



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nguru v Karanja (Civil Appeal 04 of 2020) [2023] KEHC 19245 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19245 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYAHURURU**  
**CIVIL APPEAL 04 OF 2020**  
**CM KARIUKI, J**  
**JUNE 29, 2023**

**BETWEEN**

**SAMUEL NJUGUNA NGURU ..... APPELLANT**

**AND**

**SAMUEL KIMANI KARANJA ..... RESPONDENT**

**RULING**

1. Before this court is the Appellant's Notice of Motion application dated 18th November 2022. The Appellant sought orders that: -
  - i. That the orders of the honourable court made on the 29th day of July 2021 dismissing the appeal for want of prosecution be set aside.
  - ii. The appeal filed herein on 7th February 2020 be reinstated for hearing.
2. The Application is supported by the affidavit sworn by Kulecho Kwoba of even date and is based on the grounds on the face of it and is further stating that: -
  - i. That this matter was being prosecuted actively by the Appellant.
  - ii. This matter was filed on 7/7/20, wherein the Appellant awaited the court's directions.
  - iii. The Appellant needed to be made aware of the dates the courts gave for mentions, as no mention notice was served upon them.
  - iv. That the matter was fixed for mention without the knowledge of the Appellant, and as a result, the Appellant failed to attend court on the mentioned date.



- v. After perusing the court file, The Appellant's advocate learned that the matter was dismissed on 29/7/21.
  - vi. That the Appellant's case was dismissed without giving them any opportunity to present their case.
  - vii. That it is in the interest of justice.
3. The Respondent filed a replying affidavit sworn on 15/11/2021 by Samuel Kimani Karanja opposing the application.
  4. He contended that the appeal was lodged way back on 7/7/2020, and the Appellant never bothered or attempted to prosecute the same. The Appellant is guilty of inordinate delay in bringing the present application four months after orders were made dismissing the suit and that the allegations contained in the supporting affidavit are not viable grounds for reinstating the suit.
  5. The Respondent deponed that the application is merely an afterthought and the same is frivolous, vexatious, bas in law, meritless, an abuse of the court process, and is meant to circumvent the orders made on the 29th of July 2021, and does not in the simplest terms deserve the discretion of this honourable court.

### **Appellant's Submissions**

6. The applicant's case was filed on 7th July 2020, wherein the Appellant awaited the court's direction. That the Appellant was waiting for the court to give directions in terms of hearing the said appeal only to learn that the matter was fixed for a mention by the court without the knowledge of the Appellant. By the time the Appellants learned of the directions, the matter had been dismissed for want of prosecution.
7. The Appellant asserted that the record shows he has always been diligent and ready to prosecute his matter. Through the annexed affidavit sworn on 18th November 2022, counsel explained that he could not prosecute this matter due to failure to notify the litigants, particularly the Appellant.
8. It was averred that it should be noted with concern that this matter only came up twice for mention within one week without notifying the Appellant. From the filing system, a mention was allocated one year after the filing of the appeal. It was, therefore, impossible for the Appellant to learn of the court's directions.
9. Lastly, the Appellant submitted that failure to notify the advocates on record should not be visited upon an innocent litigant, that the application has been made without undue delay, and that it is in the interest of justice that the application herein is allowed. Reliance was placed on *Daniel Kaloki Mule v Alice Ngina Mutisya & 2 Others* [2021] eKLR

### **Respondent's Submissions**

10. The Respondent stated that the issues that arise for determination include:
  - i. Whether the Appellant has been vigilant and/or keen to prosecute the appeal lodged on the 7th of February 2020;
  - ii. Whether there has been an inordinate delay in prosecuting the appeal;
  - iii. Whether the appeal should be reinstated.



11. It was averred that since appearing on 7th July 2020, the Appellant and his advocates on record have failed to attend court and fix the matter for directions before the honorable judge. To date, the Appellant has yet to file and serve a record of appeal upon the Respondent. Further, the Appellant failed to indicate the steps he took to have the appeal set down for directions.
12. The Respondent asserted that it was an abuse of the court process and a waste of judicial time for the Appellant to file an appeal and abandon the cause for more than three years. The Appellant has demonstrated that he has never been and is still not interested to prosecute his suit. As such, this court should safeguard its integrity and disallow the Appellant's prayer to reinstate the suit.
13. It was contended that even after the suit was dismissed for want of prosecution on 29th July 2021, the Appellant took more than one year and five months to apply for reinstatement; despite being aware of the dismissal from the start. That there is no plausible explanation has been tendered to excuse the unduly long delay in prosecuting the suit or filing the motion to reinstate it.
14. Reliance was placed on *Netplan East Africa Limited v Investment & Mortgages Bank Limited* [2013] eKLR, *Pitbon Waweru Maina v Thuka Muguria* [1983] eKLR.
15. The Respondent averred that the Appellant was duty-bound to follow up on its cause to ensure it was set down for hearing and expeditiously determined. The Appellant was indolent in honouring this duty, and thus the application seeking to reinstate the suit should be determined. Reliance was placed *Pyrethrum Board of Kenya v Samuel K. Kihiu & 3 Others* [2014] eKLR.
16. It was argued that the acceptable delay limit provided in the Civil Procedure Rules 2010 is one year. That the delay herein of more than one year is inordinate because it is beyond the acceptable limit in prosecuting cases.
17. It was submitted that the discretion to set aside orders should never be exercised in favour of someone who deliberately, by evasion or otherwise, seeks to block the course of justice. Reliance was placed on *Shah v Mbogo* [1968] EA 93 and *Pitbon Maina v Muguria* [1982-1988] 1 KAR 177 etc. The Respondent stated that both the Appellant and his advocate on record were absent when the matter was called, leading to the dismissal of the suit, which is a deliberate delay of the course of justice and, therefore, the court should not exercise its discretion in favour of an Appellant who failed to attend court for the hearing of his case and gives no satisfactory reasons for non-attendance then states that the dismissal order prejudices him.
18. In conclusion, the Respondent stated that the Appellant has yet to explain why he never prosecuted his appeal. Further, no justifiable reason has been tendered on why he dragged his feet to seek reinstatement of the appeal. That reinstatement of this suit will be extremely prejudicial to the Respondent, who has since moved on with his life with the warranted belief that the suit is behind him.

### **Analysis and Determination**

19. The instant application seeks to set aside the court's dismissal orders on 29<sup>th</sup> July 2021 and, consequently, reinstate the appeal for hearing on merit.
20. The Appellant averred that this matter was filed on 7<sup>th</sup> July 2020, and he had been waiting for the court's directions. He further submitted that he was not aware of the dates given by the courts for mentions as no mention notice was served upon them and that when the matter was fixed for mention, they were not notified, and as a result the Appellant failed to attend court on the mention date. The Appellant stated that their advocate learned the matter was dismissed on 29/7/21 after perusing the court file.



21. On the other hand, the Respondent averred that since appearing on 7th July 2020, the Appellant and his advocates on record have failed to attend court and fix the matter for directions before the honourable judge. To date, the Appellant has yet to file and serve a record of appeal upon the Respondent. Further, the Appellant failed to indicate the steps he took to have the appeal set down for directions.
22. I have perused the record; I have noted that nothing indicates that the Appellant was ever notified of any mentioned dates that were fixed for the matter. Moreover, it appears that the matter was only mentioned once on 29<sup>th</sup> July 2021, following which the dismissal orders were made for want of prosecution. The Appellant was not in court that day, and there is no notice to indicate that he had been made aware of that date or the dismissal therein. The Appellant did not state when he became aware that the matter had been dismissed, but this application was made more than one year later.
23. The orders sought by the Appellant are discretionary. Order 12 Rule 7 of the [Civil Procedure Rules](#) under which the Application is brought provides that:-
- “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.”
24. Furthermore, the principles governing reinstatement of the suit are stated in the case of [John Nahashon Mwangi v Kenya Finance Bank Limited \(in Liquidation\)](#) [2015] eKLR 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 the right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles that should guide the court in deciding on such matter of reinstatement of a suit which the court has dismissed. 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 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 were reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
25. Having regard to the circumstances of this case and the vehement objection by the Respondent, I am of the opinion that although the Appellant must be vigilant in prosecuting his appeal, a duty that he neglected; by applying the requirements for the right to a fair trial and the dispensation of substantive justice espoused under Article 50 as read with 159(2) (b) of the [Constitution](#), I will allow this application to accord the Appellant a chance to argue the substantive appeal. It is also my finding that the Respondent will not suffer prejudice if the appeal is reinstated. In the circumstances, the delay of over one year in filing the instant application is excusable.
26. I, however, caution the Appellant by stating that although this court has exercised its discretion in his favour, it is his responsibility to ensure that his counsel takes the steps necessary to prosecute his case. The Appellant’s counsel on record must note that this court does not serve just his narrow interest. Still, the greater picture in attaining justice must be considered, and care should be taken not to prejudice any



of the parties and, most importantly, the justice system. His inactivity and lack of interest in pursuing the appeal herein will not be excused.

27. In the result and for the above reasons, the makes the orders;
- i. I allow the application, and the dismissal order made on 29<sup>th</sup> July 2021 is hereby set aside. Consequently, the suit is reinstated. The Appellant will, however, fix the appeal for hearing within the next 45 days. Otherwise, the appeal will stand dismissed for want of prosecution.
  - ii. The Appellant will bear the costs of this Application assessed at ksh 7000, payable within 21 days in default execution to be levied.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU ON THIS 29TH DAY OF JUNE 2023.**

.....

**CHARLES KARIUKI**

**JUDGE**

