



Matoke v EN (Suing Through Her Next Friend and Father NNS) (Civil Appeal E001 of 2022) [2024] KEHC 9459 (KLR) (26 June 2024) (Ruling)

Neutral citation: [2024] KEHC 9459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E001 OF 2022**

**RL KORIR, J
JUNE 26, 2024**

BETWEEN

CYPRIAN OMBATI MATOKE APPELLANT

AND

**EN (SUING THROUGH HER NEXT FRIEND AND FATHER
NNS) RESPONDENT**

RULING

1. The Applicant, EN filed a Notice of Motion Application dated 21st March 2023 which sought the following Orders:-
 - I. Spent.
 - II. That this Appeal be dismissed with costs for want of prosecution.
 - III. That the costs of this Application and the entire Appeal be awarded to the Applicant.
2. The Application was brought under sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 17 Rule 2 (3) of the *Civil Procedure Rules* and Article 159 of the *Constitution* of Kenya. It was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by EN on 21st March 2023.

The Applicant's/Respondent Case.

3. The Applicant stated that she instituted a suit through Bomet CMCC Number 118 of 2019 which was heard and determined in her favour. That the Appellant/Respondent being aggrieved with the Judgment, appealed to this court on 6th January 2022. The Applicant further stated that since the Appeal was lodged in this court, the Appellant had not shown any interest in prosecuting his Appeal.



4. It was the Applicant's case that she is prejudiced by the continued existence of the Appeal as the trial court had determined the matter in her favour and the Appellant wanted to delay the ends of justice by failing to prosecute his Appeal. That this neglect was an abuse of the court process.
5. The Applicant stated that the Appellant had not complied with the rules of the Appeal process since the Appellant had not served the amended Memorandum of Appeal of the Record of Appeal.
6. It was the Applicant's case that the matter came before the Deputy Registrar of this court on 1st March 2023 and the Appellant sought 15 days to put their house in order, something that they have failed to do.
7. The Applicant stated that the Appellant/Respondent had not given any good reason why he did not want to prosecute his Appeal.

The Response

8. Through the Replying Affidavit dated 17th April 2023, the Appellant stated that the Appeal against Hon. Temu's Judgement dated 1st December 2021 in Bomet CMCC No. 118 of 2018 was instituted through an Amended Memorandum of Appeal dated 25th May 2022. That he then filed an Application in the trial court seeking stay of execution of the trial court's Judgement and the trial court ordered that he pays the Applicant Kshs 500,000/= and deposit the remaining balance of Kshs 1,089,156/= in a joint interest earning account, which he did.
9. It was the Appellant's case that he had been unable to file his Record of Appeal as he had not obtained the certified copies of the proceedings, Judgement and Decree in Bomet CMCC No. 118 of 2018. That he had requested for the same from the lower court registry but the said registry refused to supply him with the documents.
10. The Appellant stated that he was desirous of prosecuting his Appeal to its logical conclusion and any error and/or refusal of the lower court registry in Bomet should not be visited upon him. He further stated that under Article 159 (2) (d) of the Constitution, this court was enjoined to administer justice without undue regard to procedural technicalities.
11. It was the Appellant's case that he was committed to ensure the just and timely disposal of the Appeal. That this court should enlarge the time for the Appellant to obtain certified copies of the Judgement, Decree and the trial court proceedings.
12. The parties failed to file their written submissions and I stated that I shall rule on the basis of the Affidavits on record.
13. I have gone through and considered the Notice of Motion Application dated 21st March 2023 and the Replying Affidavit dated 17th April 2023. The only issue for my determination is if the Applicant has made out a case for the Appeal to be dismissed for want of prosecution.
14. The law on dismissal of suits for want or prosecution is anchored in Order 17 of the Civil Procedure Rules which provides that:-
 - (1) 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.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.



- (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
 - (5) A suit stands dismissed after two years where no step has been undertaken.
 - (6) A party may apply to court after dismissal of a suit under this Order.
15. In *Argan Wekesa Okumu v Dima College Limited & 2 others* (2015) eKLR, the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita –v-Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

16. Similarly in *Vintage Investments Limited v Amcon Builders Limited & another* (Civil Appeal 45 of 2019) [2021] KECA 259 (KLR) (3 December 2021) (Judgment), the Court of Appeal held that:-

“In considering an application for dismissal of a suit for want of prosecution, a defendant (like the appellant herein) must show:

- i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but should not be too difficult to recognise inordinate delay when it occurs.
- ii. That this delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.
- iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any interference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.” See *Allan v Sir Alfred Mc Alphine and Sons Ltd* [1968] 1 ALL ER 543.”

17. The power of a court in dismissal of a suit for want of prosecution under Order 17 of the *Civil Procedure Rules* is discretionary. I associate myself with the sentiments of Aburili J. in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* (2016) eKLR, where she stated as follows:-

“Nonetheless, Article 159 of the *Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity.



That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.....”

18. In the present case, a Memorandum of Appeal was filed in this court on 6th January 2022. The Appeal was in relation to the Judgement delivered on 1st December 2021. The Appellant then filed an Amended Memorandum of Appeal on 25th May 2022. From the record, the Appeal came for directions for the first time on 27th January 2023.
19. Parties subsequently appeared before the Deputy Registrar of this court on 1st March 2023 and 22nd March 2023 when the current Application was filed and came up for directions.
20. The Applicant stated that the Appellant had lost interest in prosecuting his Appeal. I have looked at the record and I have noted that the Appellant filed his Amended Memorandum of Appeal on 23rd June 2022. For the Appeal to be ripe for dismissal under the ambit of Order 17 of the *Civil Procedure Rules* (one year of no activity in the Appeal), the Appeal would have to reach 22nd June 2023 unprosecuted. The current Application was filed on 22nd March 2023 which in my view was premature.
21. I have however noted the conduct of the Appellant in prosecuting his Appeal. After filing his Memorandum of Appeal on 23rd June 2022, he did not file his Record of Appeal until 12th April 2023 which is approximately 10 months.
22. I have considered the Appellant’s submission that he has been unable to obtain certified proceedings from the registry to enable him file his Record of Appeal. He did not attached any evidence in the form of communication with the registry indicating his desire to obtain the said certified proceedings. I have also looked at his Record of Appeal which was only filed after being jolted from his slumber by the current Application for dismissal of the Appeal and I have noted that it is incomplete. That is the reason why the Appellant stated in his Replying Affidavit dated 17th April 2023 that this court should enlarge the time for him to obtain the certified proceedings and copies of the Judgement and Decree.
23. In my view, the Appellant has been indolent in prosecuting his Appeal and this has been to the detriment of the Applicant (EN) who is the Judgement Holder. However, in the interest of justice, the Appellant (Cyprian Ombati Matoke) shall be allowed to prosecute his Appeal under stringent conditions.
24. In the end, the Notice of Motion Application dated 21st March 2023 has no merit and is dismissed with no orders as to costs. I now proceed to make the following orders:-
 - I. The Appellant shall pay the Applicant/Decree holder half the decretal sum within 14 days of today.
 - II. The Appellant shall file a complete or Supplementary Record of Appeal within 14 days of today.
 - III. Failure to meet the conditions above shall lead to automatic dismissal of the Appeal.
25. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 26TH DAY OF JUNE, 2024.

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R. LAGAT-KORIR

JUDGE



Ruling delivered in open court in the presence of Mr. Mokaya for the Applicant and in the absence of the Respondent. Siele (Court Assistant).

