



REPUBLIC OF KENYA



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EWG (Minor suing through next friend and mother LG) v Grace & another (Civil Appeal 42 of 2018) [2024] KEHC 13657 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13657 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 42 OF 2018
CW GITHUA, J
OCTOBER 30, 2024**

BETWEEN

EWG (MINOR SUING THROUGH NEXT FRIEND AND MOTHER LG) APPELLANT

AND

GIKERA GRACE 1ST RESPONDENT

SIMON NG'ANG'A NJOROGE 2ND RESPONDENT

(Being an appeal against the ruling and order of Hon. J. J Masiga, SRM, delivered on the 7th of August, 2018 in the Chief Magistrates Court at Murang'a, in civil suit no. 109 of 2011)

JUDGMENT

1. This appeal emanates from the ruling and order of the lower court in which the appellant's application dated 6th September 2016 seeking reinstatement of her suit was dismissed with no orders as to costs.
2. A brief background to the appeal is that the appellant filed a suit in the lower court through a Plaintiff dated 5th May 2011 seeking general and special damages for injuries sustained in a road traffic accident on 27th November 2010 along Kariua-Muthuru road whose occurrence was blamed on the negligence of the 1st respondent when driving Motor vehicle registration number KAW 298H (subject vehicle) which was owned by the 2nd respondent. It was alleged that at the time of the accident, the appellant was travelling aboard the subject vehicle as a fare paying passenger and she sustained severe injuries as a result of the accident.
3. The record of the trial court shows that the suit was set down for hearing on 10th November 2014. On that date, the appellant testified as PW1. Her learned counsel thereafter applied for an adjournment to call other witnesses. When the matter came up for hearing on 5th December 2014, it was again



adjourned to 23rd December 2015 when the parties informed the learned trial magistrate that they were negotiating an out of court settlement.

4. On the 2nd of March 2015, Counsel holding brief for the respondent's counsel in the presence of counsel for the appellant informed the learned trial magistrate that she had instructions that parties had reached an out of court settlement but sought a mention date for parties to confirm that position. The matter was then set down for mention for that purpose on 9th March 2015 but on that date, none of the parties attended the court.
5. The record further shows that after the aforesaid date, no further action was taken by the parties and on 5th April 2016, the trial court issued and served on the parties a notice to show cause why the suit should not be dismissed for want of prosecution. On the date set for the notice to show cause, none of the parties appeared. The court consequently dismissed the suit for want of prosecution.
6. On 6th September 2016, the appellant filed an application seeking to set aside the dismissal orders issued on 26th May 2016 and for reinstatement of her suit. This is the application that was dismissed on 7th of August, 2018 giving rise to this appeal.
7. In her Memorandum of Appeal dated 20th August 2018, the appellant advanced a total of eleven grounds of appeal some of which are repetitive. In a nutshell, the appellant complained that in dismissing her application, the learned trial magistrate erred in fact and in law by: holding that the application was an afterthought and an abuse of the court process; giving undue regard to procedural technicalities at the expense of substantive justice; holding that the appellant did not advance sound reasons for not fixing the suit for hearing; and, failing to appreciate that the appellant had already testified and that parties were still exploring an out of court settlement. It was the appellant's contention that the learned trial magistrate misdirected himself when he failed to make a finding in favour of the appellant.
8. On 20th January 2023, this court directed that the appeal be prosecuted by way of written submissions. The appellant filed her written submissions on 19th June 2019 but the respondents failed to file their submissions despite being given ample opportunity to do so.
9. I have carefully considered the grounds of appeal as well as the submissions filed by the appellant and the authorities cited. Having done so, I find that a jurisdictional question arises which must be addressed first before delving into the merits of the appeal. It is now settled law that an issue of jurisdiction may be raised either by the parties or by the court Suo motu and must be determined in limine. In my view, the jurisdictional question which arises is whether as at 7th August 2018, the trial court had jurisdiction to determine an application seeking to reinstate a suit which had been dismissed for want of prosecution.
10. I say so because the record reveals that the appellant filed her application on 6th September 2016 and the same was determined on 7th of August 2018. At this time, Order 17 Rule 2 of the Civil Procedure Rules (CPR) had not been amended to allow for filing of an application to reinstate a suit which had been dismissed for want of prosecution.
11. At the time the application was filed, Order 17 Rule 2 of the CPR provided as follows;
 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.

It is important to note that Order 17 Rule 2 aforesaid was amended on the 26th of February, 2020 vide [Legal Notice no. 22 of 2020](#) which introduced Rule 2 Sub Rule 6 which allowed a party whose suit had been dismissed for want of prosecution to apply.

After the amendment, Order 17 Rule 2 (6) read as follows

“ A party may apply to court after dismissal of a suit under this order”

12. From the foregoing, it is my finding that prior to 26th February 2020, courts lacked jurisdiction to hear and determine applications for reinstatement of suits which had been dismissed for want of prosecution. Once a suit was dismissed for want of prosecution, it ceased to exist and the court became functus officio. The only remedy that was thereafter available to an aggrieved party was to appeal against the dismissal order.
13. My finding above is supported by the Court of appeal’s decision in [Wanda V Njimbiri & 2 others \(Civil Appeal 52 of 2017\)](#) [2023] KECA 378 (KLR) (31 March 2023) which expressed itself as follows when faced with the same jurisdictional question;

“This Court addressed a similar issue in [Erick Kimingichi Wapang’ana t/a Magharibi Machineries Ltd. v. Equity Bank Ltd Another, CA No 107 of 2016](#). In the leading judgment by Kiage, JA, the Court stated: - “I agree with the learned judge that upon an order of dismissal (for want of prosecution) being made, the suit ceased to exist and that rendered the court functus officio, its powers therein at an end. The only recourse available to the appellant was to appeal against such dismissal, as was rightly held by the learned judge.” In a concurring judgment, M’Inoti, JA, added: - ‘As Order 17, Rule 2 of the Civil Procedure Rules stood at the material time, the court became functus officio once it dismissed a suit for want of prosecution. It was only in February 2020 that the Civil Procedure Rules were amended vide [Legal Notice No 22 of 2020](#) to allow a party whose suit has been dismissed for want of prosecution to apply. The amendment introduced Rule 2 sub-rule 6 which provides as follows: “(6) A party may apply to court after dismissal of a suit under this order.”’ Accordingly, the trial court had no jurisdiction to entertain the purported application for reinstatement of the suit which was dismissed for want of prosecution. The appellant’s remedy lay in an appeal against the order of Onguto, J dated March 11, 2015. Satisfied as we are that the trial court did not have jurisdiction to entertain the application to reinstate the suit that was dismissed for want of prosecution, it is not necessary to address the issues raised by the appellant. Consequently, this appeal is dismissed with no orders on costs.”

14. Given the foregoing, it is my finding that the learned trial magistrate did not have jurisdiction to determine the appellant’s application dated 6th September 2016. Consequently, it is not necessary or useful for me to address the issues raised by the appellant. In the result, this appeal is hereby dismissed with costs to the respondent.

It is so ordered.



DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30TH DAY OF OCTOBER 2024.

C. W GITHUA

JUDGE

In the presence of :

Ms. Susan Waiganjo Court Assistant

No appearance for both the Appellant and Respondents

