



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**ELC CIVIL CASE NO. 311 OF 2012**

**MARY CHELIMO.....PLAINTIFF**

**VERSUS**

**MUTINDA NGARI ..... DEFENDANT**

**RULING**

1. The Applicant, **Mary Chelimo**, filed a Notice of Motion under **Order 51 Rule 1, Order 12 Rule 7** of the Civil Procedure Rules, **sections 1A, 1B and 3A** of the Civil Procedure Act and all enabling provisions of the Law **dated 15<sup>th</sup> March, 2012** seeking the following orders:

- 1) **That the dismissal of the case and or orders dated 6<sup>th</sup> October, 2010 be set aside.**
- 2) **That the plaintiff's/ applicant suit be reinstated and the plaintiff's/ applicant be allowed to take part in the proceedings.**
- 3) **That costs of the application be provided for.**

2. The Application is premised on the grounds set out therein and is supported by an affidavit sworn by the Applicant dated 14<sup>th</sup> March, 2012. She deposes that she instituted this suit through **R.M Machage & Company Advocates** on 28<sup>th</sup> February, 2006. That although the defendant entered appearance and filed defence, her advocate kept advising her every time she visited his office that they were following up her matter. That it is only in early 2012 when she visited her former advocate that she learnt that the suit had been dismissed on 6<sup>th</sup> October, 2010. She prays that the court allows her application so that the suit can be determined on merit and not to punish her for the mistake of her counsel.

3. An affidavit of service was served upon the firm of **Habashi Machafu and Company Advocates** who accepted service but declined to sign and stamp the documents saying that the defendant had passed away.

4. On 6<sup>th</sup> May, 2013 the court directed that the defendant be served in person when the applicant's Counsel intimated to court that the defendant was alive. An affidavit of service was filed by **Boniface P. O. Owuoch**e on 14<sup>th</sup> January, 2014 that he had once again effected service upon **Mr. Habashi Machafu Advocate** on 19<sup>th</sup> November, 2013. The Advocate had once more acknowledged service but declined to sign on the document insisting that he was consulting the Defendant's family as the information within his knowledge was that the defendant was deceased. The process server has not mentioned in his affidavit

whether he had traced the defendant or what efforts he had made to trace him despite the court ordering that the defendant be served in person. Despite service on the respondent's counsel, there was no response or court attendance by him.

5. I have considered the said application, the affidavits and oral submissions by the Applicant and I find two issues for determination;

**a) Is the plaintiff's counsel properly on record to enable her file this application?**

**b) Has the applicant satisfied the principles for reinstatement of a suit**

6. The plaintiff has engaged the services of a different advocate to file this application. Judgement having been entered in this matter, any counsel coming on record must follow the procedure laid down in **Order 9 Rule 9** of the Civil Procedure Rules 2010 as follows:

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

7. The incoming counsel having failed to follow the procedure as outlined is therefore not properly on record.

8. This suit was dismissed by the court on its own motion under **Order XVI Rule 6** of the old civil procedure rules as no action had been taken on the matter since 2006. This order is replicated in order 17 rule 2 (1) of the Civil Procedure Rules 2010. A party seeking to have the suit

reinstated must demonstrate good faith and bring the application for reinstatement without unreasonable delay.

See **Simion Waitim Kimani & Three others vs Equity Building Society (2010)** eKLR In this case Koome J in Paragraphs 4 and 5 held;

4. **“The courts have discretion generally to reinstate a suit which is dismissed for non attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay. This suit was filed on 12<sup>th</sup> March 2002 and since 29<sup>th</sup> November 2004 no steps were taken to prosecute it. It is the court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the year 2004. The Plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years.”**
5. **Even if this court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the court dismissed the suit for want of prosecution. According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation.....”**

Also see the case of Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) Eklr. by **Kimaru J** where he states;

**“This court has unfettered discretion to set aside any order which was entered *ex parte*. This discretion however, has to be exercised judicially. 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. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, *per se*, make this court to exercise its discretion in favour of an aggrieved litigant.”**

In the case of Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR) (*unreported*) **Waki J.A**, held at page 3 that;

**" With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and deligence that entails such matters. Instead the applicant and his advises exhibited undesirable nonchalance, which I am not inclined to countenance"**

9. In the present case, it is clear that the applicant had been indolent after filing this suit to warrant its dismissal and thereafter in bringing this application without unreasonable delay. After the suit was dismissed, the applicant did nothing for three years and only filed this application on 15<sup>th</sup> March, 2012 for reinstatement of the suit. I am not prepared to overlook the indiscretion of the applicant in failing first to prosecute her case and secondly upon dismissal, to file her application for reinstatement within a reasonable time. The applicant's conduct in this matter precludes me from exercising my discretion in her favour.

10. For the reasons stated above, I find that the Notice of Motion dated 15<sup>th</sup> March, 2012 must fail. It is hereby dismissed with costs.

**Dated, signed and delivered on this 9<sup>th</sup> day of May 2014.**

**L N WAITHAKA**

**JUDGE.**

**PRESENT**

M/S Ndeda for the plaintiff

N/A for the defendant

Emmanuel Maelo: Court Assistant

**L N WAITHAKA**

**JUDGE**