



**Kimani (Suing as the Administrator of the Estate of Francis Wanjugu Kimani) v Kinyanjui
(Civil Appeal 207 of 2019) [2023] KEHC 20767 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20767 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 207 OF 2019**

PM MULWA, J

JULY 26, 2023

BETWEEN

**CHARLES THUO KIMANI (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF FRANCIS WANJUGU KIMANI) APPELLANT**

AND

PAUL N. KINYANJUI RESPONDENT

*(Being an appeal from the ruling and order of Honourable M. Wanjala -
SRM in Thika CMCC No. 922 of 2016 delivered on 28th November 2019)*

JUDGMENT

1. The events leading to the current appeal are as follows, the appellant instituted a suit in Thika Chief Magistrate's Court as the Administrator of the Estate of Francis Wanjugu Kimani, vide a plaint dated October 8, 2013, against the respondent following a road traffic accident that occurred on September 4, 2011 along Thika Road involving Motor Vehicle KXX 96XX which was negligently driven, managed and/or controlled by the respondent causing it to fatally hit a pedestrian Francis Wanjugu Kimani.
2. In the plaint the appellant sought general damages under the Fatal Accidents Act and the Law Reform Act, special damages, costs of the suit and interest.
3. On March 24, 2015, the respondent filed his statement of defence denying the averments of the plaint. The matter was set down for hearing.
4. By the order of the trial court the suit was dismissed on November 6, 2017 for non-attendance. The appellant filed an application dated November 7, 2017 seeking to set aside the orders of November 6, 2017 dismissing the suit. By a ruling of January 28, 2019, the learned trial magistrate reinstated the suit on condition that the matter is heard and concluded within 100 days, failing which the suit would automatically stand dismissed.



5. The appellant did not set down the suit for hearing during the stipulated period. On August 6, 2019 the appellant's counsel moved the court by way of a Notice of Motion application seeking to review the orders of January 28, 2019 and extend the time for hearing the suit. The application was heard by way of written submissions and on November 28, 2019, the trial magistrate opined that the appellant had failed to act within the conditioned period, there were no orders in existence deserving an extension and dismissed the application dated August 6, 2019 with costs.
6. Aggrieved by the trial court ruling the appellant on December 20, 2020 filed the Memorandum of Appeal dated December 16, 2019 and cited the following grounds:
 - i. The learned trial magistrate erred both in law and in fact by failing to consider the appellant's documentary and oral evidence and further erred in finding against the appellant despite the weight of the evidence in his favour.
 - ii. The learned trial magistrate erred in both law and in fact by failing to take into account the whole of the evidence tendered by the appellant in his application for review dated 6th August 2019 together with the annexures attached therein.
 - iii. That the learned trial magistrate erred in law and in failing to properly evaluate the evidence on record, in particular, the plaintiff's reasons and annexures and the defendant's evidence and finding against the appellant.
 - iv. The learned trial magistrate erred both in law and in fact by dismissing the whole suit when there was an error apparent on the face of the court record.
 - v. The learned trial magistrate erred both in law and in fact by not taking into account the fact that the court diary was full and the hearing date that was given to the appellant was the only available hearing date.
 - vi. The learned trial magistrate erred in law and in fact by not taking into consideration the fact that after the Ruling was delivered on January 28, 2019, the appellant moved with haste and invited the respondent to fix a date on February 2019 less than a week after the Ruling.
 - vii. The learned trial magistrate erred both in law and in fact by failing to consider the invitation letter dated and received on February 6, 2019 to the Thika Registry in an attempt to get an early hearing date.
 - viii. The learned trial magistrate erred in both in law and in fact by failing to consider that the appellant did not delay in any way in fixing the matter for hearing within the required 100 days.
 - ix. The learned trial magistrate erred in law and in fact by dismissing the suit in its entirety.
 - x. The learned trial magistrate erred in law and in fact by not considering the evidence and submissions of both parties.
 - xi. The trial magistrate erred in law and in fact in finding that the appellant was not entitled to the costs of this suit.
 - xii. That the learned trial magistrate erred both in law and in fact by disregarding the authorities relied upon by the appellant.



- xiii. The learned trial magistrate generally misdirected himself and failed to give due and proper consideration to submissions of counsel for the appellant.
 - xiv. The learned trial magistrate erred in law and in fact and misdirected himself and failed to give due and proper consideration to the fact that the appellant had provided proof that he made an effort to fix the matter for hearing in good time only that the Court diary in Thika was full.
- 7. The appellant proposed to ask that the appeal be allowed, set aside and/or vacate the trial court orders of January 28, 2019 and extend the time within which the appellant is to prosecute the case.
 - 8. The court directed that the appeal be heard by way of written submissions. Both parties filed submissions; the appellant on December 14, 2022 and the respondent on June 5, 2023.

Appellant's submissions

- 9. Counsel submitted that the failure by the appellant to fix the matter within the stipulated 100 days was beyond his control as there was no available date. The reasons advanced for non-attendance were sufficient and the court ought to have given the appellant a chance to be heard.
- 10. That the appellant was not guilty of laches, and he had always moved the court with haste and without undue delay. He urged the court to set aside the trial court orders of November 28, 2019 and the suit be reinstated for hearing.

Respondent's submissions

- 11. In opposing the appeal, counsel submitted that the carelessness of the appellant and his advocate should not be visited on the respondent. The lack of diligence on their part is inexcusable and should not continue holding the respondent hostage.
- 12. Counsel further submitted that litigation must come to an end and pleaded with the court not to revive the matter on the sole reason that it will have a negative impact on the respondent. Counsel though in agreement that the omissions of counsel should not be visited on the appellant, submitted that the same can be addressed in another forum against the said advocate for professional negligence. He urged the court to dismiss the appeal.

Analysis and determination

- 13. This is a first appeal and the duty of the court is to analyze and re-evaluate any evidence adduced at the lower court and draw its own conclusions.
- 14. I have considered the appeal, the trial court records and the submissions filed by the parties both in support and in opposition to the appeal. The issue for determination is whether this court should reinstate the appellant's suit for hearing on merit.
- 15. Article 159 (2) (c) of the *Constitution* of Kenya places a responsibility on the courts to determine disputes and render justice without undue delay. Further, Section 1B of the *Civil Procedure Act* require that courts handle matters before them for the purposes of furthering the overriding objective specified in Section 1A thereof and achieve efficient and timely disposal of proceedings.
- 16. A party seeking reinstatement of a suit for hearing must adduce sufficient and/or reasonable explanation as to why the court should exercise its jurisdiction and review the orders dismissing the suit.



17. In *Mwangi S Kimenyi v Attorney General and Another, Misc Civil Suit No 720 of 2009*, the court stated as follows: 'When the delay is prolonged and inexcusable, such that it would cause grave injustice to one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the 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 a 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 the 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.'

18. This court takes into consideration that the matter was filed in 2013 and has been lagging in court for 10 years. The suit was first dismissed by the trial court for want of prosecution in 2017, when the appellant and his counsel failed to attend court, subsequently, the appellant applied to have the suit reinstated which the court allowed on condition that the suit is heard and determined within 100 days failure to which the suit would stand dismissed. The appellant did not set down the matter for hearing within the stipulated 100 days.
19. The appellant proceeded to fix the matter for hearing on August 6, 2019, long after the 100 days had lapsed.
20. Counsel for the appellant contends that the reason for the delay was the unavailability of dates at the registry. I am not persuaded that this is reason enough to exercise the court's discretion and reinstate the suit for hearing on merit.
21. It is my finding that if there were no available dates at the registry, the most probable move was for the appellant to cause the matter to be listed for a mention before the trial court for further directions.
22. This court agrees with the respondent's counsel that litigation must come to an end. When a party moves the court for justice, the party seeking justice must ensure the suit is expedited and timely concluded. The courts are minded about clearing the backlog of cases. This matter had taken 5 years in the courts before it was dismissed by the trial court on November 6, 2017.
23. In *Richard Ncharpi Leiyagu vs IEBC & 2 Others CA 18/2013*, the Court of Appeal held; 'The right to a hearing has always been well-protected 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.'
24. It is imperative that cases should not remain in the courts un-attended to forever. Justice should be dispensed timeously. The suit which is the subject of this appeal has been in court for a cumulative 10 years.
25. In the circumstances therefore, the appeal herein is found to be without merit and is dismissed. Each party bears its costs.



It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

This 26th day of July 2023.

.....

P.M. MULWA

JUDGE

In the presence of:

Duale – Court Assistant

Ms. Nyabisi h/b for Ms. Mideva for the appellant

Mr. Mugwe h/b for Mr. Mahugu for the respondent

