



Kamanda (Suing as a Legal Representative of the Estate of Nancy Moraa Kamanda) v Osiemo & another (Civil Appeal E013 of 2023) [2024] KEHC 9784 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9784 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E013 OF 2023**

TA ODERA, J

JULY 31, 2024

BETWEEN

**COSMAS MK GITEYA APPELLANT
SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF NANCY MORAA
KAMANDA**

AND

**PAMELLA MORAA OSIEMO 1ST RESPONDENT
EQUITY BANK LIMITED 2ND RESPONDENT**

(Being an appeal arising from the ruling of the Senior Resident Magistrate Honourable P.K. Mutai delivered on 16.01.2023 in Kisii CMCC No.632 of 2010 between Cosmas M.K. Giteya (Suing as legal representative of the estate of Nancy Moraa Kamanda) vs Pamela Moraa Osiemo & 2 Others)

JUDGMENT

1. The appellant filed the appeal herein against the ruling on Hon P Mutai (PM) dated on the grounds that:
 1. The learned trial magistrate erred in law and fact in dismissing the application on the ground that the applicant took 49 days to mount the applicant.
 2. That the learned trial magistrate erred in law and in fact in holding that 49 days was inordinate delay to present the application without considering that it is the applicant who gives instructions.
 3. That the learned trial magistrate erred in law and in fact in dismissing the application without considering that the appellant/applicant was ready to proceed on the even date.



4. The learned trial magistrate erred on law and in fact in dismissing the application without considering that the suit was dismissed virtually when the network had failed.
 5. That the trial magistrate erred in law and fact in dismissing the application by applying judicial discretion wrongly.
 6. That learned trial magistrate failed to take into account and/or consideration the submissions by the applicant/appellant and thereby misapprehended the appellant's/applicants and/or version thus leading to the erroneous conclusion and findings.
2. It is proposed to ask this Honourable Court to order that: -
- a. The appeal herein be allowed and the ruling of the trial magistrate dated 16th day of January 2023 and delivered on the even date be set aside quashed and/or varied and the main suit be reinstated for hearing.
 - b. That Honourable court be pleased to order that the matter be reinstated for hearing on merit.
 - c. That the costs of this appeal be borne by the respondent.
3. This is an Appellate court and the duty of this court is to re-evaluate the evidence on record and arrive at its own conclusion bearing in mind that it did not have a chance to see or hear the witnesses.
4. The appellant filed the suit in the lower court on 10.12.2010 it is a road traffic accident case and he seeks damages. The case did not proceed for various reasons and on 9.5.2022 Mr. Anyona for the appellant took a hearing date of 27.6.22 but come that day there was no appearance by either party and the suit was dismissed for want of attendance.
5. On 18.8.22 appellant filed the application dated 15.8.22 seeking setting side of the dismissal orders and reinstatement of the suit. The appellant's main ground in the said application was that the suit came up for hearing on the material day and it was called out online but counsel for appellant was unable to login due to network challenges and thus dismissed. The appellant states that he was in open court on the material day on the advice of his counsel and he was ready to be heard online was dismissed. Also that he will be prejudiced unless the suit is reinstated.
6. Elizabeth Wanjohi counsel for 1st respondent swore an affidavit dated 18.10.22 in opposition to the said application she said that the appellant did not attended court for hearing on 27.6.22 and that he has not been keen to pursue the matter which was filed in the year 2010 and that notice to show cause for dismissal was issued to him on 26.2.20 which was set for hearing on 26.3.20 but the case was not dismissed on that date due to the covid 19 break. Also that the appellant also failed to attend court on 27.9.21 and 31.1.22. further that the application was brought 3 months after the dismissal and the reasons for the same are misleading. She further deponed that the appellant is guilty of indolence and that litigation must come to an end. She said that the application was not merited and sought its dismissal.
7. The appellant filed a supplementary affidavit in which he reiterated that he was in open court when the matter was filed while his counsel was appearing online and had network challenges when this matter was called and he even handled other matters online. Further that even in the event that the matter was not heard online mistake of his advocate should not be visited upon him. He also deponed that the delay in the matter has also been occasioned by misplacement court file.
8. The learned magistrate ruled on the application on 16.1.23 and dismissed the same saying that the appellant was not serious with the matter since it was filed on 10.12.10 several notice to show cause were



issued to him to explain why the case should not be dismissed for want of prosecution. He mentioned the notice dated 28.11.16, 29.9.18 and 9.4.2021. He said the reason that the network was unstable on the material day is not convincing as the other matter proceeded seamlessly on the material day. Also that the case was dismissed on 27.6.22 and the application was filed on 15.10.22 and the reasons for the delay were not explained. Further that no sufficient cause was shown to make the court exercise its discretion in favour of the applicant.

9. I have carefully re- considered the application the supporting, supplementary and replying affidavits and the able submissions by both counsel herein.
10. Order 12 Rule & 7 of the civil procedure rules provides that; where under this order judgment has been entered or a suit dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just”.
11. It is thus clear that the court has discretion to set aside dismissal orders on such terms that it may deem just. In the case of *Shah vs Mbogo* (1979) EA 116, it was held “This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, 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.”
12. The main reason counsel gave for not attending court was that he had a network challenge on the material day and the appellant said he was with his advocate and network failed them. They later proceeded to open court and the court Assistant told them that the matter had been dismissed for non -attendance. In dismissing the trial magistrate considered the age of the matter, the conduct of the appellant in delaying the matter and the fact that the application was filed about 3 months down the line after the dismissal. He found that no sufficient cause had been established to warrant reinstatement of the suit as the other matters for that day proceeded seamlessly. The learned trial magistrate relied on the case of *Shah vs Mbogo* (Supra) and *Wachira Karani vs Bildad Wachira* (2016) EKLRL where the supreme court cited the Supreme Court of India in the case of *Parimal vs Veena* where it was held that: -

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

13. The application was later filed 3 months down the line and no explanation was given for the same. If indeed counsel and appellant were aware of the dismissal on the material day, then why did it take 3 months to file the application for reinstatement? It is clear that on the said hearing date, the appellant and his counsel were not in court and did not log in or attempt to log in. I find that there was unreasonable delay in filing the application.
14. As per the record case in the lower court was filed almost 24 years ago and the appellant has not been keen to prosecute it. Though right to be heard is fundamental, it must be balanced with the need to expedite cases and the right to fair and speedy hearing which is available to both parties. Expeditious



disposal of cases is now enshrined under Article 159 (2) (b) of *the Constitution* of Kenya and it is trite that “Justice delayed is justice denied” and Litigation must come to an end.

15. I agree with the trial magistrate that no sufficient cause was established to warrant reinstatement of the case. The learned Trial magistrate exercised his discretion judiciously and I see no reason to interfere with it.
16. The appeal is devoid of merit and I proceed to dismiss it with costs to the respondents.

T.A ODERA

JUDGE

20.6.24

DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2024 IN THE PRESENCE OF:

Kamau for the 1st respondent

Anyona for the appellant.

Court Assistant - Oigo

