



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**NAIROBI**

**ELC CASE NO 16 OF 2022**

**MARY WANJIKU NGATIA**  
**(Suing in her capacity as Co-Administrator of the**  
**Estate of the late EVANS NGINGI GITAU**  
**(Deceased).....**  
**PLAINTIFF**

**=VERSUS=**

**DELL DEVELOPMENT CO. LTD**  
**SHINE YUSUF**  
**THE DIRECTOR - GENERAL**  
**NAIROBI METROPOLITAN**  
**SERVICES.....DEFENDANTS/RESPONDENTS**

**RULING**

1. By a Notice of Motion dated 3rd February 2025, brought under Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 12 Rule 7 of the Civil Procedure Rules 2010, the Applicant seeks the following orders:

***a) Spent.***

***b) THAT the Honourable Court be pleased to set aside its order dated 11<sup>th</sup> October 2023 dismissing the Plaintiff's suit for want of prosecution.***

***c) THAT the Honourable Court be pleased to reinstate the Plaintiff's suit for hearing on its merits.***

***d) THAT the costs of this application be in the cause.***

2. The application is based on the grounds appearing on its face, together with the supporting affidavit of Mary Wanjiku Ngatia, sworn on even date.

### **THE APPLICANT'S CASE**

3. It is the Applicant's case that her former advocate failed to inform her that the matter had been scheduled for Notice to Show Cause why the suit should not be dismissed. The Applicant contends that she has at all material times been desirous of prosecuting the suit but was unaware of the said proceedings due to the omission on the part of her former advocate. She contended that she became aware of the dismissal only after instructing her current advocate, who perused the file and discovered the status of the matter. She contended that the suit was dismissed for want of attendance by her former Advocate.
4. The Applicant is apprehensive that she will suffer irreparable harm if the orders sought are not granted.
5. Though duly served, the Defendants did not file any response to the application.

### **ANALYSIS AND DETERMINATION**

6. Having considered the application and the supporting affidavit, the only issue that arises for determination is whether the Court should set aside the order issued on 11/10/2023 dismissing the Plaintiff's suit for want of prosecution.
7. Setting aside an ex parte order is discretionary. The Court must exercise this discretion judiciously to ensure that justice is done for both parties.
8. The overriding objective of this Court under Section 1A of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 3A of the Civil Procedure Act binds this Court to promote the ends of justice in civil litigation. The Applicant has brought this application pursuant to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, which states as follows;

***“Where under this Order judgment has been entered, or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”***

9. The record shows that the Plaintiffs filed this suit by a Plaint dated 25<sup>th</sup> July 2022. The matter was scheduled for a hearing of a notice to show cause, as the Plaintiff had not taken any steps to prosecute the suit.
10. It is evident from the record that the suit was dismissed due to an inordinate delay in prosecuting it. The Applicant

attributed the delay to her former advocate, whom she alleged failed to inform her about the suit. In **Ivita Vs Kyumbu [1975] eKLR, Z.R. Chesoni J.** held as follows: -

***“So 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 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... Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”***

11. In **Essanji & Another Vs Solanki (1968) EA 218**, it was observed as follows: -

***“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”***

12. The test for reinstating a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable, whether justice can still be done despite the delay and whether the Plaintiff or Defendant would be prejudiced by the reinstatement of the suit. In the present case, I find that the Applicants’ explanation for the delay in prosecuting the matter is plausible. No prejudice will be suffered by the Defendants if the suit is reinstated. It is in the interest of justice that this matter proceeds on its merits to its logical conclusion.
13. In the end, I find that the application dated 3<sup>rd</sup> February 2025 is merited and is hereby as follows: -

- a) The Order made on 11<sup>th</sup> October 2023, dismissing the suit for want of prosecution, is hereby set aside.***
- b) The Plaintiff’s suit is hereby reinstated for hearing.***
- c) Costs shall be in the cause.***

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF APRIL, 2026.**

.....  
**HON. T. MURIGI  
JUDGE**

**IN THE PRESENCE OF: -**

In the absence of the parties  
Ahmed – Court Assistant

ORIGINAL