



**Happiness Real Limited v Kennedy Ogero Mokaya t/a Mokaya Ogutu & Company Advocates  
(Environment & Land Case 169 of 2012) [2023] KEELC 17312 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17312 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 169 OF 2012  
NA MATHEKA, J  
MAY 10, 2023**

**BETWEEN**

**HAPPINESS REAL LIMITED ..... PLAINTIFF**

**AND**

**KENNEDY OGERO MOKAYA T/A MOKAYA OGUTU & COMPANY  
ADVOCATES ..... DEFENDANT**

**RULING**

1. The application is dated 21<sup>st</sup> October 2022 and is brought under order 12 rule 7, section 3A of the [Civil Procedure Act](#), cap 21 Laws of Kenya seeking the following orders;
  1. That this application be heard as a matter of urgency and service be dispensed with the first instance
  2. That this Honourable Court be pleased to set aside the proceedings and orders issued on October 4, 2022.
  3. That this Honourable Court be pleased to reinstate the suit.
  4. That the costs of this application be in course.
2. It is based on the grounds that the above matter was scheduled for hearing on October 4, 2022 That the plaintiffs Advocate instructed Counsel Mr. Paul Magolo, to hold her brief in the above matter on October 4, 2022. That the plaintiff/applicants Advocate was unable to attend court as she had another matter in Kericho at the Environment and Land Court on October 5, 2022 being ELC No. 1 19 of 2007 *Kiplangat Ngeno v Eunice Nyasuguta Makori & 2 others* in which she is a witness and hence had to travel on October 4, 2022. That Counsel holding brief was unable to open the court link and hence unable to address the court. That efforts to know what transpired in court were not successful as they could not trace the court file until 14th October 2022. That it was until October 14, 2022 when



they were informed that the matter was dismissed for want of prosecution. That the plaintiff/applicant stands to suffer irreparable loss if the proceedings and orders issued on October 4, 2022 are not set aside and the suit reinstated herein. That the mistake of counsel should not be visited on an innocent litigant. That this application is made in the best interest of the plaintiff/applicant.

3. The respondent stated that the matter herein was set for hearing on October 4, 2022 by the consent of both parties. That when the matter was called out the Plaintiff and/or its representative was not present nor their Counsel whereupon the court, rightfully so, proceeded to dismiss the matter for want of prosecution. That the plaintiff has never been keen to prosecute this very matter and the current proceedings in court were initiated by the court's Notice to Show Cause as to why the matter should not be dismissed for want of prosecution. That there is no affidavit filed by the plaintiff and/or its representative to show that they were ready to proceed with the hearing of their case on October 4, 2022. That from the court's record it is clear that the plaintiff has always sought adjournments on this matter for one reason or the other, a clear indication that the plaintiff has never been keen to prosecute this matter. That the affidavit of Paul Walter Magato Advocate does not in any case indicate or state that he had instructions to proceed with the hearing of the case on the said date of 4<sup>th</sup> October, 2022 and if so as to how many witnesses he had lined up, if any, for the hearing of the case. That similarly the affidavit of Lucy Momanyi, Advocate does not state what exact instructions were given to Counsel holding brief if any. That the matter herein was on the return of the Title Documents to the Plaintiff which was done long ago in the year 2012 and there is no other pending issue for trial in this matter.
4. This court has considered the application and the submissions therein. In the case of *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."
5. In the case of *Ivita v Kyumbu* [1984] KLR 441 the court held as follows:

The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay".
6. I have perused the court record and find that the matter herein was set for hearing on October 4, 2022 by the consent of both parties. That when the matter was called out the Plaintiff and/or its representative was not present nor their Counsel whereupon the court proceeded to dismiss the matter. This is an old matter of 2012 and the court record shows that the Plaintiff and or their Advocate has been consistently absent and on March 21, 2022 the final adjournment was given. On the July 4, 2022 the hearing date



of October 4, 2022 was taken by consent. On the October 4, 2022 the plaintiff and their Advocate were again absent hence the matter was dismissed. The applicant stated that the Counsel holding brief was unable to open the court link and hence unable to address the court. That efforts to know what transpired in court were not successful as they could not trace the court file until October 14, 2022. Reasons advanced why this application should be granted are unacceptable. I find that the applicant is not keen on prosecuting this matter.

7. In the case of *Utalii Transport Company Ltd & 3 Others v NIC Bank & another* [2014] eKLR, the court held that it is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In *Ivita v Kyumbu* (supra), Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF MAY 2023.**

**N.A. MATHEKA**

**JUDGE**

