing a suit has an option of instituting a fresh action as per provisions of order 25 Rule 4 of the Civil Procedure Rules which is similar to Rule 27 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules 2013. The order and Rule referred herein above do not envisage a litigant who has withdrawn the suit to seek a reinstatement; as a withdrawal means there is no suit pending anymore. In view of the above it is my view once a suit is withdrawn there is nothing that can be sought to be reinstated by the court.

**B. Whether the petitioner has locus?**

10. The Respondent contends, that Applicant has no *locus standi* to file any proceedings as he is not an appointed executor under any will or any administration *ad litem* under any court order. The Respondent is therefore urging the Applicant shall be clothed with *locus standi*; upon obtaining a limited or full grant of letter of administration in a case involving the estate of a dead person and as such urges court not to entertain this application.

11. The Applicant on his part avers that he is the administrator of the estate of Humphrey Mwangi Kinuthia (deceased) and has letters of Administration *ad Litem* to pursue this case on behalf of the deceased.

12. In view of the fact that this court is not dealing with the main petition, but an application and the Applicant avers he is an administrator of the deed estate; I find no justification of holding that the Applicant has no locus standi to bring up this application. Secondly under Article 22(2) (a) of the Constitution of Kenya 2010 I find the Applicant has locus standi to bring up this application. A personal representative has locus standi to bring up this application before this court. I do not find any basis to hold otherwise.

**C. Whether the Notice of Motion dated 12<sup>th</sup> August 2018 is defective and incompetent?**

13. The Respondent contends, that Notice of Motion dated 12<sup>th</sup> August 2018 is defective as the same is instituted under unknown provisions of law as apparent on the face of the said application urging as such interlocutory application cannot be granted in vacuum. It is contended by the Respondent, that the prayers should be supported by relevant provisions, expressly provided under the law. It is further urged that there isn't even a main suit from which the Applicant can seek the orders prayed in the Notice of Motion. (See **Nyamira F.C.S vs The Chief Land Registrar & another (2005) eKLR** where it was held that the main suit had to be alive for an interlocutory order to be made.

14. It is further contended, that the Notice of Motion is fatally defective for the reason that the annexures attached thereto offend Rule 9 of the Oaths and Statutory Declarations Rules which provides for mandatory sealing and stamping of affidavit annexures.

15. The Applicant in response urges the application seeks to revive a petition that was alive and active before but was withdrawn and that there is no limitation with respect to constitutional petition alleging violation of fundamental rights.

16. The Applicant's application is alleged to be defective for failure to state under what provision of the law it is brought under. The failure to state the provision under which the application is brought under do not in my view make such an application defective. Under **order 51 Rule 10(1) and (2) of the Civil Procedure** it is provided thus:-

**"(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**

**(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."**

Secondly the Respondent contends the application is defective because there is no suit, however the application is not seeking to enforce any orders in respect of the already withdrawn petition but are seeking to revive the petition. I therefore do not agree that the application is fatally defective and cannot be canvassed as such with a view to have the petition revived.

**D. Whether the petitioner is guilty of locus?**

17. The Respondent contend the petitioner is guilty of laches urging at the time of withdrawing the petition the petitioner was aware of his right to file a fresh suit but took no action. He waited for 15 months before withdrawing the petition. The Respondent urges the inaction of 15 months upto the time of withdrawal of the suit constitutes unreasonable delay.

18. The Applicant urges the petition was withdrawn for good reasons as averred in the supportive affidavit and the instant application was filed on 17<sup>th</sup> October 2018 a period of 2 months from the date of withdrawal of the petition.

19. I have considered the period when the petition was filed and the time of withdrawal and find the delay to be inordinate, however the delay from the time of withdrawal to the time of filing the instant application of 2 month period is also inordinate. The period taken from the date of filing the petition as well as of filing the instant application in my view is unreasonable and undue delay.

**E. Whether the petitioner has established sufficient reason to warrant reinstatement, if at all?**

20. The Respondent position is that there is no suit capable of being reinstated following withdrawal of the petition by the petitioner. From the date of filing the petition the petitioner went to slumber for over 1 year before instituting the present application. The delay has never been satisfactory explained as service could easily have been effected through Newspapers advertisement. It has not been demonstrated that there is an error apparent on record nor is there sufficient cause that has been demonstrated that would allow the court to exercise its discretion in favour of the Applicant. It is further noted, withdrawal of suits (petitions) before this court require leave of the court as per Rule 27(2) and (3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rule, 2013; and as such the petitions therefore are never withdraw at the whims of a petitioner, but rather by a sanction of the court. This court jealously protects the integrity of the court and avoids abuse of its process by vexatious litigants who takes court precious time for granted and should allow petitioner to abuse the court process.

21. The upshot is that the Applicant application is without merit and I proceed to make the following orders:-

**a) The Applicant application is without merit and the Applicant is not entitled to the orders for setting aside orders withdrawing the petition and for reinstatement of the petition as sought in the Notice of Motion dated 12<sup>th</sup> August 2018.**

**b) The withdrawn suit ought to be allowed to rest where it was laid.**

**c) The Respondent is granted costs of the application.**

**Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of October, 2019.**

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**J .A. MAKAU**

**JUDGE**