Kenei v Keya & 2 others (Civil Appeal 127 of 2018) [2024] KEHC 10123 (KLR) (14 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10123 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 127 OF 2018

RN NYAKUNDI, J

AUGUST 14, 2024

BETWEEN

PAUL KEMOI KENEI .... APPELLANT

AND

BELINDA MUHENJE KEYA .... 1ST RESPONDENT

VITALIS SHIKAMBE KEYA .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

RULING

1. Before me for determination is a notice of motion dated 14th April, 2024 expressed to be brought under the provisions of Section 1A, 3 & 3A, 63(e) of the *Civil Procedure Act*, Order 12 Rule 7, Order 51 Rule 1, Order 22 Rule 22(1), Order 50 Rule 4 and Order 50 Rule 6 of the *Civil Procedure Rules* and Article 159 (2)(d) of the *Constitution*. The applicant seeks orders as follows:

    a. Spent

    b. That this court be pleased to order stay of execution of the judgment of the trial court in Eldoret CMCC No E829 & 830 of 2011 Belinda Muhenje Keya & another v Paul Kemoi Kenei & Attorney General pending the hearing and determination of the application.

    c. That the order issued by the Honourable Justice Wananda made on the 19th February, 2024 dismissing the appeal filed herein together with all other consequential orders be varied and set aside.

    d. That this appeal be reinstated for hearing and determination subject to conditions that this court will deem fit to order

    e. The costs of the application be provided for

2. The background of the grounds in support of the application are that the appeal was dismissed on 2nd August, 2023 for want of prosecution. The applicant is however keen to prosecute the appeal and is aggrieved by the decision of the court. The applicant averred that the delay in prosecuting the appeal was not intentional. That the past advocates of the applicant failed to take the required action in prosecution of the appeal or file a notice of delay in complying with the pre-trial directions. The delay in complying with the filing of the record of appeal and taking the necessary steps towards the prosecution and conclusion of this appeal was occasioned by the trial court's file which went missing for a long time and couldn't be traced.

3. That the applicant learnt of the dismissal when he appointed the current firm, who upon perusal of the appeal discovered that the same had been dismissed.

4. That for the said reasons the Appeal herein was not admitted for hearing and ended up being listed for dismissal. The applicant as a result prays for a chance to prosecute the appeal herein. That they stand suffer irreparably if the court's orders of 2.8.2023 is not reviewed as they shall have lost a chance at the seat of justice.

5. The applicant deposed that currently there is no stay of execution of orders and the applicants are in the circumstances exposed to execution. That the Respondent may execute any time now, the judgement and decree Eldoret CMCC No 829 & 830 of 2011 Belinda Muhenje Keya & another v Paul Kemoi Kenei & The Attorney General.

6. The applicant further averred that the Respondent herein is a man of straw and shall not be able to refund the decretal sum in Eldoret CMCC No E67A of 2017 Hamisi Ichela Mohammed v Michael Wafula Wekesa & Rose Shitsinzi.

7. The application is not opposed as there is no response on record. I shall however proceed to make a determination on whether the orders sought can issue.

8. The applicant equally filed submissions dated 12th April, 2024 in agitating for orders as to stay and setting aside orders issued by Justice Wananda on 19th February, 2024 dismissing the appeal herein together with all other consequential orders.

9. Learned Counsel for the applicant couched two issues for identification:

    a. Whether the court has jurisdiction to determine this application

    b. Whether the applicant deserve the orders sought.

10. On the first issue, it was counsel's submission that this court is clothed with discretionary powers to hear and determine this application as the same has been brought under the provisions of Order 12 Rule 7 of the *Civil Procedure Rules* which provides as hereunder:

> "7. 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."

11. The applicant further submitted on the second ground that the application is not fatally defective as the application as it calls this court to exercise discretion towards achieving the legal requirements of a fair trial under Art. 50 of the *Constitution* and requirements for dispensation of substantive justice under Art. 159(2) (b) of the *Constitution*. That there is substantial delay that the applicant has acknowledged in his supporting affidavit but the same is not so inordinate but one which the applicant has explained to have been caused by the professional negligence of his previous advocates.

12. In support of these arguments, counsel placed reliance on the case of *Key Freight Kenya Limited v Mohammed Abdi* (2022) eKLR where the high court faced with comparable circumstance allowed the application and reinstated the appeal.

Resolution

13. I have read through the application and equally perused through the record, wherein the appeal was dismissed for want of prosecution vide the order dated 2nd August, 2023. The record reveals that the appeal was filed on 17th October, 2018 and the appeal was dismissed on 2nd August, 2023.

14. The power to dismiss a suit for want of prosecution is governed Order 17 of the *Civil Procedure Rules*. Under 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."

15. It is trite that before any suit is dismissed for want of prosecution, the threshold to apply is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Put differently, if the court is satisfied with the Appellant's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties, and hence the action would be not to dismiss the suit but direct that it be heard at the earliest time possible and available.

16. The test was enunciated in the case of *Nilesh Premchand Mulji Shah & another T/A Ketan Emporium v MD Popat and others & another* [2016] eKLR, the court 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. This is what the case of *Ivita v Kyumbu* [1984] KLR 441 espoused that:
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> > "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

17. I must point out that reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner. The court in *Shah v Mbogo & another* (1967) EA 116 stated that, "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 deliberatively sought.

18. From the foregoing authorities, it is evident that this court's discretion should be exercised judiciously. Once a suit has been dismissed for want of prosecution, the implication is that the parties fell short of

their obligation to assist the court in achieving its overriding objective. Therefore, the party who needs a reversal of the order of dismissal, should advance a sufficient explanation as to why the application should be allowed in persuading the court to exercise its discretion.

19. The explanation given by the applicant is that the past advocates of the applicant failed to take the required action in prosecution of the appeal or file a notice of delay in complying with the pre-trial directions. That the delay in complying with the filing of the record of appeal and taking the necessary steps towards the prosecution and conclusion of this appeal was occasioned by the trial court's file which went missing for a long time and couldn't be traced.

20. The issue of missing records or non-typing of proceedings within the hierarchy of courts more specifically between the magistrate's courts and the High Court is a matter institutional concern and the Public at large. The provisions of Article 50 (5) (b) of the *Constitution* though in the face of it seems to address rights as between the accused person and the state Mutatis Mutandis it also applies in equal measure in the administration of Civil Justice. This is the spirit of this provision that an accused person or a party to a proceeding has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law. These are the grievances being raised by the intended Appellant in the affidavit in support of the Notice of Motion for enlargement of time and stay of execution. In addition to the authorities cited the general principle running through the foregoing provisions on stay of execution is what I call the filter principles which the persuasive court as explicated clearly enough in in Marie Makhoul and Marguerita Dev Sabina James Alcide SLUHCVAP No 30/2011 Thus:

    a. The general a rule is for no say as a successful litigant is entitled to the fruits of his judgement without filter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of a judgement in his favour, particularly after a full trial on the merits.

    b. The modem authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of Linotype-Hell Finance Ltd v Baker where Stoughton L.J opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of Success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.

    c. The authority of Hammond Suddard Solicitors v Agrichem International Holdings is ground in the same principle though formulated differently. In that case the court pointed out that the evidence is support of a stay needs to be full, Franck and clear. They went on to state the principle thus

    > "…. Whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether thee is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgement? On the other hand if a stay is refused and the appeal succeeds and the judgement is enforced in the meantime what are the risks of the appellant being able to recover any monies paid form the respondent.

21. In applying the test as outlined in the previous paragraphs, I am persuaded that the applicant has advanced a reasonable explanation as to what occasioned the delay. The courts should in reasonable

circumstances such as this allow the parties to ventilate their disputes. After a determination has been made, each party should appreciate the fact that they have all been afforded a chance at the seat of justice regardless of the outcome in terms of Article 50 of the *Constitution* on Fair Trial Rights. In the circumstance therefore, the application dated 3rd April, 2024 is allowed and the Orders dated 8th August and issued on 2nd August, 2023 set aside.

22. Given that outcome, it would be a pure academic exercise if execution is allowed to proceed. As a result, stay orders are issued awaiting the determination of the appeal. Parties are advised to fast track the hearing and disposal of the appeal.

23. Each party shall bear its own costs.

DATED AND SIGNED DELIVERED VIA EMAIL AT ELDORET THIS 14TH DAY OF AUGUST, 2024

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R. NYAKUNDI

JUDGE