

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL SUIT NO. 493 OF 1999**

**KASIKU KITONYE ..... 1<sup>ST</sup> PLAINTIFF**

**KAVEMBA KITONYE alias KALEMBA..... 2<sup>ND</sup>**  
**PLAINTIFF**

**VERSUS**

**RAPHAEL MAWEU MUNYAO ..... 1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**PAULINE MUTUKU ..... 2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**ALICE NDETHYA KIMOLO ..... 3**  
**DEFENDANT/RESPONDENT**

**SAMUEL MBINDYO NZIOKA ..... 4<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**

**ELIAKIM KIMEU WAMBUA ..... 5<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**

**ROBERT MUSYOKI YENYE ..... 6<sup>TH</sup> DEFENDANT/RESPONDENT**

**DAVID MUTETI KISILU ..... 7<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**

**MUTANTEEU YOUTH**

**POLYTECHNIC .....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This suit was dismissed for want of prosecution on 23/02/2015.

2. The Applicants'/Plaintiffs' by this **Motion dated 14/02/2025** seek orders for setting aside of the dismissal orders and reinstate the suit for hearing on merit.
3. The **Motion** is grounded on **Order 8 Rule 5 and Order 8 Rule 51 of the Civil Procedure Rules (CPR)**. It is further supported by the affidavit of Kavemba Kitonye sworn on 14/02/2025.
4. The Applicants depone that prior to the dismissal orders they were not served with a notice to show cause why the suit should not be dismissed; that their then advocate was appointed judge in 2014 and had challenges instructing fresh legal representation; that the 1<sup>st</sup> Plaintiff died on 16/03/2024 and there is need to substitute him.
5. They posited that letters of **Administration Ad Litem were duly issued on 29/10/2024**; arguing that the orders they seek will not prejudice the Defendant if granted.
6. In **opposing the motion**, the Defendants filed **grounds of opposition dated 7/04/2025** summarily stating that the application is an abuse of court process considering that the suit was dismissed in February 2015, the same having been filed in 1999.
7. They further posited that the delay of ten years is inordinate and in excusable, that grant of the orders sought would greatly prejudice them due to the inordinate delay; and that no

reasonable explanation has been provided by the Applicants for the unreasonable delay.

8. Parties offered oral arguments on the application. The Applicants relied on their supporting affidavit stating that the delay is not inordinate due to circumstances of the case.

The Respondents in support of their grounds of opposition reiterated that the delay of 10 years is inordinate and no explanation was offered. They further submitted that a party seeking courts exercise of discretion must come to court with good faith; that the application must be brought with reasonable time; and therefore prolonged delay is inexcusable as is in the instant matter of 10 years.

9. The court has carefully considered the parties arguments in support of their respective cases.

**Order 12 Rule 7 CPR** allows the court to set aside its orders upon terms as may be just.

The principles that a party seeking such orders have been set in numerous decisions; they must demonstrate sufficient cause and reasons for the inordinate delay, which must not be deliberate or due to the party's inaction. The motion must also be made within reasonable time from the date of dismissals seeking setting aside or variation of the orders.

10. In the case of **Olumber V. Obanyi (Civil Appeal E014 of 2024) 2025[KEHC 5386] (KLR)** the court (Musyoka J) in similar

situation, citing the old age case of **Ivita v. Kyumbu [1984]** eKLR reiterated the principles that must be considered, thus;-

- 1) Whether the delay is prolonged and inexcusable,*
- 2) Whether justice can be done despite the delay.*
- 3) Justice is justice to both parties,*
- 4) Whether the opposite side would be prejudiced.*

11. Further, the court is mandated under **Article 50** and **159** of the **Constitution**, and the objectives in **Sections 1, 1A and 3A** of the **Civil Procedure Act**, wherein the call for discretion of a court were discussed in the case of **John Nahashon Mwangi V. Kenya Finance Bank Limited (in Liquidation) 2015 eKLR**.

In the instant case, the suit was filed in 1999. No action was taken by the Plaintiffs to prosecute the suit. It was dismissed for want of prosecution on 23/02/2015.

It is factual that the Plaintiffs then advocate was appointed judge in 2014. It cannot be true that appointment of the advocate disconnected the Plaintiffs from the court. They had an option to appoint another counsel to progress their case. That was in July 2014. What is the position prior to July 2014, from 1999, a period of 13 years?

12. Further, it is on record that the suit was dismissed on 23/02/2015. The Plaintiffs went on sleeping on their rights for another 10 years upto 14/02/2025 when the Plaintiffs woke up to file this application.

13. I have perused the supporting affidavit of the Plaintiffs in support of the application. There is no mention or explanation whatsoever that can meet the principles stated at the case of **Ivita v Kyumbu (Supra); or Olumbe v. Obanyi** or any other. Each party's interests in a case ought to be considered. Prolonged delay in prosecution of a case may cause substantial prejudice to the Defendants. This is seen in the death of the 1<sup>st</sup> Plaintiff. This however, prejudices the Plaintiffs themselves.
14. A delay that runs to 26 years and not sufficiently explained which I hold is the position here, is an outright act of abuse of court process. It is amplified by facts beyond their control like when witnesses to the parties may not be available to come to testify after such a long period as stated in the case of **Ivita v. Kyumbu (supra)**; that too may affect documentation that may have been lost or misplaced.
15. In addition, the case belongs to the Plaintiffs. It is and always is the Plaintiffs who ought to check constantly with their Advocates as to status and progression of their case as held by the Court of Appeal in **Duale Mary Anne Gurne V. Amina Mohammed Mahamoud & another [2014] eKLR**.
16. **Ultimately, the instant case having been in limbo for 16 years before it was dismissed on 23/02/2015; and further, the Plaintiffs having not brought an application for setting aside the dismissal orders for no realistic or unexplained delay for another 10 years, for the**

**foregoing and in the interest of fairness and justice, there can be No other order sufficient to address the parties concerns but to dismiss the application. It is so dismissed with costs to the Defendants.**

**Delivered Dated and Signed at Nairobi this 30<sup>th</sup> day of October, 2025.**

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**JANET MULWA.**

**JUDGE**

ORIGINAL