

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(CIVIL DIVISION)
CIVIL SUIT NO E249 OF 2009**

MARY W NGUNJU
.....PLAINTIFF

VERSUS

COMMERCIAL BANK OF AFRICA LTD.....1st
DEFENDANTS

SAMUEL M MURAGO T/A MISA AGENCIES2ND
DEFENDANT

RULING

1. The plaintiff seeks, vide an application dated **1st August 2025**, to have the court file reconstructed and for costs of the application to be in the cause. She averred in her deposition in support of the application, sworn on the same date, that the court file could not be traced despite an extensive search. She annexed to her disposition her a letter that her counsel wrote on **27th November 2024**. Ms. Ngunju contended that unless the court file was reconstructed, she would be prejudiced as the defendants used orders obtained in this matter to sell her property, something she reckoned was unlawful. To enable the court reconstruct the file, she attached various documents that, according to her, were filed in this matter.
2. The application is opposed. The respondents filed a replying affidavit sworn by Ms Christine Wahome in which she contended that allowing the application would prejudice the defendants and that the plaintiff had been indolent in prosecuting the suit. Ms. Wahome stated that,

given the time that had lapsed, it would be difficult for the defendants to defend themselves as records and witnesses may be unavailable. She prayed that the application be dismissed.

3. The application was canvassed by way of written submissions. In the submissions dated **26th November 2025**, the plaintiff blamed the dormancy of the matter on the loss of the court file. Her counsel argued that the 1st defendant had approbated and reprobated the existence of this matter, arguing in the Malindi matter that it was still pending, and then turning around to deny it in this matter, based on Order 17 Rule 2 (5) of the Civil Procedure Rules, 2010.
4. On their part, the 1st defendant filed written submissions dated 20th November 2025 in which its counsel prayed that the application be dismissed. Counsel contended that the long delay had not been explained. In support of the said contention, reliance was placed on the case of *Mwambegu v Hinzano & 3 others* [2025] KEHC 2366 (KLR) and ***Vintage Investments Ltd v Amcon Builders Ltd & another* [2021] KECA 259 (KLR)**.
5. Counsel further submitted that it would be difficult to produce evidence and or witnesses and that third parties, in particular the person who bought the property in a public auction, would be prejudiced.

6. I have considered the matter carefully. I note that the delay by the plaintiff has not been explained; there was a very long period of dormancy on her part, which the plaintiff ought to have explained.
7. The likelihood of prejudice in this case is high, in view of the fact that over 13 years have lapsed since the matter was prosecuted before this Court. There is no certainty that the documents sought to be relied upon are those that were in the original file.
8. Having said so, I am of the view that the court should strive as much as possible to determine matters on the merits. The court should favour a course of action that preserves suits, rather than one that determines them on technicalities. Reconstructing this matter will not amount to its determination; some of the issues raised by the 1st defendant can still be ventilated in the reconstructed file. I have in mind the question raised as to what effect Order 17 Rule 2 (5) of the Civil Procedure Rules, 2010 has, and if suits are automatically dismissed upon the expiration of the statutory period.
9. Having considered this matter carefully, I very reluctantly allow the application dated 1st **August 2025** in the interest of justice. Costs shall be in the cause.
10. It is so ordered.

Dated and signed in Mombasa, this 18th day of February 2026.

Delivered virtually through **Microsoft TEAMS.**

Gregory Mutai

JUDGE

In the presence of:

Mr. Odero, holding brief for Mr. Billy Kongere, for the 1st Defendant;

No appearance for the Plaintiff; and

Bancy – Court Assistant.

Original