REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 32 OF 2007

PROTUS WANGILWA ..... 1ST PLAINTIFF/APPLICANT

EVANS SIMIYU ..... 2nd PLAINTIFF/APPLICANT

(*Suing as administrators to the Estate of*

***The Late RAJAB NAROTSO MWANDIA – deceased*)**

VERSUS

ERNEST MUNENE T/a KARAMBEE

PETROL STATION ..... DEFENDANT/RESPONDENT

RULING

1. Protus Wangilwa and Evans Simiyu, the Plaintiffs/ Applicants took out the Notice of Motion dated 26th February, 2018 in which they sought the following orders inter alia:

i. THAT the orders issued on 24th April, 2015 be vacated.

ii. THAT the Plaintiffs be allowed to prosecute this Suit.

iii. THAT the costs of this application be in the cause.

2. The motion is supported by the affidavit of Protus Wangilwa and Evans Simiyu where they averred that their advocate on record at the time failed to keep them abreast on the court process and neither did he inform them that the suit had been dismissed. They averred that they only became aware that the suit had been dismissed in the year 2017 upon perusal of the court file. They averred that the reinstatement of this suit will not prejudice the Defendant/Respondent. In the further affidavit sworn by Protus Wangilwa on 17th May, 2018, he averred that upon realisation that the suit had been dismissed, he followed up with the court.

3. The motion is opposed by the Defendant/Respondent who filed the replying affidavit of Penina Oloo and averred that the Plaintiffs/ Applicants delay to prosecute the case was inordinate, prolonged, unexplained. The Plaintiffs were also accused of neglecting or refusing to set the suit down for hearing within the reasonable time after close of pleadings. The Defendant/Respondent averred that the Plaintiffs/Applicants had a duty to prosecute their case. The Defendant/Respondent has argued that the reinstatement of the suit would be prejudicial to him and opposed the reinstatement of the application for reinstatement.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. The court issued notice to the Plaintiff/Applicant to show cause why this suit should not be dismissed. Neither the Plaintiffs/ Applicants nor the Defendant/Respondent attended court for the hearing of the Notice to Show Cause. Consequently, the suit was dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 on 24th February, 2015.

5. Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 provides:

"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 satisfaction, may dismiss the suit."

6. This court finds that there are two issues for determination: whether the delay was deliberate and or inexcusable; and whether prejudice

will be suffered by either party to the suit.

7. In the case of **Peter Bekyibei Langat V Recho Chepkurui Mosonik & Another [2014] eKLR** Lady Justice L. Waithaka echoed the view of **Justice L. Kimaru in Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) eKLR** as follows:

> ***"The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence …. In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing''.***

8. Lady Justice L. Waithaka in the case of **Alice Mumbi Nganga vs Danson Chege Nganga & Another** (supra) found that the Plaintiff/Applicant had a responsibility in following up on the progress of her case. Lady Justice Waithaka stated inter alia that: -

> ***"In the instant case, the Plaintiffs/Applicants were not vigilant in following up on their case. They left everything to their lawyer and waited for their lawyer to give them updates. They ought to have monitored the progress of their case from the time of commencement as it is not enough to say that their lawyer was supposed to keep them updated. Every litigant has a duty not only to themselves but also to the court to ensure that their matters get getting prosecuted."***

9. The Court of Appeal in **Ivita vs. Kyumbu [1975] eKLR** held inter alia: -

> ***"The Defendant must however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."***

10. The Plaintiffs/Applicants upon realising that their matter had been dismissed, sought to have the matter reinstated and this is evidenced in the letter dated 1st March, 2017 and this led to the filing of their application for reinstatement of the suit. This demonstrates vigilance on their part.

11. This court has the discretion to allow the reinstatement of this suit in the interest of justice. It is the court's opinion that prejudice will not be suffered upon by either the Plaintiffs/Applicants or the Defendant/Respondent. Consequently, the order issued on 24th February, 2015 dismissing this suit for want of prosecution is hereby set aside. This suit is reinstated for hearing on its merits. Costs of the motion to abide the outcome of this suit.

Dated, Signed and Delivered in open court this 20th day of July, 2018.

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J.K. SERGON

JUDGE

In the presence of:

………. *For the Plaintiff*

………. *For the Defendant*