



REPUBLIC OF KENYA



**KENYA LAW**  
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**BK (Minor suing through his father and next friend DKK) v Mwashhi (Civil Appeal 118 of 2017) [2023] KEHC 3192 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3192 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 118 OF 2017**

**TM MATHEKA, J  
MARCH 29, 2023**

**BETWEEN**

**BK (MINOR SUING THROUGH HIS FATHER AND NEXT FRIEND  
DKK) ..... APPLICANT**

**AND**

**MACHANGA MWASHI ..... RESPONDENT**

*(Arising from the judgement in Nakuru CMCC No. 595 of 2012 delivered on 14th August, 2017.)*

**RULING**

1. Vide the Notice of Motion dated 25th June, 2021 brought pursuant to Article 159(1)(d) of the [Constitution of Kenya, 2010](#), order 12 rule 7 & order 51 rule 1 of the [Civil Procedure Rules 2010](#) and Section 3 and 3A of the [Civil Procedure Act](#), the Appellant/Applicant is seeking for orders;
  1. That the orders dismissing the Appeal herein be set aside.
  2. That costs of this Application be in the course.
2. The Application is based on the grounds that the Applicant was aggrieved and dissatisfied with the judgement in Nakuru CMCC No. 595 of 2012 delivered on 14<sup>th</sup> August, 2017 and has preferred this appeal; that due to no fault of the Appellant and after persistent follow ups at the registry, the appellant is yet to be furnished with the typed proceedings in the lower court file; that neither the applicant nor his advocate received a notice to show cause why the appeal should not be dismissed for want of prosecution before the same was dismissed; that this Honourable Court has wide and unfettered discretion to set aside orders when justice so demands; that the appellant herein has always been desirous of prosecuting the appeal and as is exhibited by their continuous efforts in trying to acquire certified proceedings and decree to enable him file the appeal; that in addition to the foregoing and upon requesting the court to list this matter for mention for purpose of taking directions, it became



apparent that the appeal herein was dismissed for want of prosecution on 11<sup>th</sup> March, 2020; that the appellant/applicant is bound to suffer irreparable loss unless the orders sought are granted as he will be condemned unheard; and that it is only fair and just that the order dismissing appeal be set aside and the matter be admitted for hearing on merit.

3. The Application is supported by the affidavit of DKK sworn on 25<sup>th</sup> June, 2021 reiterating the above grounds.
4. The application is opposed through the respondent's replying affidavit sworn on 29<sup>th</sup> October 2021. It is his position that the Application is incompetent, misconceived, bad in law, made in bad faith and is meant to delay the delivery of justice and ought to be struck out. Further that on merit of the application, a matter stands dismissed where after two years no steps have been taken to prosecute it and thus there is no need for service of a notice to show cause upon the applicant before dismissing the matter.
5. He deposed further that, the applicant has not brought any new evidence or advanced any sufficient reason to warrant the setting aside of the orders made dismissing the appeal and that the delay in prosecuting the appeal against the judgement delivered on 14<sup>th</sup> August, 2017 up to the time 11<sup>th</sup> March, 2021 when the appeal was dismissed is unreasonable, unmerited and incurable.
6. It was his averment that the length of time since the matter was dismissed on 11<sup>th</sup> March, 2021 to when this application was made is unreasonable and clearly shows that the applicant lost desire to prosecute the matter.
7. He averred that setting aside of an order of the court is an act of judicial discretion and that the applicant does not deserve it as he and his advocate have shown a laxity in prosecuting this appeal; that the Applicant has not demonstrated the loss he will suffer if orders sought are not granted and whilst on his part he will be greatly prejudiced if the orders sought are granted as he will continue being in distress considering the matter has been in court since the year 2012.
8. It is his prayer that the Application be dismissed with costs.
9. Parties canvassed the application through written submissions.

### **Applicant's Written Submissions**

10. The Applicant reiterated the contents of his supporting affidavit. He submitted that the appeal was dismissed on 11<sup>th</sup> March, 2021 without service of the dismissal notice upon him/his advocate and denying him the opportunity to explain the reasons for the delay; that he is desirous of prosecuting his appeal and delay in compiling the record of appeal has been occasioned by delay in obtaining certified typed proceedings; that it is only fair and just that the orders sought herein be granted and appeal be reinstated for hearing on merit.
11. He referred this court to the provisions of Order 9B Rule 8 of the *Civil Procedure Rules* and submitted that this court has discretion to grant the orders sought, He relied on :-
  1. *Shah v Mbogo* (1967) EA 166 referred to in the case of *Securicor Courier (K) Ltd v Owino* [1993] eKLR where it was stated that "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."



2. *Lucy Bosire v Kehancha Div. Land dispute Tribunal & 2 others* (2013) eKLR- where it was stated that, the court in exercising its discretion should always opt for the lower rather than higher risk of injustice.
  3. *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173 where the court held that:- “ ..In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...”
  4. *John Nabashon Mwangi -vs- Kenya Finance Bank Limited (In liquidation)* [2015] eKLR where the court stated that Article 50 and 159 of the *Constitution* 2010 desire to serve substantive justice to all the parties and constitute the defined principles which would guide the court in making a decision on such a matter of reinstatement of a suit which has been dismissed.
12. The Applicant argued that the principles governing the setting aside of an order for dismissal of a suit for want of prosecution are enunciated in the case of *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014]eKLR. These principles are:
- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
  - 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;
  - 3) Whether the delay is an abuse of the court process;
  - 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
  - 5) What prejudice will the dismissal occasion to the plaintiff?
  - 6) Whether the plaintiff has offered a reasonable explanation for the delay;
  - 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?
13. The applicant submitted that the delay was not occasioned by him but rather the court as it is yet to supply him with certified typed proceedings and that such delay is excusable and does not amount to an abuse of the court process.
14. He further submitted that the said delay has prejudiced him and will continue to do so if this application is disallowed. That dismissing a suit without hearing him was tantamount to being condemned unheard which is contrary to the rules of natural justice.
15. He urged this court to exercise its discretion in his favour and stated that he is willing to abide by the conditions set by this court.

### **Respondent’s Submissions.**

16. The respondent framed three issues for determination.
  - i. Whether there was proper notice to show cause
  - ii. Whether there was delay and whether it is excusable



- iii. Will setting aside be prejudicial to the respondent?
17. On the issue of notice to show cause the respondent submitted that Order 17 Rule 2(1) of the Civil Procedure Rules grants this court power to dismiss a suit in which no action has been taken for one year. That pursuant to this provision the court is required to give notice to the concerned party to show cause why the matter should not be dismissed for want of prosecution and if no cause is shown to the satisfaction of the court the court may dismiss the suit as it did in this matter.
  18. He submitted that in Kestem Company Ltd v Ndala Shop Limited & 2 others [2018] eKLR the court held that Order 17 rule 2(1) of the Civil Procedure Rules does not require a court to serve notice as it uses the word “give notice” and therefore the court may give notice of dismissal through its official website or through cause list.
  19. The respondent submitted that in this matter the court gave the notice of dismissal of the suit through its website and cause list prepared.
  20. The respondent submitted that this court should apply the test that matters should be disposed off expeditiously and that justice is served to all parties.
  21. On whether there was delay and whether it was excusable the respondent submitted that there had been inordinate delay on the part of the applicant in prosecuting this matter as he took no steps for 6 years to prosecute the appeal from the time he filed it in 2014 and a further 2 years to seek set aside the dismissal order.
  22. That the applicant had the choice to file a supplementary record of appeal even as he awaited the typed proceedings in order to compile a full record. That having not done so is an indication that he is not desirous to have the matter heard and determined.
  23. On whether he will suffer prejudice the respondent submitted that that the delay of 8 years has not been satisfactorily explained by the applicant and that delay is a source of prejudice to him as it affects the fair administration of justice as envisaged under Article 47 of the Constitution and is contrary to the provisions of Article 159 which requires expeditious disposal of matters.
  24. The respondent urged this court to be persuaded by the holding in Jacob Njeru Karuku v Njagi Njuguna [2021] eKLR in which the court dismissed a similar application for lack of merit.

### **Analysis and Determination**

25. The only issue for determination is whether or not this court should set aside the order dismissing the Appellant’s appeal issued on 11<sup>th</sup> March 2020 and reinstate it for hearing and determination on merit.
26. The appeal was dismissed under Order 42, Rule 35(2) of the Civil Procedure Rules and not Order 17 Rule (2)(1) which parties herein have cited.
27. The said Order 42, Rule 35(2) states;

“If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.”
28. Pursuant to the above provision the Deputy Registrar issued a dismissal notice to counsel for each party herein. The said notice is dated 26<sup>th</sup> February 2020 wherein the matter was to be mentioned on 11<sup>th</sup> March, 2020. However, from the face of this notice, it is apparent that only the advocate for the



Respondent was served with it. There is no evidence therefore that the Applicant or his advocate was aware of the same.

29. On 11<sup>th</sup> March, 2020 there was no appearance by either the Appellant or the Respondent and this court proceeded to dismiss the matter for want of prosecution.
30. The Applicant filed his Memorandum of Appeal on 14<sup>th</sup> September, 2017 and has never prosecuted this Appeal to date. He has attributed the delay in prosecuting the appeal and listing it for direction to delay in obtaining certified typed proceedings despite efforts to do so. He has attached letters dated 18<sup>th</sup> May, 2021 requesting for proceedings to enable him pursue the appeal and one dated 29<sup>th</sup> April, 2021 requesting this matter to be listed for directions. It is clear from the date of these letters that they were written long after the Appeal was dismissed.
31. It is further apparent that the Appellant/Applicant upon filing the appeal did not take any steps to prosecute the same. The Court of Appeal decision in *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & Another* [2014], eKLR held:-

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed...We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filling the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice... Why didn’t she set the appeal down for hearing for almost 14 years”? The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.”

32. Further in *Mwangi S. Kimenyi vs Attorney General & Another*, Civil Suit Misc. No. 720 of 2009 it was held:-

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the act straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- 1) whether the delay has been intentional and contumelious;
- 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;
- 3) whether the delay is inordinate and inexcusable;
- 4) whether delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and
- 5) what prejudice will the dismissal cause to the plaintiff.



By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

33. The appellant filed his appeal on 14<sup>th</sup> September, 2017. For 3 years 6 months he did nothing until the appeal was dismissed on 11<sup>th</sup> March, 2020. This application was filed on 7<sup>th</sup> July 2021 one year 4 months after the appeal was dismissed. It is evident that efforts to obtain the proceedings the applicant is talking about as the main cause of the delay began long after the dismissal of the appeal. This is not the conduct of a person desirous of prosecuting his issue. It is not the conduct of a person deserving the discretion of this court. The appellant has simply exhibited indolence and slumber over his right.
34. Having considered all the submissions, the record, and the authorities cited, I am of the view that the application has no merit and the same is dismissed with costs to the respondent.
35. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> MARCH 2023.**

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**MUMBUA T MATHEKA**

**JUDGE**

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