

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL CASE NO. 928 OF 2005**  
**(AS CONSOLIDATED WITH CIVIL CASE NO. 929 OF 2005)**

**JAMES KARIUKI KAMAU.....1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**

**STEPHEN WACHIRA WANDERI.....2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**-VERSUS-**

**THE INSPECTOR GENERAL OF POLICE.....1<sup>ST</sup>**  
**DEFENDANT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

**The Notice of Motion**

1. **James Kariuki Kamau** and **Stephen Wachira Wanderi** (the 1<sup>st</sup> and 2<sup>nd</sup> Applicants) filed a Notice of Motion dated 28/09/2024 (the Application) under Sections 1, 1A, 3 and 3A of the Civil Procedure Act (CPA); and Order 12, Rules 1, 2 and 7, and Order 51, Rule 1 of the Civil Procedure Rules (CPR)

seeking an order to reinstate this suit for hearing and determination on its merits.

2. The Application is supported by grounds found on its body and in the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant on 28/09/2024. The Applicants have stated that the suit was dismissed on 21/10/2018 for failure by the Applicants to comply with the court's directions issued on 22/09/2017.
3. The 1<sup>st</sup> Applicant has stated that the Applicants were represented by **Mr. Samuel Gathungu Mugambi**, of **M/S Mugambi & Co. Advocates** (deceased), at all material times, until his demise on 20/05/2018; that prior to his death, the said advocate did not provide the Applicants with the relevant updates on the progress of the suit, hence, they were unaware of the existence of the court's directions; that the Applicants were therefore not aware of the dismissal of the suit; that the applicants only came to learn of the death of their advocate in March, 2019 when they were contacted to collect the client file relating to this suit from the advocate's office following its closure; that thereafter, the 1<sup>st</sup> Applicant instructed the firm of

**Muchoki Kangata Njenga & Co. Advocates** (the current advocates) to take over conduct of the matter and that upon perusing the file, the Applicants' current advocates learnt that this suit had been dismissed.

4. The 1<sup>st</sup> Applicant has deposed that the delay in prosecuting the suit was unintentional. He urged the court to exercise its discretion in favour of the Applicants, by granting the prayer for reinstatement sought. The 1<sup>st</sup> Applicant has undertaken to ensure that the suit is expeditiously prosecuted.
5. The **Inspector General of Police** and the **Hon. Attorney General** (the 1<sup>st</sup> and 2<sup>nd</sup> Respondents) did not file any responses to the Application or participate at the hearing of the same. They were served with the Application and the evidence of service presented to the court.

### **Oral submissions**

6. The Applicants made brief oral submissions through **Mr. Njenga**, learned counsel. He reiterated the grounds supporting the application that the delay in prosecuting the suit was occasioned by the death of the Applicants' former

advocate, which death the Applicants were not initially aware of and that the orders made in this instance will impact High Court Civil Case No. 929 of 2005, with which the present suit has been consolidated.

### **Determination**

7. I have considered the application and the grounds supporting it. The Applicants are invoking the discretion of this court to grant the prayers sought. I am alive to the legal position that the discretion of this court to set aside an order dismissing a suit is unfettered, but that discretion must be exercised judicially upon presentation of credible evidence by the applicant. In **Shah v Mbogo & Another [1967] E.A 116** the Court expressed itself as follows in respect of the rationale for exercising the discretion:

***“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”***

8. The same principles were amplified by the court in **Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193**. Although the court in the above cases was dealing with the applications to set aside *ex parte* judgments, it is my considered view that the principles pronounced therein apply with equal force in this matter.
9. I have carefully read the record of the court, particularly the events leading up to the order dismissing the suit. The record reveals that the Applicants filed the present suit by way of a plaint dated 21/07/2005 (later amended on 19/10/2017, seeking general, aggravated and exemplary damages, and loss of earnings against the Defendants. The claim arose from a claim of malicious prosecution. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants subsequently entered appearance through the 2<sup>nd</sup> Defendant and filed their joint statement of defence dated 21/05/2007 denying allegations in the plaint and liability.
10. The matter was mentioned on various dates thereafter. Pre-trial directions were issued on 22/09/2017 whereby the Applicants were directed to comply with the pre-trial directions set out under Order 11 of the CPR within 30 days

therefrom, failing which the suit would stand dismissed. The Applicants did not comply with those directions leading to dismissal of the suit. That dismissal gave rise to this Application.

11.I have considered the explanation offered by the Applicants for their failure to comply with the directions of the court issued on 22/09/2017. I have seen **Annexure “JKK1”**, a death certificate showing that **Mr. Samuel Gathungu Mugambi** died on 20/05/2018.

12.The Applicants have faulted their former advocate for his inadvertence in updating them on the progress of the suit. While alive to the legal principle that the inadvertence and/or mistake of an advocate ought not to be visited upon the client, I equally acknowledge the position that the suit belongs to the client and it is therefore upon the client to follow up on the progress of his or her case with the advocate as pronounced by the court in **B1-Mach Engineers Ltd v James Kahoro Mwangi (2011) eKLR**, that:

***“The applicant had a duty to pursue his advocates to find out the position on the litigation but there***

***is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty for the client to pursue his matter. If the client was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate."***

13.The Applicants did not demonstrate any steps taken on their part, in proactively following up on their case following its dismissal. Further, I have noted that there is a delay of seven (7) years from the date the suit was dismissed in 2017 and the time of filing of the instant application. That delay has not been explained.

14.It is not in doubt that a party to a suit is entitled to be heard on the merits of his or her case, it is my considered view that, that right cannot be extended to accommodate parties who are indolent in pursuing their cases without any reasonable excuse.

15.In my considered view, to allow the reinstatement of the present suit in view of the present circumstances would be

akin to running contrary to the overriding objective in **Section 1A** and **1B** of the CPA that mandates this court and the parties ***to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.***

16. In **Karuturi Networks Ltd & Anor v Daly & Figgis Advocates, Civil Appl. NAI. 293/09**, the Court of Appeal stated as follows in reference to the Overriding Objective:

**“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes *inter alia* reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court.”**

17. This is an old matter, filed in 2005. It is now almost 21 years later. At the time it was dismissed, it was 12 years old in the

judicial system. Further, the reason for delay of six (6) years between the time when the Applicants engaged the firm of **M/S D. Njogu & Co. Advocates** to take over conduct of the matter from the former advocate in late 2018, and the date of filing the instant Motion in late 2024, has not been elucidated.

18. Ultimately, I am of the view that the Applicants have not demonstrated, by cogent evidence, the lack of proactivity on their part in pursuing the progress of their suit or ensuring compliance with court directions and expeditious prosecution of the suit, as well as their failure to promptly move the court for reinstatement of the suit after its dismissal.

19. Consequently, it is my finding, and I so hold, that the Notice of Motion dated 28/09/2024 is devoid of merit. It is hereby dismissed, with no order as to costs.

20. It is so ordered.

**Dated, signed and delivered this 5<sup>th</sup> day of February 2026.**

**S. N. MUTUKU  
JUDGE**

**In the presence of:**

1. Ms Swaka holding brief for Mr. Njenga for the  
Plaintiffs/Applicants

2. N/A for the Defendants/Respondents