



**Nairobi Serena Hotel v Machuka & another (Civil Appeal 690 of 2017)
[2023] KEHC 19059 (KLR) (Civ) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 19059 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 690 OF 2017

DO CHEPKWONY, J

FEBRUARY 17, 2023

BETWEEN

NAIROBI SERENA HOTEL APPELLANT

AND

WYCLIFF MAKORI MACHUKA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. Before this court for determination is a Notice of Motion application filed by the Appellant/Applicant dated March 21, 2022 which is brought under the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 17 rule 2 of the [Civil Procedure Rules](#) seeking for the following terms;
 - a. Spent;
 - b. That this honourable court be pleased to issue an interim order for stay of execution against the Judgment delivered on December 23, 2016 pending the hearing of this application interpartes.
 - c. That the orders of this honourable court be pleased to set aside the orders made on March 18, 2022 dismissing the Appellant's suit and all other consequential orders thereto.
 - d. That this honourable court be pleased to reinstate the Appellant/Applicant's suit.
 - e. That costs the application be in the cause.



2. The application is premised on the grounds set out on its face and reiterated in the Supporting Affidavit sworn by Terry Gachinga of even date. It is averred therein that on March 17, 2022, the matter was listed for Notice to Show Cause why it should not be dismissed for want of prosecution. It is contended that the Applicant's counsel logged onto the online court session on time but due to network issues, the court indicated that the matter would be dealt with at 4.00pm. At 4.00pm, the Applicant's counsel logged onto the court session and stayed on until 6.00pm but the court session would not take place. According to the Applicant's counsel, she kept checking the e-filing system under case activities for any directions on the matter and they did not receive any communication that the same would be mentioned on March 18, 2022. That in the course of refreshing the matter on the e-filing system, counsel realized that it had been marked as "dismissed for want of prosecution – case closed". According to Applicant's counsel, she had reasons why there had been a delay in having the matter prosecuted and was ready to adduce the same in court. She gave the main reason for delay in having the matter prosecuted as being failure to trace the lower court file, which she has confirmed has now been traced and are ready to take directions on hearing of the appeal. Counsel depones that the Appellant will greatly be prejudiced with the dismissal of the appeal and seeks that the said orders be set aside. She attached the copies of Cause-list of March 17, 2022 and screenshot of her screen at around 5.55pm.
3. In opposing the application, the 1st Respondent filed a Replying Affidavit sworn by Daniel Kirera Bosire on April 4, 2022 and stated that sine filing the appeal dated July 30, 2018, on August 1, 2018, the Appellant has not taken any reasonable steps to prosecute the matter which is more than three (3) years since. He avers that on several occasions, the Respondent has written to the Deputy Registrar which have been copied to the Appellant's counsel in an attempt to set down the matter for hearing but all that has been in vain. It is also averred that the continued presence of the matter in court without proper and reasonable prosecution is highly prejudicial to the 1st Respondent who is unable to execute the decree herein. It is contended that the court was right in dismissing the appeal as the same was ripe for dismissal in terms of the Civil Procedure Rules having remained unprosecuted for more than twelve (12) months. He urges the court to dismiss the Appellant's application for want of merit with costs to the 1st

Respondent.

4. The Appellant/Applicant filed a further affidavit and a Supplementary Affidavit in which she annexed the Notice from the High Court, Civil Appeals Registry which was informing parties that the lower court file had been received and it was collected on July 5, 2022.
5. By directions of this court issued on July 16, 2022, both parties filed their respective written submissions in support and in opposition to the application. The Appellant's submissions are dated August 10, 2022 while the 1st Respondent's submissions are dated August 18, 2022.

Analysis and Determination

6. I have considered the Notice of Motion application dated March 21, 2022, the response thereto, further and Supplementary Affidavits together with the written submissions by both parties through their respective counsel. In my mind, the only issue arising is whether or not the Applicant has made out a case to warrant reinstatement of this appeal?



7. Before I proceed to determine this issue, it is important to identify the law that governs the dismissal of a suit for want of prosecution. On this point, the guiding law on Notice to Show Cause is provided for under Order 17 Rule 2 of the [Civil Procedure Rules, 2010](#), which states 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. (emphasis added).
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.”

8. The Appellant/Applicant is seeking this court to reinstate the appeal which was dismissed pursuant to a Notice to Show Cause issued by the Deputy Registrar of this Court. The right to be heard is a constitutional right which is anchored in the [Constitution](#). I will not dwell much on this subject as the principles governing reinstatement of a suit have well been settled within our jurisdiction. In the case of [John Nabashon Mwangi –vs- Kenya Finance Bank Limited \(in Liquidation\)](#) [2015]eKLR, the court held 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.”

9. The aforementioned Article 50(1) of the [Constitution of Kenya](#) guarantees a party the right to a fair hearing and it states that:-

“Every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”



10. It is thus clear from the wording of the Constitution that dismissing a matter without having it heard on its merits amounts to curtailing a party's right to a fair hearing as envisioned in our Constitution. Therefore, this Court being the custodian of justice has a duty to ensure that parties are given a chance to advance their issues which can only be achieved in a full trial.
11. The Court of Appeal has held in the case of Richard Ncharpi Leiyagu -vs- Independent Electoral Boundaries Commission & 2 Others [2013] eKLR that:-

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
12. It should be noted that dismissal of suits is a draconian mechanism which should be exercised sparingly and judiciously depending on the evidence placed before a court. Otherwise it can be used as a weapon for causing injustice to the affected party. This is the position taken by the court in the case of John Nabashon Mwangi -vs- Kenya Finance Bank Limited (in Liquidation) (supra) where the court held 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.”
13. According to the Appellant/Applicant the appeal was filed in 2017 and the last time the matter was in court was on March 14, 2019 but the same was not set down for hearing as there was delay in transmission of the lower court file to the Civil Appeals Registry. It is noteworthy that this is a prerequisite before an appeal can be set down for hearing.
14. The 1st Respondent has stated that the Appellant/Applicant has not taken any action since the appeal was filed, which is more than three (3) years.
15. A perusal of the court record shows that the matter was dismissed on March 18, 2022 and the current application before court is dated March 21, 2022, which in my view was filed timeously and without delay.
16. A perusal of court record shows that the matter was last before court on March 14, 2019, which is indeed more than 3 years before it was dismissed. However, it will be noted that there are several letters from the Firm of Namachanja & Mbugua Advocates addressed to the Deputy Registrar and the Executive Officer, Chief Magistrate's Court inquiring on the proceedings and hearing of this appeal, respectively. I also note that there is an entry in one of the letters that the file was retrieved on February 15, 2022 and forwarded to Executive Officer for action and the Executive officer entered a remark that the file will be taken to the High court before March 17, 2022.
17. The letters clearly show that the Appellant's/Applicant's advocate has taken the necessary steps to follow up on the lower court record and have this appeal heard and determined. It ought to be noted that obtaining of court proceedings is not within the control of the Appellant or its advocate on record and the same cannot be blamed on them.



18. Reinstatement of a suit discretionary remedy of this court which can only be granted to a very deserving party once he satisfies the court. It will be further noted that the record shows that this suit was dismissed on March 18, 2022 and this application is dated March 22, 2022 which is a demonstration that it was filed timeously and without delay. I am therefore inclined to exercise discretion in favour of the Appellant/Applicant.
19. Based on the foregoing, I am satisfied that the Appellant/Applicant has made out a case to warrant the grant of the orders sought and proceed to make the following orders:-
- a. The dismissal Order issued on March 18, 2022 be and is hereby set aside and consequently the suit is reinstated.
 - b. The appeal be set down for directions within 45 days from today's date, failure to which the appeal shall stand dismissed.
 - c. Matter to be mentioned before the Deputy Registrar to confirm compliance on March 9, 2023.
 - d. Costs to be in the cause of the appeal.
- 20 It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS ...17TH ... DAY OF...FEBRUARY.... 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Gachinga counsel for the Appellant

Mr. Ongegu counsel for the Respondent

Court Assistant – Simon

