

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. 317 of 2011

ERASTUS MAINA WACHIRA.....1ST
PLAINTIFF

HENRY MURIUKI KAMAKU.....2ND
PLAINTIFF

JOHN KILUVA MUTUKU.....3RD
PLAINTIFF

VERSUS

THE SWISS PORT CARGO SERVICES COMPANY1ST
DEFENDANT

TANDU ALARMS SYSTEMS.....2ND
DEFENDANT

THE COMMISSIONER OF POLICE.....3RD
DEFENDANT

AMOS OYUGI.....4TH
DEFENDANT

HON. ATTORNEY GENERAL.....5TH
DEFENDANT

RULING

1. The **motion for determination here is dated 30/04/2025.** It is brought by the Plaintiffs seeking

numerous reliefs, but mainly an order to review, revise, vacate end or set aside orders of court dated 1/04/2025 (Mulwa J) marking the suit as closed; and reopening of the same for hearing. The motion is premised on provisions of **Order 45; and 51 of the Civil Procedure Rules** and **Section 80, 90, 1A, 1B and 3A of the Civil Procedure Act**; upon the supporting affidavit sworn by Paul Omondi Otiende, Advocate for the Plaintiffs.

2. The Plaintiffs case is that on 8/10/2024, the suit was reinstated for hearing by the Hon. Ongeru J. after it had been dismissed upon terms that:-
 - a) *The Plaintiff pay to the Defendant throw away costs of Kshs. 30,000/=*
 - b) *That the Plaintiffs prosecute the case within 120 days;*
 - c) *The hearing date be taken within 30 days.*
3. It is the Plaintiff's further statement that the Ruling was delivered by the Judge from Voi High Court and that it took 3 weeks for the court file to be returned to Milimani Civil Registry and posting of the ruling at the CTS, upon which the Plaintiffs by letter dated 25/10/2024, it was uploaded in the CTS on 26/10/2024 requested for a hearing date pursuant to the court directions.

Additionally, it is posted by the Plaintiffs that the Court Administrator placed the court file before the Presiding Judge who administratively assigned the suit to Hon. Cherere J. for

hearing; that on 23/01/2025 the case was rescheduled hearing on 25/03/2025 as the Judge was on leave.

4. The Plaintiffs continue to state that on 25/03/2025, Cherere J referred the matter to this court (Mulwa J.) for hearing; that on 1/04/2024 the matter was closed for non-prosecution of the suit within 120 days – pursuant to Court Orders dated 8/10/2024.

The Plaintiffs further posit that at all material times the judges had been aware of the limited time for the prosecution of the case and the keenness of the Plaintiffs to prosecute the case.

5. The Applicants further add that their failure to make a formal application to extend time for prosecution of the suit was an honest mistake on the part of their advocates stating that the time lapse was unfortunate and highly regretted, and therefore urge the court to set aside the orders and reinstate the suit for hearing at the interest of justice.

The referenced court orders/directions are attached hereto as exhibits **“PO -0-01, P.O 0-02, P.O 0-03, P. O. 0-04 a, & 6 and P. O. 05** that includes all the activities by the parties as appears at the CTS.

6. In opposition to the motion, the 1st Defendant filed a replying affidavit sworn by the 1st Defendant, through its Human Resource Manager, Samia Barasa on 20/06/2025, upon

which he avers that the orders sought by the Plaintiffs are ambiguous, vague and contradictory and incapable of being issued, citing **Order 2** thereof as stated, as it refers to court orders issued on 1/04/2025.

7. The Defendants posits that court orders for payment of throw away costs being a condition given by the court were not complied with as the 1st Respondent/Defendant were not paid despite reminders by emails marked as "SB-1" as annexure adding that at all times the matter came for mention before the judges, at no time did the Plaintiffs bring to the judge's attention that there were timelines set for hearing of the suit.
8. It is further posited that the Plaintiffs indolence was excused by the court when it reinstated the case for hearing by the orders of 8/10/2024 and therefore the court ought not extend the favour for a second time, saying that their conduct is not worthy of the courts discretion as no substantive reasons were advanced for their failure to seek extension of time to have the suit heard.

In summation, it is the Defendants submissions that, grant of the reliefs sought will greatly prejudice them as the suit was dismissed in 2017; was reinstated in 2024, dismissed again in 2025 and now seek reinstatement.

9. Together with the replying affidavit, the 1st Defendant raised a **Notice of Preliminary Objection (PO) dated 20/06/2024.**

The gist of the preliminary objection is that the motion dated 30/04/2025 offends the statutory provisions of:-

- 1) Order 9 Rule 9 CPA; and**
- 2) Order 7 of the CPA on resjudicata**
- 3) That the court is functus Officio hence it lacks jurisdiction to determine the application dated 30/04/2025.**

Parties filed written submission on both the Preliminary Objection and the motion, which the court has considered.

Analysis and Determination

- 10.** The court will interrogate the Preliminary Objection first as it may determine and/or have the effect of disposal of the application under review as held in the case of **Mukisa Biscuits Manufactures Ltd v. West End Distributors [1969] EA 696**, and applied in many decisions in our courts among them **Mwalungu Mwambu Nyiyo & 201 Others vs. Total Oil Products [EA] ltd & Another [2021] eKLR** and **Attorney General & Another v. Andrew Mwaura Githinji & Another [2016]**.
- 11.** A Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the Preliminary Objection

cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

It should raise a pure point of law which if argued on the assumption that all facts pleaded by the other side are correct. Further, the court has to be satisfied that there is no proper contest as to the facts as they are deemed as agreed and are prima facie presented in the pleadings on record.

Issues raised in the Preliminary Objection

- 12. Order 9 Rule 9 of the CPR** is the underpinning legislation in respect of change of Advocates or acting in person after judgment has been delivered.

This suit was dismissed for want of prosecution on 24/03/2017 but upon application by a motion dated 14/02/2025, the suit was reinstated for hearing by orders of Ongeru J. on 8/10/2024.

At the time of the dismissal of the suit on 24/03/2017 the 1st Respondent was represented by the firm of Acholla Jaoko & Co. Advocates.

- 13.** After judgment, the 1st Defendant replaced its representation to the firm of Kinyua Mbaabu & Co. Advocates who sought to oppose the Plaintiffs application dated 3/07/2023 when they sought reinstatement of the suit

Thereafter, the said law firm by their motion dated 6/06/2024 sought leave to come on record for the 1st Respondent. Court records show that the said application was never prosecuted, and therefore the said law firm never came on record for the 1st Respondent/Defendant there been no leave granted nor a consent of parties filed.

- 14.** It is now trite that a court record can easily be found at the Judiciary Court Tracking System (CTS) from around 2023 to date. A perusal of the CTS (by the Plaintiffs Advocates) and by this court confirms that the firm of Kinyua Mbaabu & Co. Advocates did not file a Notice of Change of Advocates to enable it come on record properly.
- 15.** The 1st Defendant on the import of Order **9 Rule 9 Civil Procedure Rules**, submits that after the dismissal of the suit by an order of 1/04/2025, the application dated 3/07/2024 and this instant application dated 30/04/2025 were filed by the Plaintiffs through the firm of Omondi Odege & Co. Advocates who they state had also not sought leave to come-on record for the Plaintiffs. In other words, the 1st Defendant is saying that the Plaintiffs Advocates, Omondi Odegi & Co. Advocates have no locus standi to bring the motion dated 30/04/2025 and therefore should face similar consequences.

- 16.** I have perused the Ruling of the Hon. Ongeru J. dated 8/10/2024. At para. 2 (iv) and (vi) ; the judge upon perusal of records at the CTS made a finding that the law firm of Naikuni, Ngaa & Miencha Co. Advocates signed a consent with the law firm of Omondi & Odegi & Co. Advocates allowing them to come on record for the Plaintiffs in early 2023, and prosecuted its motion dated 3/07/2023 from which the ruling of 8/10/2024 was made;- and which is subject of the motion before me. That being the case, the law firm of Omondi Odegi & Co. Advocates were properly on record post judgment for the plaintiffs; contrary to what the 1st Defendant submits.
- 17.** The court to come to the above decision is guided by superior Court decisions in **Symposia Consult Ltd v. George Gikere Kaburu & 2 Others [2019] eKLR Kabiru & Another v. Amboso [2024] eKLR**; for the learned holdings that provisions of **Order 9 Rule 9 CPA** are mandatory provisions and failure to comply is fundamental omission worthy of dismissing any pleadings filed by an advocate not properly on record for a party.
- 18.** The Learned Judges further held in **Paul Kiplangat Keter v. John Koech [2021] eKLR** that courts cannot turn a blind eye to situations where rules of procedure are blatantly breached.

At the end, the court finds that the 1st Defendant's Preliminary Objection dated 20/06/2024 on non-compliance with provisions of **Order 9 Rule 9** by the Plaintiffs to be incompetent. The law firm of Omondi Odegi & Co. Advocates had locus to file the motion dated 30/04/2025 on behalf of the Plaintiffs.

- 19.** I have considered the submissions by the Plaintiffs dated 21/07/2025. Issue of compliance with provisions of **Order 9 Rule 9 CPR** is substantively discussed as to its compliance with the said provisions.

At paragraph 18, 19 and 20 of this ruling; the court came to the conclusion that the 1st Defendants Advocates are not properly on record as no leave was ever granted to it to take over post judgment, as its application for leave dated 6/06/2024 was never prosecuted, nor was a consent between the outgoing and incoming advocates was filed.

- 20.** Therefore, the court finds that the 1st Defendants Advocates, Kinyua Mbaabu & Co. Advocates, lacked locus standi to represent the 1st Defendant. To that extend, its Preliminary Objection and the Relying Affidavit to the Plaintiffs motion dated 30/04/2025 are incompetent and cannot stand. Ultimately, the 1st Defendants Preliminary Objection is struck out in limine.

21. For the above reason, the court will not belabor further interrogating the 2nd and 3rd arms of Preliminary Objection.

Notice of Motion dated 30/04/2025.

22. By the finding of the court that the 1st Defendant Advocates are not properly on record, it follows that the motion is undefended as all pleadings filed by the said Advcoates were incompetently filed.

The supporting grounds and affidavit have been considered alongside court ruling dated 8/10/2024. The reasons for the failure to comply with the timeline granted by the court for prosecution of the suit of 120 days have been considered as well as the submissions dated 21/07/2025. There is no dispute on the mode of delivery of the ruling. Of interest is that, it was uploaded into the CTS on 26/10/2024 and administratively the matter moved from one court to another upto when it finally was placed before this court on 1/04/2025 on which date the court dismissed it for want of prosecution within the 120 days granted by the Hon. Ongeru J.

23. I have considered the Applicants plea that its failure to apply for extension on time was an honest mistake on its part and plea that the mistake should not be visited upon the Plaintiffs.

The question before the court is therefore ***whether the suit should be reinstated for hearing.***

24. In the Court of Appeal case of **Murtaza Hussein Bandah t/a Shimoni Enterprises VPA Wills [1991]KLR**; the court made observations that the court has inherent power to restore a dismissed case for hearing, that the decision to do so is no doubt an exercise of judicial discretion to be exercised on basis of evidence and sound legal principles upon material disclosure for the failures being disclosed by the Applicant.
25. **Article 159 and 50 of the Constitution** employs the court to do substantive justice to all parties more particularly that in making a decision for dismissal of a suit that has been dismissed or reinstatement of the same, such actions should be exercised with great care so as not to drive or push litigants from the seat of judgment.
- In the case of **John Nahashon Mwangi V. Kenya Finance Ltd (in Liquidation) [2015] eKLR**, the Court (Gikonyo J), stated that; *Courts should sparingly dismiss suits for want of prosecution is a draconian act, which drives away the Plaintiff in an arbitrary manner from the seat of Judgment. Such acts are comparable only to the proverbial “sword of the Damodes” which should only draw blood where it is absolutely necessary.*

26. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate suit ... *and considering the prejudice that the Defendant would suffer if the suit was reinstated against the plaintiff will suffer if the suit is not reinstated*".
27. On issue of Advocate mistake which is the issue here, the court in the case of **CFC Stantic Limited v. John Maina Githaiga & Another [2013]eKLR** held that:-"*... that being the mistake of counsel, the same ought not be visited on the appellant*"

Further in the case of **Lee Muthoga v. Habib Zurich finance (K) Ltd & Another** (cited in the CFC Stantic Bank above) the court held that "*It is a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight...*"

28. I have observed that the Applicants have made efforts to prosecute the suit by complying with the conditions given in the ruling of 8/04/2024 (Meoli j.) save for the prosecution within 120 days. They have demonstrated willingness to do so and made the instant application timeously.
- I have been urged to review or vary the dismissal order dated 1/04/2025 by setting it aside or revising the same

pursuant to **Order 45 CPR and Section 80 of the Civil Procedure Act.**

29. At the time the dismissal order was made in court, the material leading to the dismissal where not placed before the court. The court acted purely on the order of Ongeri J. that the suit should have been prosecuted within 120 days. The court was right to dismiss the suit as the timelines, had lapsed, and no extension had been sought. Pursuant to **Order 45 Rule 1, 2 and 3 CPR**, it appears to me that there is sufficient ground to review the dismissal order for ends of justice to be seen to be done.
30. On prejudice to the Defendants, there is no dispute that the suit has been on dismissed before, in 2017, and again in 2024. Why then should it be reinstated once more? It is a genuine question by the Defendants.

In terms with the holding in **Union Insurance Co. of Kenya Ltd v. Ramzan Abdul Dhani Civil Application No. Nai 179 of 1998** the court held:-

“the law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then, the only point on which the party on not utilizing the opportunity can be heard is why he did not utilize it!”

31. I am persuaded as to the reasons advanced by the Plaintiffs. However, adherence to timelines to timeliness given by court ought to be strictly complied with as held by the **Supreme Court of Kenya** in the case of **Salat v. Independent Electoral and Bounderies Commission & 7 Others [2014] eKLR**, wherein in it emphasized that:-

“... the whole essence of litigation as a contest is that each party must be ready and willing to abide the rules of the game and by any fair orders made by the court”.

32. Having rendered that the reasons for noncompliance` have been sufficiently explained, I shall allow the application as follows;

a) In terms of prayer number 2, by reviewing court orders dated 1/04/2025 thus reinstating the plaintiff's suit for hearing on its merits.

b) That the parties do attend court for taking a hearing date for this suit on 13/11/2025 at 9.00am. The Plaintiffs shall notify the defendant of the above orders.

c) The above indulgence of the court to the plaintiff/shall not be free of charge. The plaintiffs shall pay to the 1st Defendant, the only party seemingly prejudiced by the inordinate delay, a sum of Kshs. 30,000/= as throw away

costs within 30 days of this ruling. In default, these orders shall lapse automatically.

d) Costs of the application shall be borne by the plaintiffs.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 30th day of October, 2025

.....

JANET MULWA.

JUDGE