

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELC CASE NO 34 OF 2018**

**PETER KALAMA & ANOTHER .....**  
**PLAINTIFF**

**VERSUS**

**MWIDADI SAIDI CHIPHORO KIVORO & ANOR .....**  
**DEFENDANTS**

**AND**

**KAMLESH LALIT DURGASHANKER PANDYA .....1<sup>ST</sup> INTERESTED PARTY**  
**MINESH GOVIND HARJI NATHOO .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. In the application dated 28<sup>th</sup> April 2025, the plaintiff seeks the following prayers:

- a. That the suit be reinstated;
- b. That the plaintiff be granted leave to amend its plaint as set out in the draft amended plaint attached to his application;
- c. That the draft amended plaint attached to the application be deemed as duly filed and served;
- d. That the 1<sup>st</sup> defendant be at liberty to file his amended defence within 14 days;
- e. That the 2<sup>nd</sup> defendants be deemed duly added and be at liberty to file its defence within 14 days;
- f. Any other relief the honourable court may deem fit;
- g. Costs of this application be provided for.

2. The application is premised on the grounds that: the original claim was for trespass; the present claim alleges fraud and misrepresentation; that the original claim may not lead to a decision on the real matters in controversy; that upon service of the replying affidavit to an application filed by the plaintiff, the fact that the defendants had sold a portion of plot

no 914 was disclosed; the said portion was disposed of to the interested parties who have now been issued with title deeds; that the acts of the defendants were calculated to defeat the plaintiff's claim; that the interested parties contributed to the acts leading to the fraud by financing them; that the 1<sup>st</sup> defendant had not filed a defence to the claim; that the 2<sup>nd</sup> plaintiff is now deceased and at the time of dismissal of the suit a grant of letters of administration to his estate had not been obtained;

3. The application is opposed.
4. The 1<sup>st</sup> defendant filed his sworn affidavit dated 3<sup>rd</sup> June 2025. he opposes the application on the basis that his brother the 2<sup>nd</sup> defendant passed on long ago; that the plaintiff lost interest in the matter; that the suit should remain dismissed; that the applicant's brother died on 29<sup>th</sup> June 2022 and there has been lengthy delay since then; that the present is an omnibus application including prayers for amendment and yet at the moment there is no suit to be amended; that by the time the suit was filed in 2018, the two brothers named as defendants had already sold the suit land, and it had been registered in the names of the current owners in 2016; that the defendants now lack interest in the suit land (and in any event one defendant is deceased) and that the applicant has been sleeping on his rights.
5. The second interested party filed is sworn affidavit dated 3<sup>rd</sup> June 2025 in opposition to the motion. The gist of his opposition is that there is no case before Court where the plaintiff is suing on his own behalf and on behalf

estate of Albert Kalama Nzaro (deceased) and the plaintiff would have to file a fresh suit if he intends to change the names of the parties in respect of the plaintiffs; the first plaintiff has brought an omnibus application for reinstatement as well as amendment yet one cannot apply for leave to amend a suit that has been struck off by the court; that from 18<sup>th</sup> September up to October 2023 when the notice to show cause was issued the plaintiff had lain quiet for a period of 4 years and 11 months and he did not even attend court when the mother was dismissed in the year 2023. That in any event, the plaintiff did not make any application for the reinstatement of his case until 28<sup>th</sup> April 2025; that the plaintiff's manner of dealing with his case may lead to protracted proceedings even matter and his delay is inordinate and the application should be dismissed.

6. The Attorney General filed grounds of a position dated 29<sup>th</sup> May 2025 in which he stated that the application is misconceived, frivolous and vexatious, and an abuse of the court process; that the plaintiff has not given proper grounds as to why the suit should be reinstated; that the orders sought are untenable and a nullity, and that the applicant is the author of his own misfortune.

### **SUBMISSIONS**

7. The applicant filed submissions dated 24<sup>th</sup> June 2025. The highlights of the submissions are as follows: the court file does not have any evidence of service to show that the notice to show cause was actually served through the addresses given; that it is the court that dismissed the suit

*suo moto* for want of prosecution; that the ownership of the suit lands is yet to be established or determined; that, relying on the case of *Lewar Ventures Limited Versus Equity Bank Kenya Limited 2022 eKLR*, however late the amendment is sought to be made, it should be allowed; that a copy of the grant to the estate of the deceased 2<sup>nd</sup> plaintiff is attached as an exhibit in the supporting affidavit.

8. The defendant and the interested parties filed their submissions dated 1<sup>st</sup> August 2025. They cited Legal Notice Number 22 of 2020 and Order 17 Rule 25 and 6 which provide as follows:
  - a. A suit stands dismissed after 2 years we are no step has been undertaken;
  - b. A party may apply to court after dismissal of a suit under this order.
9. They rely on the case of **Rajesh Rugani Versus 50 Investment Limited and Another 2016 eKLR** which quoted **Ivita versus Kyumbu 1984 KLR 441**. They stated that there had been a delay of **4** years and **11** months during which the plaintiff took no steps in prosecuting the suit leading to its dismissal; that further, from the date of dismissal of the suit on 26<sup>th</sup> of October 2023 the present application was filed on 28<sup>th</sup> April 2025, after a period of **1** year and **5** months had elapsed in between those dates. They relied on the case of **Patrick Wanyonyi Hayemba Versus Teacher Service Commission and 2 Others 2019 eKLR** and stated that the court properly exercised its discretion to dismiss the suit for want of prosecution; that though the plaintiff invokes the provisions of

**Section 1A, 1B** and **3A** on the overriding objective, litigation has come to an end in this case such as to prevent the defendants and interested parties from utilizing their resources to defend the suit. They state that the circumstances of the present suit show that the plaintiff is not deserving of the court's discretion, and so reinstatement is not deserved in the face of the inordinate delay. They pray for a dismissal of the application.

#### **ANALYSIS AND DETERMINATION.**

10. For determination is whether the suit ought to be reinstated and whether the amendments sought ought to be allowed.
11. The provisions of Order 17 Rule 2 state as follows:
12. On the 26<sup>th</sup> October 2023 this court dismissed the present suit for want of prosecution. The present application was brought on 28<sup>th</sup> April 2025, a period of more than one year later. Before the dismissal the suit had lain unprosecuted for a period of about **4** years in that between 25<sup>th</sup> July 2019 and 26<sup>th</sup> October 2023, no action had been taken either by the plaintiff or by the defendant.
13. The applicant has demonstrated that the 2<sup>nd</sup> plaintiff who was his brother is now deceased. However, he has not gone to the extent of substituting him in this suit and he cannot be deemed to be bringing the

application on his estate's behalf. His application is therefore defective in that regard since he is not representing his deceased brother's estate.

14. Secondly, it is clear from the applicant's admission that the applicant's brother died way back in **2022** and he, as the surviving plaintiff, did not take any other action including an application for substitution or for revival of suit until the filing of the present application in April 2025. The suit by the 2<sup>nd</sup> plaintiff is already abated. There is thus no suit. The applicant has no capacity to bring the present application alone where the suit had been commenced by the two of them without first reviving the suit of the second plaintiff and the present application is fatally defective for that reason.

15. Thirdly, the period of delay is instrumental in whether orders of reinstatement will issue. In the case of **Rajesh Rughani v Fifty Investments Limited & another [2016] KECA 829 (KLR)** the Court of Appeal stated as follows:

**"The test for dismissal of a suit for want of prosecution is stated in the case of Ivita -v- Kyumbu (1984) KLR 441). The test was expressed as follows:**

**"The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must 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."**

16. The delay that has been witnessed in the present case militates against the grant of the prayer for reinstatement.
17. The fact that an amendment of the plaint is proposed by the applicant is no justification for setting aside, no matter how improved the new plaint could be perchance the proposed amendment was allowed. The court's mandate in an application for reinstatement is confined to the merits of the original suit as filed, or the state of the pleadings filed as at the time of dismissal.
18. Upon examination of the file record *vis-a-vis* the application, it is apparent that by the time the suit was filed, the suit property had already been transferred to third parties in the year **2016** yet the said parties were not joined to the suit. They are being sought to be joined by way of the present application. However even they were joined in this suit it would be futile because they would not be able to participate and urge their respective cases as third parties. They would have required to be joined as substantive parties. The application is therefore defective in that respect too.
19. **4** years of doing nothing to prosecute a case is not a short period in litigation. Besides owing to the **9** years that have passed from the time the proposed interested parties became the owners of the land without them being joined, it would be improper to upon them to come and defend the present suit yet the plaintiff could have joined them at

inception. The proposed joinder would occasion them much hardship and this court thinks that justice would not be done in view of such delay.

20. Consequently, I find that the prayers for reinstatement and amendment sought in the application dated 28<sup>th</sup> April 2025 cannot be granted for the reasons set out herein above and I hereby dismiss the said application with costs to the 1<sup>st</sup> defendant.

**Dated, signed and delivered at Malindi on this 15<sup>th</sup> day of December, 2025.**

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE  
JUDGE, ELC, MALINDI.**