



**Wafula (Legal representative of Peter Mayeku Khisa - Dcd) & another v Khisa
(Civil Suit 130 of 2012) [2025] KEELC 3127 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CIVIL SUIT 130 OF 2012
EC CHERONO, J
MARCH 27, 2025**

BETWEEN

**DAVID WANJALA WAFULA (LEGAL REPRESENTATIVE OF PETER MAYEKU
KHISA - DCD) APPLICANT**

AND

GODFREY MASIBO SAKWA PLAINTIFF

AND

PETER MAYEKU KHISA DEFENDANT

RULING

1. The subject application is the Motion by the plaintiff dated 02/07/2024, seeking reinstatement of the suit which was dismissed for want of prosecution. The application is supported by the affidavit sworn by David Wanjala Wafula on 02/07/2024. The only issue for determination in the said application is whether sufficient reasons have been given to warrant reinstating of this suit
2. The power to dismiss a suit for want of prosecution is governed by Order 17 of the Civil Procedure Rules. Order 17 Rule 2(1) of the Civil Procedure Rules provides as follows:

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”
3. The constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of *the Constitution*. Further, it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without unreasonable delay. Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya, are relevant, with regard to this. Section 3A of the *Civil Procedure Act* gives the court wide discretion over matters and issues that are before it, including the



question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute the same. Section 3A reads:

“ 3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

4. The factors taken into account or consideration for the purpose of reinstatement of suits were addressed in *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

“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. The Defendant must however satisfy the court that it 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for 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.”

5. Reinstating a suit is the discretion of a court which discretion ought to be exercised judiciously as was held in *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

6. This suit was dismissed on 23/04/2024 and prior to that, the Applicant had filed an application dated 22/11/2022 and submissions on 17/03/2023. Since then, the Applicant has never taken any steps to prosecute the said application, whether by himself or through his appointed advocate whom he now denies having engaged him. That notwithstanding, it is important to note as was stated in *Ruga Distributors Limited vs Nairobi Bottlers Limited* [2015] eKLR, where Aburili J. cited with approval the decision of Kimaru J. in *Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi HCCC397/2002*, where he stated;

“.. it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case...In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal.”

7. I note from the record that this is a suit that was dismissed under Order 12 Rule 3(1) CPR. I further note that the Applicant came in with an application dated 14/02/2022 seeking to have the court correct the decree issued on 07/12/2016 to read Godfrey Masibo Sakwa as defendant and Peter Mayeku Khisa as plaintiff. The Applicant also filed an application dated 22/11/2022 seeking to have the court correct its court order issued on 15/02/2022 to read Godfrey Masibo Sakwa as plaintiff and Peter Mayeku



Khisa as defendant. Further, the applicant had filed another application seeking to have the names of the parties corrected to read Godfrey Masibo Sakwa as plaintiff and Peter Mayeku Khisa as defendant.

8. All these applications were not prosecuted. Clearly, the Applicant was indolent in the manner he handled this suit. He is actually the author of the said confusion as he is not even clear on the issues and the parties. From the foregoing, I am not certain what purpose the reinstatement of this suit will serve.
9. In the end, I find that the application dated 02/07/2024 is devoid of merit and the same is hereby dismissed with no orders as to costs.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF MARCH, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Plaintiff/Applicant-absent.
2. Defendant/Respondent-absent
3. Bett C/A.

