



Masinde & another (Suing as the legal representatives of the Estate of Martin Simiyu Masinde) v Timex Freight Limited (Civil Appeal 79 of 2019) [2023] KEHC 19386 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 79 OF 2019**

DK KEMEL, J

JUNE 30, 2023

BETWEEN

JOHN SIMIYU MASINDE 1ST APPELLANT

CHRISTINE NAMBANGALA 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MARTIN
SIMIYU MASINDE**

AND

TIMEX FREIGHT LIMITED RESPONDENT

*(Being an appeal against the ruling and order of Hon C.A.S Mutai
SPM in Bungoma CMCC No. 71 of 2015 delivered on 30/8/2019)*

JUDGMENT

1. The appellants had filed an application dated November 15, 2018 seeking reinstatement of suit that had been dismissed by the learned trial magistrate on 18/7/2017 for want of prosecution. Upon the said dismissal, the appellants filed the application culminating in a ruling where the learned trial magistrate found that the appellants had failed to prosecute their case for more than two years This aggrieved the appellants who moved this court on the following grounds;
 - a. The learned trial magistrate erred by failing to take into account the totality of the evidence and facts presented before him in arriving at the said decision.
 - b. The trial magistrate erred by dwelling on extraneous matters in arriving at the said decision.
 - c. The learned trial magistrate erred by failing to appreciate that the appellants appointed and entrusted their then advocates who were on record in the mother suit to act for and prosecute the suit on their behalf.



- d. The learned trial magistrate erred by failing to acknowledge the circumstances of the case and render a just and accurate decision.
 - e. The learned the trial magistrate erred by failing to acknowledge that the act of timely and expeditiously prosecuting the mother suit was occasioned by M/s Mukooli & Associates Advocates the then advocates for the appellants herein and not the appellants themselves.
 - f. The learned trial magistrate erred by sending away the appellants from the judgement seat and denying them a chance to be heard which act deprives them their constitutional rights.
 - g. The learned trial magistrate erred by dismissing the appellant's application dated 15/11/2018.
2. Briefly, the appellant's application before the trial court was premised on the fact that their then counsel did not inform them of the dismissal and only learnt of it when they visited the said firm's chambers on 24/10/2018 and got information that the matter had been dismissed on 18/7/2017 for want of prosecution.
 3. Basically, the appellants are saying that the dismissal of the suit was as a result of counsel's mistake which should not be visited upon them.
 4. Considering the application, the learned trial magistrate found in part that the appellants delayed for more than two years for them to take action in the matter. He held that the appellants should have followed up with the advocate or the court registry.
 5. Looking at the record, the suit was filed on 9/2/2015 and a request for judgement made on 12/5/2015. The suit was dismissed on July 18, 2017 and the application to reinstate it filed on 15/11/2018, more than a year after dismissal.
 6. The dismissal of a suit for want of prosecution is provided for under order 17 rule 2 of the [Civil Procedure Rule](#) which states;

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.
 7. From the record, it is noted that there are notices issued under the said Order; the first one is dated June 8, 2017 and the second one is dated June 29, 2017. In both cases, there is no evidence that the same was either received by either the plaintiff or the defendant nor there is a certificate of posting to the respective parties or an affidavit of service sworn by the person who served the notice.
 8. In the case of [Ivita v Kyumbu](#) [1984] KLR 441, as cited by the appellant, the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the



plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.

9. As stated, there is no evidence that the notice was served upon the parties to the suit. This scenario was captured in *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] eKLR, where the court held;

“But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the cause lists, Websites or even court notice boards. (see the cases of *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR and *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR).”

10. In granting the order of reinstatement of a suit dismissed, the court is called upon to balance between the plaintiff's rights to have the suit determined expeditiously as provided under the overriding objectives and the defendants rights not be inordinately pinned down by the suit. In either way, the court is to do justice to both parties while respecting their rights.
11. In as much as the defendant seems not to have participated in the suit before the dismissal, I find that the failure by the trial court to ensure that service has been effected on all the parties is paramount and such a miss-step should not be taken lightly as it denies the parties rights to be heard.
12. In the circumstances, I do find merit in the appeal and I hereby allow it on terms that the trial court's order dismissing Bungoma CMCC No. 71 of 2015 is hereby set aside and in its place substituted with an order reinstating the suit which should be fixed for hearing before the subordinate court within 30 days as of today failing which the suit shall stand dismissed. As the respondent did not participate in the proceedings in the trial court and in this appeal, there shall be no orders as to costs.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2023

D.Kemei

Judge

In the presence of :

No appearance Ngaiywa for Appellant

Machuma Respondent

Kizito Court Assistant

