Oloo v Transnational Bank Ltd (Civil Appeal 3 of 2019)
[2022] KEHC 10696 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10696 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 3 OF 2019

EKO OGOLA, J

JUNE 27, 2022

BETWEEN

MICHAEL OTIENO OLOO ..... APPLICANT

AND

TRANSNATIONAL BANK LTD ..... RESPONDENT

RULING

Introduction & Background

1. The appellant herein filed the application dated the 16th of March 2021 seeking primarily the reinstatement of his appeal pursuant to an order made by this court on the 2nd of March 2021 dismissing his appeal for want of prosecution.

2. The application is premised on grounds that the appellant is desirous of prosecuting his appeal and that the delay in prosecuting the same has been occasioned by facts outside his control. He further averred that he has an arguable appeal which should be heard on merit and finally, that the blunder occasioned should not be visited on him.

3. The application was supported by the affidavit of Counsel A. Kariuki Mwaniki sworn on even date wherein he deponed that the dismissal of the appeal for want of prosecution was not due to his fault. He deponed rather that after filing the memorandum of appeal on the 11th of January 2019, he requested for certified copies of the proceedings on the 15th of January 2019 and certified copies of decree on the 18th of July 2019. However, he was not furnished with the same due to what he termed as slow response to his inquiries and failure of the registry to trace his file and as a result, he is unable to file the record of appeal.

4. Counsel further averred that on the 10th of December 2020, he received notice for mention only to learn that the appeal had been admitted on 22nd October 2020 and listed for mention on the 24th of November 2020 but he was never issued with notice of the same. Similarly, counsel argued that he

was never served/issued with orders that the record be filed within 15 days. He averred that on the 2nd of March 2021 he experienced difficulties in joining the virtual session and only succeeded to join at 10.00 a.m. only to find out that the virtual court session had ended and his appeal dismissed for want of prosecution.

5. Counsel averred that the appellant is interested in pursuing his appeal and prayed that the same be reinstated unconditionally on the basis that the appellant should not be faulted for the challenges which his advocate faced in joining the court virtual session.

6. The application was opposed by the respondent vide a replying affidavit filed on the 23rd of April 2021. In particular, the respondent was of the view that the appellant is not serious in prosecuting the appeal. The respondent took issue with the fact that no record of appeal has been filed/served to enable them respond accordingly and further that the appeal is merely a delay tactic to frustrate the respondent from enjoying the fruits of its judgement.

7. The appeal was canvassed by way of written submissions.

Determination.

8. The issue of reinstatement of an appeal is a discretion of the Court. This discretion must be exercised fairly and judicially. It must be based on good reason(s) and not on mere allegations.

9. The principles governing reinstatement of 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 right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. 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 it is absolutely 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 was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated."

10. In *Ivita v Kyumbu*(1984) KLR 441, the court affirmed the above test in dismissing a suit for want of prosecution as follows: -

> " The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."

11. In addition, in *Mwangi S. Kimenyi v Attorney General and Another*, Civil Suit Misc. No. 720 of 2009, the court restated the test as follows: -

> " 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the 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.

2. Invariably, what should matter to the court is to serve substantive justice through 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 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." Emphasis added

12. In the instant case, the appellant seeks reinstatement of suit arguing that he was unable to join in the virtual sessions on the 2nd of March 2021 after experiencing difficulties in joining the said session. It was his counsel's submissions that he only joined at 10.00 a.m after the virtual session had ended. He therefore pleaded that his difficulty in joining the session should not be visited upon the appellant.

13. On the other hand, the respondent submitted that the delay in prosecuting the appeal herein is inordinate and inexcusable. Counsel submitted that if the appellant's advocate was desirous in attending the court session, he would have done all within his power to join the session including reaching out to the Judiciary personnel.

14. Whereas the appellant seeks reinstatement of his suit primarily on his counsel's failure to show up in court on the 2nd of March 2021 despite sufficient notice of the same, I am of the view that this court in determining whether the delay is inexcusable or inordinate, must look at the totality of the appellant's conduct from the filing of the appeal up to the date the application for reinstatement was made.

15. In this regard, I am guided by the decision of the Court of Appeal in *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & Another* [2014] eKLR where the Court in holding the view that reinstating the appeal in the High Court would amount to an abuse of the court process and injustice, stated: -

> " There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the Appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed..."

16. The memorandum of appeal dated the 10th of January 2019 was filed on the 11th of January 2019. Shortly thereafter, Counsel for the appellant wrote to the Chief Magistrate requesting for certified copies of the proceedings and judgement. The letter is dated the 10th of January 2019 and was filed on the 15th of January 2019. Indeed, counsel paid for the same via receipt dated even date and marked 15/01/2019.

17. On the same day, the deputy registrar wrote to the Chief Magistrate informing requiring him to forward to the High Court the original records together with certified copies of the proceedings and

judgement for appeal purposes within 30 days from receipt of the letter. There is no record anywhere to indicate that the deputy registrar's letter was not complied with.

18. The matter came up for mention on the 24th of November 2020 where the court directed the appellant to file and serve the record of appeal within 15 days. The same was never complied with by the appellant.

19. The matter further came up for mention on the 19th of January 2021 where the court listed the matter for directions on the 2nd of March 2021. On that day, counsel for the appellant did not appear. In fact, the court did wait for him up to 9.40 a.m but he did not show up. In the end, the court dismissed the appeal for want of prosecution. Soon thereafter, the appellant filed the instant application.

20. The evidence I have highlighted above leads me to one conclusion and that is that the appellant is not desirous of pursuing the instant appeal. It is clear that he went quiet soon after filling the appeal in 2019 and only reappeared when the matter had been dismissed for want of prosecution in 2021. The delay of almost 2 years has not been sufficiently explained.

21. Whereas I am alive to the principles enshrined in Article 159 of *the Constitution*, I am inclined to disagree with the appellant that he is desirous of prosecuting the instant appeal. The Appellant's behavior in my view, from the time of filing the appeal, demonstrates indolence and a lack of interest in pursuing his appeal and therefore sleeping on his right to appeal. In *Simon Wachira Nyaga v Patricia Wamwirwa* [2018] eKLR:- The Court stated: -

> " Equity helps the vigilant but not the indolent. The law encourages a speedy resolution for every dispute. A court of equity has always refused its aid to stale demands, where a party has slept on his right and acquiesced for a great length of time. The Appellant slept on his rights even after being offered a warning by the Court."

22. Consequently, having considered the application, the affidavits on record, list of authorities, submissions by counsel and the law, I am satisfied that in the circumstance of this application, there is no basis for reinstating the appeal which was dismissed on the 2nd of March 2021.

23. The application is lacking in merit. The same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF JUNE 2022.

E. K. OGOLA

JUDGE