



REPUBLIC OF KENYA



KENYA LAW
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**Mshingati & another v Mithome & another (Civil Appeal
E002 of 2020) [2023] KEHC 24472 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24472 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E002 OF 2020
SM GITHINJI, J
OCTOBER 26, 2023**

BETWEEN

DONATAI KALAWA MSHINGATI 1ST APPELLANT

STANLEY MASANO SENGONDO 2ND APPELLANT

AND

JOSEPH THIANE MITHOME 1ST RESPONDENT

**DORINE MUKUBA (SUING AS LEGAL REPRESENTATIVE OF PATRICK
MWENDAS THIANE (DECEASED)) 2ND RESPONDENT**

*(Being an Appeal of the Judgment of Honourable N.C.Adalo
delivered in SRM No.347 of 2016 Mariakani on 25th August, 2020)*

RULING

CORAM: Hon. Justice S. M. Githinji

Mr Mokaya Advocate for the Appellant

Mr Njoroge Advocate for the Respondent

1. For determination is the appellants' notice of motion dated 2nd December 2022 seeking the following orders;
 - a. That this honourable court be and is hereby pleased to vacate, vary and/or set aside its dismissal orders issued on the 3rd day of December 2020 dismissing the Applicant's Memorandum of Appeal dated 23rd September 2020 hereof and reinstate the Memorandum of Appeal for hearing.
 - b. That this honourable court be pleased to make any such orders as it may deem fit and just to grant in the interest of justice.



- c. That the costs of this application be provided for.
2. The application is founded on the grounds set out on the face of it and the supporting affidavit of Kennedy O. Mokaya advocate in conduct of the matter who deponed that a Memorandum of Appeal dated 23rd September 2020 was served on the respondent. He stated that the appeal was mentioned in court in November 2020 without notification to either party and on 3rd December 2020 the Memorandum of Appeal was dismissed for want of prosecution.
3. The respondents filed a replying affidavit sworn by the 1st respondent Joseph Thiane Mithome who deponed that the applicant had known about the dismissal of the appeal since February 2022 and he only filed the instant application on 2nd December 2022 and served it on the respondents' advocate on 6th June 2023 thus he is guilty of laches.

Disposition

4. The application was disposed of by way of written submissions. I have considered the application, the response thereto, the written submissions as well as the authorities relied upon. The issue for determination is whether the order for setting aside/varying the orders for dismissal is merited.
5. Order 17 rule 2(1) of the [Civil Procedure Rules](#), which governs dismissal of suits for want of prosecution, provides as follows:

“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.”
6. Further order 17 rule 2(3) of the [Civil Procedure Rules](#), states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”
7. Clearly, the statutory threshold set out under Order 17 rule 2 of the [Civil Procedure Rules](#) is that a suit qualifies to be dismissed for want of prosecution: if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.
8. In [Argan Wekesa Okumu vs Dima College Limited & 2 others](#) [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution. See the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”



9. Whether to exercise the power of dismissal for want of prosecution under order 17 is, however, a matter that is within the discretion of the court. In its decision in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* [2016] eKLR, the court stated as follows:

“ 11. Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita vs Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

10. In *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows: -

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.”

11. The circumstances in the case at bar is that the Applicant filed a Memorandum of Appeal on 23rd September 2020. The same is said to have been served upon the respondents on 24th September 2020. The applicant did not demonstrate to satisfaction of the court that there were any steps taken to have the matter proceed. It is stated that the same was slowed down for kick off due to Covid19 pandemic and lack of notice from court. In my view, it is too late in the day that two years later, someone would still have the excuse of the Covid -19 pandemic. The court takes judicial notice that after a while, advocates were able to regularize matters that had been down scaled by the pandemic. Thus, it is really not a sufficient reason that two years later, one would raise that excuse. In addition, the applicant brought this application two year after dismissal of the Memorandum of appeal. This is an inordinate delay which has not been sufficiently explained.
12. In the circumstances and guided by the statute and case law above, I find the application void of merit and the same is hereby dismissed with costs.



RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 26TH DAY OF OCTOBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Ms Nyambane holding brief for Mr Mokaya for the Applicant
2. Mr Njoroge for the Respondent (absent)
3. Ms Nyambane;-I seek leave to appeal.

Court; - The sought leave is granted.

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S.M.GITHINJI

JUDGE

26/10/2023

