



**Kimani (Suing on Behalf of New Jerusalem Church) v Cheruiyot & 2 others (Civil Appeal 41 of 2023) [2024] KEHC 8997 (KLR) (Civ) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8997 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CIVIL  
CIVIL APPEAL 41 OF 2023  
CM KARIUKI, J  
JULY 26, 2024**

**BETWEEN**

**MOSES MBUGUA KIMANI (SUING ON BEHALF OF NEW JERUSALEM CHURCH) ..... APPELLANT**

**AND**

**EXEKIEL CHERUIYOT ..... 1<sup>ST</sup> RESPONDENT  
STEPHEN MUNGAI ..... 2<sup>ND</sup> RESPONDENT  
MARGARET NJOKI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the court is the notice of motion dated 22<sup>nd</sup> February 2022, in which the applicant sought the following orders: -
  - i. Spent
  - ii. Spent
  - iii. Spent
  - iv. That this honourable court be pleased to set aside and vary the dismissal order of the Appellant's appeal and any subsequent order thereof. And, that the appeal be reinstated for hearing on merits.
  - v. That cost of this application be in the cause.
  - vi. On the grounds that:-



- vii. The Appellant has been proceeding on the direction issued by the honourable court that this matter is still alive per the orders of the honourable judge on 17/10/2019 which directed that the file be transferred to Nyahururu High Court for hearing and determination of the appeal.
  - viii. That subsequent to the transfer of this appeal the Appellants have never been issued with any notice to show cause why the appeal should not be dismissed for want of prosecution.
  - ix. That on perusal of the court file there is an order issued on 16/3/2016, this honourable court issued an order in terms that the appeal was dismissed for want of prosecution and the costs were awarded to the Appellants.
  - x. That on the basis of the said order, the Appellant was surprised to be served with a notice of taxation by the Respondent yet costs had been awarded to the Appellants.
  - xi. That it is glaringly obvious that the Appellants have been greatly misled in these proceedings.
  - xii. That the Respondents will suffer no prejudice of the orders sought are granted and the appeal heard and determined on merit.
2. The application is supported by the affidavit deponed by Moses Mbugua Kimani.
  3. On the other hand, the Respondents filed a replying affidavit deponed by David K. Kaburu dated 8<sup>th</sup> March 2022 in which he averred that:-
    - i. This appeal came into existence on 19/12/2014 when the Appellant filed Nakuru HCCA No. 190/2014 challenging dismissal orders that were issued in Nyahururu CMCC No. 175/2011 against the Appellant. The said memorandum of appeal was served upon them on 14/1/2015.
    - ii. The Appellant failed to take any action to prosecute the appeal and by chamber summons application dated 14/3/2016, the deponent on behalf of the Respondents applied for dismissal of the appeal for want of prosecution.
    - iii. The said application was served upon the Appellant's advocates M/S Njuguna Kamanga & Co. Advocates as per the affidavit of service filed in court on 31/5/2016.
    - iv. The Appellant did not contest the said application by filing any replying affidavit or grounds of objection.
    - v. The said application came up for hearing before Honourable Justice Mulwa on 2/6/2016 when the said appeal was dismissed with costs for want of prosecution.
    - vi. That on 18/6/2016, they wrote to the Appellant's advocate explaining the appeal had been dismissed and seeking payment of Kshs. 150,000/- as costs thereof.
    - vii. That on 24/6/2016, the Appellant personally approached the deponent in his office and promised to pay some costs the following week but since then he has never paid anything at all and the deponent then prepared and filed the Respondents bill of costs dated 2/8/2016 and the deputy registrar issued the notice of taxation dated 10<sup>th</sup> August 2016.
    - viii. The said bill of costs was duly served upon M/S Njuguna Kamanga & Co. Advocates and an affidavit of service dated 30/9/2016 duly filed in court on 7/10/2016.
    - ix. That on 17/10/2016, the deputy registrar who was supposed to conduct taxation of the bill of costs aforesaid was not sitting and the original file mysteriously disappeared from that time henceforth.



- x. That the appeal was transferred to Nyahururu High Court without the original file and missing documents and proceedings and it was on this basis that Honourable Justice Kariuki on 14/3/2021 directed the file be forwarded to the deputy registrar to tax costs based on available records. Accordingly, the bill of costs was fixed for taxation on 18/11/2021 and the Appellant's advocates served but neither he nor his advocates attended court to challenge the taxation on 18/11/2021.
  - xi. That it is not true that the Appellant's appeal was dismissed on 16/3/2016 as alleged by the Appellant. The purported order of 16/3/2016 is not authentic because contrary to what is purported, the deponent never filed any notice of motion dated 14/3/2016 or attended court on 16/3/2016 as alleged in the order.
  - xii. That the purported order is manufactured or procured to defeat justice. It wouldn't make any sense that the deponent could have filed a notice of motion application on 14/3/2016 and in 2 days on 16/3/2016 get an order for dismissal of the case.
  - xiii. That in any case it would appear even stranger that the Appellant's appeal was dismissed for want of prosecution yet the costs were awarded to the Appellant in the purported order.
  - xiv. That the ordinary and natural order that should issue in terms with Section 27 of the Civil Procedure Act is that the appeal is dismissed with costs to the Respondent and not as alleged by the Appellant or the purported order.
  - xv. That there is no plausible reason or justification given why the court should stay execution herein noting that the Appellant has not even taken legal action to challenge the certificate of costs herein against him.
  - xvi. That the Appellant has not given any or any good reason why the order for dismissal of the appeal should be set aside or varied or why the appeal which had been dead for about 7 years should not be reinstated or revived.
  - xvii. That the Appellant's application is frivolous, vexatious, scandalous, mischievous and devoid of material support both in law and facts and the same should be dismissed.
4. Appellant/Applicant's Written Submissions
  5. The Appellant submitted that he filed the present appeal against the ruling of the honourable resident magistrate Victoria Ochanda in Nyahururu PMCC No. 175 of 2011 delivered on 25.11.2014 on grounds set out in the memorandum of appeal. The trial court had dismissed the Appellant's suit on grounds of non-attendance of the advocate then acting for the Appellant. During the pendency of the appeal, they were served with a notice to show cause why the appeal should not be dismissed under Order 42 Rule 35 (2) of the Civil Procedure Rules where the Appellant was required to attend court on 18/9/2019.
  6. The Appellant appeared in court on 18/9/2019 when he requested to be given more time to look for legal representation as the advocate failed to appear and it is then that he instructed the firm of Wangechi Wangare & Associates Advocates to appear on their behalf. The said advocates appeared before court on 17<sup>th</sup> October 2019 where the court directed that the file be transferred to Nyahururu for hearing and determination of the appeal. It took too long for the file to be transferred to Nyahururu High Court.
  7. It was contended that upon perusal of the court file, it appeared that the appeal was dismissed on 2.6.2016 but the court proceeded and misdirected the Appellant that the appeal was still pending



hearing and determination. That the Appellant obtained an order issued on 16.3.2016 which gave orders that the appeal was dismissed for want of prosecution and that costs were awarded to him. That it is surprising that the Respondent proceeded to have costs taxed in his favour yet according to him and the directions of court:-

- i. The appeal was transferred to Nyahururu for hearing and determination.
  - ii. The appeal has never been dismissed while at Nyahururu.
8. In any event, the costs were awarded to me.
  9. The Appellant stated that this matter is marred with confusion which greatly prejudice and subvert the course of justice and it is in the interest of justice and fairness that the appeal be reinstated for hearing and determination on merit. That there is continued grave miscarriage of justice in this case occasioned by the Respondent's misdirection of proceedings. That granting of the orders sought in this application will not prejudice the Respondent. Reliance was placed on *John Nahashon Mwangi v Kenya Finance Bank Limited (in liquidation) [2015] eKLR*
  10. It was asserted that the Appellant has been misled by the court and when the notice to dismiss the appeal was issued, it appeared as if the suit was still active and it was transferred to Nyahururu High Court for hearing and disposal notwithstanding that "it had been dismissed in 2016" but continued to be active in court. That the trial court file and the original appeal files can be reconstructed in the interest of substantive justice. Lastly, they urged this honourable court to consider the special circumstances of this matter and Article 159 of *the Constitution*, the balance of convenience and the great prejudice occasioned to the Appellant and allow the application, reinstate the appeal for hearing and determination on merit.

### **Analysis and Determination**

12. The instant application is asking for setting aside and vary the dismissal orders of the Appellant's appeal and that the appeal be reinstated for hearing on merits.
13. The orders sought by the Appellant are discretionary. Order 12 Rule 7 of the Civil Procedure Rules under which the Application is brought provides that:-

"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".
14. Furthermore, the principles governing reinstatement of suit are stated in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR* as follows: -

"The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial "Sword of the Damocles" which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law



should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

15. From the record, the appeal came into existence on 19/12/2014 when the Appellant filed Nakuru HCCA No. 190/2014 challenging dismissal orders that were issued in Nyahururu CMCC No.175/2011 against the Appellant. Further, the appeal was dismissed by high court for want of prosecution by the Appellants. The Appellant then proceeded to file the instant application which was also dismissed for want of prosecution by the Appellant but was later reinstated by the court exercising its jurisdiction in favour of the Appellant vide the ruling dated 9<sup>th</sup> February 2022. Evidently, the Appellant has a pattern of neglecting their duty to prosecute their case. It is not the duty of the court to pursue parties with a view of having them prosecute their cases. Cases belong to parties!
16. The Appellant has concentrated his efforts in lamenting that he was not served with the notice to show cause why the appeal should not be dismissed for want of prosecution. There was no explanation given for the delay in prosecution of the appeal in the first place. The inordinate delay in prosecution of the appeal was not explained. To further amplify the fact that the Appellant has been guilty of laches, the appeal that the Appellant seeks to have reinstated was also challenging the trial court's dismissal of the Appellant's suit for want of prosecution. The application, subject of this ruling, had also been dismissed for want of prosecution and was conditionally reinstated by this court. It is quite obvious from the foregoing that the Appellant has been guilty of indolence. Equity does not aid the indolent, and this court being both a court of law and equity, will not lend its aid to the Appellant.
17. Furthermore, the Appellant attempted to hoodwink the court to accept blame for them not prosecuting their appeal. The Respondent laid out a clear narrative of how this matter has proceeded from the lower court backed with sufficient evidence; a narrative this court is inclined to accept as the true account of proceedings. That being the case and in view of the foregoing analysis, it is my considered finding that the application dated 22/2/2022 has no merit and the same is dismissed forthwith with costs to the Respondents.

I. The application is hereby dismissed with costs to the respondent.

**RULING DATED AND SIGNED AT NYANDARUA THIS 26<sup>TH</sup> DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

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**CHARLES KARIUKI**

**JUDGE**

