REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 1428 OF 1991

HFCK LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

JAMES SAMUEL AWINYO.....1ST DEFENDANT

MARGARET AKINYI AWINYO.....2ND DEFENDANT

ISAAC SAMUEL AWINYO.....APPLICANT

RULING

1. The Applicant **Isaac Samuel Awiyo** describing himself as the Administrator of the Estate of the Defendants herein seek as against the Plaintiff, HFCK Limited an order to set aside the court's orders dismissing the suit **dated 2/10/2001** for want of prosecution, and upon the above being granted, an order for substitution of the Defendants who died on 15/6/2002, and 3/6/2025 respectfully, and to be allowed to defend the suit.

2. The application is predicated upon grounds on its face and supporting affidavit he swore on an even date, and annexures thereto. It is made under provisions of **Section 1A, 1B, 3A & 63 (e)** of the **Civil Procedure Act (CPA) and Order 7Rule 1, Order 9 Rule 9 Order 12 Rule 7 and Order 17 Rule 2 of the Civil Procedure Rules (CPR)**.

3. The Applicant's case as may be garnered from his affidavit material is that he is the Administrator Ad Litem of the Estate of the Defendants (deceased) who died on 15/06/2002 and 3/06/2025 respectfully by a limited grant issued by court in issued by the court in the Chief Magistrates Court at Kisumu MCSUCCMISC. Cause No. E117/2025 on 31/07/2025 – "Ext. No. 15A4".

4. He posits that when applying for the said Limited Grant Ad Litem, upon perusal of court documents, he discovered that prior to the death of the 1st and 2nd Defendants there existed a case between them and HFCK being HCCC. No. 1428 of 1991 at the High Court at Nairobi (this case), that the said case was dismissed on 2/10/2001 for want of prosecution- order marked "15A 3," that there was no Notice to show cause under **Order 17 Rule 2 CPR** issued to the Defendants yet the 2nd Defendant died on 3/06/2025- death certificate annexed as Ext- "ISA6"

5. It is his deposition that it is his desire to prosecute the case as he does not know why the then Advocates on record for the parties **Kibuchi & Co. Advocates for the plaintiff and Cheloti Etole & Kokonya Advocates** never prosecuted the case stating that the suit property LR No. Nairobi/Block/72/176 is in deplorable and inhabitable state –Ext. pictures as "ISA6".

6. He further posits that from records he found, the debt owed to HFCK by the defendants was fully paid attaching payment

details as Ext "1SA4" and wonders why HFCK released the Title to the property to them.

7. The Plaintiff opposed the application by the **Notice of Preliminary Objection dated 18/12/2025.** The gist of the objection is based on provisions of **Order 24 Rule 4, Order 9 Rule 9, and Order 7 Rule 1 & 2 CPR.**

8. Directions were issued that the Preliminary Objection and the motion be determined simultaneously upon submissions. Both parties complied.

Analysis and Determination

9. It is trite that a Preliminary Objection consists of points of law which is pleaded, and if argued as a legal issue may dispose of the suit as held in the celebrated case of **Mukhisa Biscuit Manufacturing Co. Ltd v. West End Distributors,** and followed by a myriad of superior court decisions on the settled principles that;

   a) it should be a pure point of law;
   b) it must be argued on the assumption that all the facts pleaded are correct;
   c) that it cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
   d) that if successful, it may dispose of the entire suit.

   See also **Aviation & Allied workers Union Kenya V. Kenya Airways Limited & 3 others [2015] eKLR and Mwongela V. Mutinda & Another (Land case No. E005/2024 eKLR.**

10. It is upon the above legal principles that the court will in the first instance render itself on the issue whether the Preliminary Objection raised by the Plaintiff is merited.

The Preliminary Objection.

11. **Order 24 Rule 4 of the CPR** provides:

1) Where one of two defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

2) ……..

3) …….

4) 4)Where within one year no application is made under Sub-Rule (1), the suit shall abate against the deceased Defendant.

12. Dates of death of both defendants have been stated as 3/6/2002 and 31/7/2025 respectively by the Applicant. By the above legal provisions, the suit abated as against the 1st Defendant James Samuel Awinyo on 4/6/2003 there being no application made for his substitution by his estate as provided under **Sub-Rule 4(1) CPR**. However, the suit continued as

against the 2nd Defendant upto when the court dismissed the suit for want of prosecution by an order issued on 2/10/2001, 24 years since its dismissal, to wit, by date of his death, there was no suit in existence.

13. The other objection is based on provisions of **Order 9 Rule 9 CPR**. It provides –Change to be effected by order of court to consent of parties – thus:-

> "*where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate after judgment has been passed, such* change or intention to act in person shall not be effected without an order of court;
>
> *a) Upon an application with notice to all the parties;*
>
> *b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case maybe".*

14. Here, at the date of death of the 2nd Defendant on 3/06/2025, the court record shows that no judgment had been delivered in place hence the dismissal. Provisions of **Order 9 Rule 9** are applicable when there is a judgment in place and a party wishes to engage a new advocate or to act in person. The objection in respect of this provision is therefore misplaced.

15. The Applicant's engagement of the law firm of **Ochanda Onguru & Co. Advocates,** vide a Notice of Appointment of Advocates is properly on record; on behalf of the 2nd

Defendants Estate as Administrator Ad Litem, the suit having been dismissed, not abated, with an attempt to revive the suit.

16. **Order 17 Rule 2** provides for dismissal of suits wherein no step or application has been made by either party for one year. At that stage, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no cause is shown to the court's satisfaction, the case is dismissed. Here, the question that is for interrogation is whether the court issued and served a Notice to show cause to the 2nd Defendant to show cause why the suit should not be dismissed for want of prosecution.

17. The Applicant deposes that no notice was ever served upon the 2nd Defendant prior to the dismissal of the suit. In repost, the Plaintiff submits that absence of Notice to Shaw Cause does not render a dismissal of a suit by the court as irregular or improper, and further that a suit dismissed 24 years before this application can not be reinstated citing the Doctrine of laches.

Notice to show cause?

18. I have perused the entire court record, and found no such notice having been issued by the court and/or served. Superior courts have however , in numerous decisions held in respect to **Order 17 Rule 2 CPR** that the provision is not mandatory, thus giving the court discretion to either dismiss the suit or not.

19. The courts in the following cases among others- **Lawrence Kamugane & Another v. Stephen Mwangi Mugo [2019] KLR;** and **Mohamoud Ali Mohammed v. AG & 2 Others [2021] eKLR; Fran Investment Limited v. G4S Security Services Limited [2015] eKLR,** held that the said provision (**Order 17 Rule 2(1)** does not require service of notice, but give notice, which the court may give notice of dismissal through its official website or through the cause list.

20. The court in the case of **Mohamoud Ali Mohammed** (supra) continued to say that those mediums stated above will constitute sufficient notice for purposes of **Order 17 rule 2(1) of the CPR**; but that nothing precludes the court from serving the notice as per **Order 5 of the Civil Procedure Rules.**

21. This court concurs with the learned decisions on the matter of issue and service of a notice to show cause upon the parties and particularly the deceased Defendant. Here, it is to be noted, upon perusal of the court record that the Defendants had not filed statements of defence despite having been served with the court process. This is clear as garnered from the Applicant's motion-supporting affidavit as he seeks leave to file a defence once the suit is reinstated for hearing. For record purposes, the impugned suit was filed by a Plaint dated 18/3/1991.

22. The court has considered the Respondent's response to the motion and the submissions. It has not been explained why this court would be persuaded to exercise its discretion to grant

a party leave to file a defence to a suit filed in 1991, dismissed for want of prosecution on 2/10/2001, during the lifetime of the 2nd Defendant.

23. The doctrine of laches is grounded under **Article 159 of the Kenya Constitution, and Section 1A (3) of the Civil Procedure Act** whereupon parties to a suit and Advocates are mandated to assist the court in promoting the overriding objective principle, by facilitating the just and expeditious resolution of all disputes.

24. It is worth noting that the delay in bringing this motion despite the Applicant's plea cannot be entertained. The 2nd Defendants had sufficient time since death of the 1st defendant, and dismissal of the suit to approach the court for reinstatement of the suit.

25. The court in the case **of Argan Wekesa Okumu V. Dima College Ltd & 2 Others** while interrogating the matter of delay of only 5 years as opposed to the matter before me, held that unexplained and inordinate delay in every stage of the case was absolutely unmerited. The same position was upheld in the case of **Mosi V. Ochumba (**sued on his behalf and on behalf of the estate of Silfu**)** deceased.

26. It is trite that public policy demands that there ought to be an end to litigation; that it would be unfair to reopen litigation for litigants whose cases are considered to have been dead and buried for a considerable period of time. In this case, 24 years

cannot be deemed as a short time by all standards. The above was the holding in the case of **Jason Mungai Kamau v. Jane Wanjiru Kamau & 4 Others [2008] eKLR.**

27. On the matter of substitution of the deceased 2nd Defendant, that is only possible if the dismissed suit is resurrected. Considering that I have found no reasons whatsoever to resurrect the dead suit 24 years ago, and there being no live suit in place, the prayer cannot be sustained.

28. The court has considered the prejudice that may be caused to the Plaintiff should the suit be reinstated and called upon to prepare for the hearing of the suit filed in 1991. The court in the case of **Ivita vs. Kyumbu [1994] KLR 441** considered the prejudice to parties as well as the court in reinstating a case for hearing which was dismissed many years and held that it would not be in the interest of justice as it may not be possible for parties to find and or trace witnesses due to the inordinate delay.

29. In the end, the court finds no plausible reasons advanced for reinstate the suit. Further, the Applicant by his motion has failed to demonstrate by evidence his perceived ownership of the suit property by way of a title or any other lawful instrument or transmission of interest in the estate of the 2nd Defendant now deceased.

30. **For the foregoing the preliminary objection succeeds rendering determination of the Application dated**

18/09/2025 unmerited and moot. It is dismissed with costs to the Plaintiff.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 16 April 2026.

.....

JANET MULWA.

JUDGE