



**MIN (Suing through BW as a father and next friend) v Oguta & 2 others (Civil Appeal E028 of 2022) [2023] KEHC 27080 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27080 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E028 OF 2022**

**DK KEMEL, J**

**DECEMBER 19, 2023**

**BETWEEN**

**MIN (SUING THROUGH BW AS A FATHER AND NEXT FRIEND) ..... APPELLANT**

**AND**

**PETER KAMANDA OGUTA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**VICTOR MUGANE ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from the Ruling of Hon. A.N. Barasa-PM made on 8th March 2022 in Webuye SPMCC No. 289 of 2008)*

**JUDGMENT**

1. This Appeal arises from the ruling of Hon. A.N. Barasa-PM made on March 8, 2022 in Webuye SPMCC No. 289 of 2008 in which the learned magistrate dismissed an application dated 4/6/2021 seeking reinstatement of suit that had been dismissed on 15/9/2015 for want of prosecution of suit. The Appellant preferred this appeal on the following Grounds of Appeal:
  - i. That the learned magistrate erred in law and fact in failing to appreciate and take judicial notice that there was in existence Moratorium Orders issued in Nairobi HCC No. 465 of 2011 which barred the prosecution of proceedings of whatever nature against the policy holders of M/S BlueShield Insurance Company Limited.
  - ii. That the learned magistrate erred in law and fact in failing to address the fact that the Court had wrongfully dismissed the Appellant's suit on 5<sup>th</sup> September 2015 suo motto without any fault on the part of the Appellant.



- iii. That the learned magistrate erred in law and fact in finding that the Appellant was guilty of delays in bringing the application in quo dated 4<sup>th</sup> June 2021 after the Moratorium Orders issued in Nairobi High Court No. 465 of 2011 had been lifted on February 13, 2020.
  - iv. That the learned magistrate erred in law and fact in finding that the Appellant was guilty of delays in prosecuting the matter between the period of 2015 and 2021 without first taking judicial notice of Moratorium Orders issued in Nairobi High Court 465 of 2011.
  - v. That the learned magistrate erred in law and fact in wrongfully applying the equitable doctrine of laches and/or delay in dismissing the Appellant's application dated June 4, 2021.
  - vi. That the learned magistrate erred in law and fact in dismissing the Appellant's application in quo dated June 4, 2021 by failing to consider and appreciate the doctrines of stare decisis and judicial precedent.
  - vii. That the learned magistrate erred in law and fact by disregarding the Appellant's evidence on record and dismissing the Appellant's application in quo dated June 4, 2021.
  - viii. That the ruling of the learned magistrate on the Appellant's application in quo dated 4<sup>th</sup> June 2021 delivered on the March 8, 2022 is against the law, judicial and legal principles and the weight of the evidence on record.
2. The Appellant prayed for the ruling of the lower Court dated March 8, 2022 be reviewed and/or set aside; this Court be pleased to revisit the Appellant's application dated June 4, 2021 and allow the same as prayed and that the Respondents to bear the costs of this appeal.
  3. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submissions. At the time of writing this judgment, the Appellant was the only party who had filed her submissions.
  4. I have re-evaluated the rival arguments presented before the trial court. I have further considered the Appellant's written submissions. It is apparent from the record that the Appellant herein *vide* a Notice of Motion application dated June 4, 2021 sought orders to reinstate her suit which was dismissed for want of prosecution way back on September 15, 2015. The application was supported by the affidavit sworn by Situma Collins Sami who deponed that the suit was not prosecuted for a long time due to the moratorium orders against suits touching on vehicles that had been insured by BlueShield Insurance Company Limited. The same moratorium order was lifted on February 13, 2020 and that the Appellants application was filed more than a year from the time of the alleged lifting of moratorium orders.
  5. I have carefully examined the grounds set out on the face of the aforesaid motion plus the facts deponed in the rival affidavits and the rival written submissions filed in support and against the application. The Appellant put forward the following grounds in support of the motion dated 4<sup>th</sup> June 2021:
    - a) That her suit was dismissed for want of prosecution without any fault on the Appellant's part.
    - b) That the suit could not be prosecuted because there was a moratorium placed against Blue Shield Insurance Company which had been placed under statutory management.
    - c) That under article 159 of the [Constitution](#), section 1A and 2A of the [Civil Procedure Act](#), it would be fair to reinstate the Appellant's suit.
    - d) That the Appellant has an arguable case with high chances of success and it is in the best interest of justice that the suit be reinstated so that it can be heard and determined.



6. The learned Magistrate noted that the Appellant had stated that there was a moratorium. In her ruling, she stated that she was not persuaded by the explanation the Appellant had offered in regard to the delay between the time the moratorium order was vacated and or lifted and that the Appellant filed the application dated June 4, 2021 about one year after the moratorium was lifted.
7. With respect, I think the trial magistrate fell into error. It is clear from the record that the Appellant expressly averred in the supporting affidavit that she only learnt about the dismissal while in Court on September 15, 2015 which indicates that no notice to show cause why her suit should not be dismissed for want of prosecution was served upon her. This averment was not controverted by the respondents. Had the Appellant been given such a notice, she would have been able to explain to the Court the reason for her delay.
8. The Appellant would have also informed the Court that at the time of the dismissal there was a moratorium which stopped all proceedings in matters involving insureds of Blue Shield Insurance Company Limited which was under statutory management.
9. I am satisfied that the learned Magistrate merely paid lip service to the arguments put forward by the Appellant in support of the motion dated June 4, 2021. Had she seriously considered the aforesaid grounds, she would have concluded that the Appellant's motion dated June 4, 2021 was meritorious.
10. In the end, I find the appeal has merit. The same is allowed in the following terms:
  - i. The order dismissing the Appellant's motion dated 4<sup>th</sup> June 2021 is hereby set aside and is substituted with an order allowing the application.
  - ii. The suit i.e Webuye CMCC No. 287 of 2008 is reinstated and to be heard on priority basis.
  - iii. Costs of this appeal and the motion before the trial court to abide the outcome of the suit.

**DATED AND DELIVERED AT BUNGOMA THIS 19<sup>TH</sup> DAY OF DECEMBER 2023**

**D. KEMEI**

**JUDGE**

**In the presence of:**

Ogola for Situma for Appellant

No appearance for Respondents

Kizito Court Assistant

