



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 121 OF 2006

JOSPHAT MABIALA AKOYO.....PLAINTIFF/APPLICANT

VERSUS

GEORGE MABELE SIFUNA.....1ST DEFENDANT/RESPONDENT

JOHN ODHIAMBO.....2ND DEFENDANT/RESPONDENT

RULING

(On reinstatement of a suit after dismissal for want of prosecution)

Brief Background of the Case

1. The Plaintiff brought the suit herein against the defendants through the firm of Ms. Wachakana & Company Advocates. He did so by a Plaint dated **12/6/2006** and filed on **14/6/2006**. The defendants entered appearance on **30/6/2006** through the firm of Ms. J.M. Wafula & Company Advocates. They did so vide a Memorandum of Appearance dated **26/6/2006**. Thereafter, they filed a joint defence and counterclaim, and other documents in support of the pleadings on **13/7/2006**.

2. From the record, it would seem that no meaningful progress was made towards the finalization of the matter by way of hearing. However, there were a few steps made during the pendency of the suit, but only on preliminary and interlocutory issues up to the time it went into a lull. This happened on **4/7/2013** when it was last in court. It was then dismissed on **10/2/2016**, for want of prosecution hence the instant application.

The Application

3. The Applicant filed the instant application on **23/11/2021**. It was dated **18/11/2021**. He brought it under **Sections 1A, 1B, 3, 3A, 63 (e), 80 and 100** of the **Civil Procedure Act** and **Order 8 Rules 3 and 5, Order 12 Rule 7, Order 45 Rules 1 and 2, Order 51 Rule 1** of the **Civil Procedure Rules, Article 159 (2)** of the **Constitution of Kenya, 2010** and “**all enabling provisions of the Law.**”

4. The Applicant sought the following specific orders:

1. ...spent

2. That the order made by this court on 10/2/2016 dismissing the Plaintiff’s suit be vacated and set aside and this suit be fixed for hearing on merit.

3. That the costs of the application be in the cause.

6. He listed ten (**10**) grounds in support of the Application. He also supported it by his own affidavit sworn on **18/11/2021**. The affidavit reiterated the contents of the grounds hence I discuss them both herein as one. The Applicant deponed that he was the registered owner of **LR NO. Waitaluk/Mabonde Block 12/Sirembe/88 and 89**. He annexed copies of the title deeds to the affidavit and marked them as **JA2**. His contention was that sometimes in **2004**, the defendants encroached on his land thus prompting the filing of the suit against them. He annexed copies of letters marked **JA3** to show that there was a land dispute between him and the said parties. He insisted that the defendants still encroached on his parcels of land, thereby preventing him from utilizing them. To fortify his contention, he annexed a survey report showing the extent of encroachment and marked it as **JA4**.

6. He contented further that on **15/11/2021** he learnt that the suit had been dismissed for want of prosecution on **10/2/2016** due to his non-attendance and that of his counsel (*emphasis mine*). He annexed a copy of the court order dated **10/2/2016** and marked it as **JA5**. He explained that he was not able to attend Court on the material date because he was not aware that the suit had been fixed for hearing thus his non-attendance was not intentional. He pointed out that the dismissal was not communicated to him either. He stated that had been made aware of it, he would have acted fast to have the dismissal reversed.

7. He stated further that he became aware of the dismissal of the suit when he visited the Court Registry on the relevant date after becoming suspicious due to non-communication by his previous advocates. He was shocked to find out that the matter had been dismissed yet his advocate never informed him about it yet he had paid all legal fees. He was specific that the previous advocate assured him that there was no problem with his case, kept him in the dark but did not prosecute his case.

8. He deponed that he now instructed his current advocates to act for him and was keen on prosecuting the case which he would like to be heard on merit. He stated that he would be gravely prejudiced since the defendants shall continue to encroach his land if the suit is not reinstated. He then deponed that he would be punished for the mistakes of his previous advocates unless the suit was reinstated. He stated that it was in the interest of justice that the application be allowed.

The Response

9. The Application was opposed. The Defendants filed grounds of opposition as well as a replying affidavit. Both were dated **7/1/2022** and filed on **10/1/2022**. The Defendants too echoed the content of the grounds of opposition in the replying affidavit. Therefore, I will not reproduce here the content of both separately. I will only delve into the contents of the replying affidavit since they capture what is contained in the grounds.

The Replying Affidavit

10. The replying Affidavit was sworn by **George Mabele Sifuna**, the 1st Respondent. He did it on his own behalf and that of his co-respondent. He deponed that they were aware that the plaintiff's suit had been dismissed for want of prosecution on the material date. Further, that by then the plaintiff was represented by the firm of Ms. Wachakana & Co. Advocates. Their contention was that there was no explanation for the delay in bringing the instant application since the **16/2/2016**. They stated that there was no basis for granting the orders sought.

11. Their further contention was that the Plaintiff purported to remove the firm of Ms. Wachakana & Co. Advocates without seeking leave of the court to do so. They annexed to the Affidavit a copy of a Notice to Act in person and marked it as **GMS1**. He stated that the firm of Ms. Teti & Company Advocates is not properly on record because the Plaintiff's previous advocates had not been removed from the record in compliance with **Order 9 Rule 9** of the Civil Procedure Rules and that the said previous law firm had not been accorded an opportunity to defend itself against the allegations by the Plaintiff. According to them, the instant Application was tainted with illegality, had no merit and ought to be dismissed with costs.

12. On **10/02/2022** the Applicant sought leave of the Court to file a Supplementary Affidavit. Leave was granted for him to do so within five (5) days. He was given chance to file a supplementary set of submissions within the said period. As at the time I prepared this Ruling he had not filed any of the two items.

Submissions

13. On **10/02/2022** when this matter came for hearing of the application the Applicant sought leave to file a Supplementary Affidavit. The Court gave him five (5) days to do so and leave to file a supplementary set of submissions. This court directed the parties to canvass the instant application by way of written submissions. The Applicant filed his dated **29/11/2021** on **30/11/2021**. The Respondents filed theirs dated **03/02/2022** on **04/02/2022**. In the submissions, the Respondents repeated that the Applicant has not given any reasonable explanation for his failure to move the Court during the period the matter lay idle and even after it was dismissed.

Determination

14. In my considered view, after analyzing the Application, the Affidavit in its support, the Replying Affidavit, the submissions, the case law cited and the provisions of law relied on, I have two issues for determination. They are:

a) Whether the Application is merited;

b) Who to bear the costs of the Application?

15. I first address a preliminary issue that learned counsel grappled with as they sought to represent their respective clients. This was representation. The firm of Ms. R. E. Nyamu & Co. Advocates filed an Application seeking for leave to act for the defendants for the reason that the proprietor of the previous law firm on record for the defendants died. The Application was allowed by consent. The said firm then filed a Notice of Appointment of Advocates. On the part of the Applicant, he filed a Notice to Act in Person simultaneously with a Notice of Appointment of Advocates. Both documents were dated and filed the same date.

16. The rationale behind the actions of the two law firms came out when the capacity of the law firm representing the Applicant was raised by the Respondents. The argument was that the said law firm was improperly on record, having not complied with **Order 9 Rule 9** of the **Civil Procedure Rules**. In essence the argument was that neither the Court nor the previous firm of Advocates had given the current law firm representing the Applicant leave or consent respectively for them to do so. Thus, if the Court would find that the said firm was not

properly on record it means that even the Application filed through the said firm is not properly before Court and should be struck out.

17. **Order 9 Rule 9** of the **Civil Procedure Rules** provides that:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court-

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

18. The contention in this matter was that the current law firm representing the Applicant came on record without or before complying with the said Rule. The defining phrase which is to guide the Court in determining whether or not there was failure to comply with the law is “after judgment has been passed.” In my view it means that the subsequent law firm must be intending to represent the party when an event has occurred, and that event is the passing or delivery of a judgment in the suit by a Court. The term judgment is so notorious that there is an assumption that everyone ought to know its meaning. But that is far from the truth. To others, judgment means ability to make decisions while to some it means a calamity or negative consequence of an act. Both are right. But in the legal context the two meanings do not come anywhere close to giving the meaning. Therefore, it is important to understand what amounts to a judgment as used in the provisions given above.

19. The starting point is finding the grammatical meaning of the term. A plain reading of the term means that a Court of competent jurisdiction must have heard the evidence of the party(ies) and arrived at a final decision. That final decision reached on merits is what a judgment is taken to mean. It means the opinion itself held over something. One of the meanings rendered by **Brian A. Garner in Black’s Law Dictionary, 11 Edition, Thompson Reuters, St. Paul, MN, 2019** at page **1007** is “A Court’s final determination of the rights and obligations of the parties in a case.” He then says it includes an equitable decree or any order from which an appeal lies. In my view, this definition ties with my understanding of the term judgment as given above about the grammatical rendition of the term.

20. In the instant case, the suit was dismissed for want of prosecution under **Order 17** of the **Civil Procedure Rules**. The question then is whether the order of dismissal amounted to a judgment as defined above. In my view it did not. The Court did not get into the merits of the suit herein on **10/02/2016**. It did not declare the rights of the parties. It simply stated that the Plaintiff had not taken steps in the matter for over a period that he should have done, and he did not offer any explanation as to why. Such a decision did not therefore warrant the procedure as envisaged under **Order 9 Rule 9** of the **Civil Procedure Rules**.

21. I now turn to the merits of the Application by starting to look at the relevance of the provisions cited. It is worth restating that it has been opined many times over that in instances where there are express provisions of the law on an issue to be decided by a Court, it bears no need for a party to cite other provisions in support of the manner he/she moves the Court save for the law: citing others is basically irrelevant. In the instant Applicant, some of the irrelevant provisions cited were, for example, **Section 1A** which provides for the overriding objective of the **Civil Procedure Act, 1B** on the duty of the Court, **Section 63** of the **Civil Procedure Act**. The **Section** provides for the conduct of Supplemental Proceedings and this is not one of them. Therefore, when **Sub-Section (e)** thereof gives the Court power to make any interlocutory order as may be just and convenient so as to prevent the ends of justice from being defeated, this is not a rule that would as of necessity add to the already existing law on setting aside. **Section 80** of the **Act** and **Order 45 Rules 1** and **2** of the **Civil Procedure Rules** deal with applications for review. No such prayer made herein. **Order 51 Rule 1** is only on the form of an Application and that need not be cited unless there is reason to explain why the Application is in a specific format rather than the one provided. **Order 8 Rule 3** of the **Procedure** provides for amendment of pleadings with leave of Court, while **Rule 5** together with **Section 100** of the **Act** have to do with the general power of the Court to amend pleadings. I need not go into discussing the details herein. **Order 12 Rule 7** provides for setting aside judgment or dismissal of suit as a result of non-attendance in Court of a Plaintiff or Defendant in cases where there is a claim or counterclaim respectively have been fixed for hearing. I have left out **Sections 3** of the **Act** which provides for the saving of special jurisdiction of the Court and **3A** on inherent power of the Court because, as I will explain below, they are the ones applicable in the Application herein.

22. For the Applicant to purport to rely on **Order 12 Rule 7** it was sheer misconception of the law. This suit was dismissed under **Order 17**. Thus, **Order 12** and any of the rules thereunder are inapplicable. In my humble view, while the Applicant has the right to attempt to rely on any relevant provision of the law, misleading the Court on any other different one is conduct that exemplifying a classic example of poor drafting of pleadings and poor professionalism.

23. Again, the Applicant relied on a phrase which read: “all other enabling provisions of the law.” The phrase assists neither the Plaintiff nor the Court as it does not indicate which other provision the Court can rely on in order to grant the orders sought. It is meaningless. On several occasions, this Court has advised and continues to echo proper wisdom that such a phrase does not assist any one and should not be cited in Applications. At best, the phrase is a mere sentence added to an Application to lie there. Unless it is expounded on and shown how and which provisions the party seeks the Court to consider by reference to the phrase, it is of least avail to a party citing it. In the case of **Josphat Oginda Sasia v Wycliffe Wabwile Kiiya [2022] eKLR**, this Court stated as follows:

“It is time, in modernity, that parties were conscious and deliberate in specificity over that which they present to and ask of Courts. A lot of investment is made to teach law in law schools. Such enlightenment should be progressive rather than retrogressive. To lump up phrases that do not have anything before a Court exemplifies the latter and negates development of the legal profession.”

24. That said, for a party who wishes to set aside an order of dismissal of suit for want of prosecution he has to bring himself within the proper provisions of the law. This is **Order 17** of the **Civil Procedure Rules**. In the instant Application, the Applicant moved the Court under **Order 12 Rule 7**. As I explained above, **Order 12** generally deals with hearing and consequences of non-attendance. Thus, **Order 12**

Rule 7 provides for the remedy available to such a party.

25. In regard to the Application before me, the circumstances are different from those contemplated in **Order 12** of the **Civil Procedure Rules**. In the instant matter, this suit was filed on **14/06/2006**. From then, a number of steps were taken in it. But from **4/7/2013** until **10/2/2016** when the Court itself moved it for notice to show cause why it should not be dismissed for want of prosecution. That was two and half (2½) years late. The notice thereof was duly issued and served. It read in part as being a notice to “*Show Cause why it should not be dismissed for non-prosecution pursuant to Order 17 Rule (2) (1) of the Civil Procedure Rules 2010.*” Thus, on **10/02/2016** the suit was not set down for hearing but for notice to show cause why it should not be dismissed for want of prosecution. The parties having not attended Court and cause having not been shown, the suit was dismissed accordingly.

26. The suit having been dismissed in terms of **Order 17**, it was open for the party to move the Court appropriately. Under the said **Order 17**, there is no provision for setting aside an order made by the Court. To me, there is no room for setting aside an order of dismissal of a suit under said Order. The Order is silent on what happens. The Rules Committee did not make provision for such an action. While that would seem to fetter the discretion of the Court to be exercised appropriately, it is my view that the door is not closed to a party who can show that for good cause he did not move the Court until his suit was dismissed.

27. For the reason that there is no express provision on setting aside of a decision of dismissal for want of prosecution made under **Order 17** of the Civil Procedure Rules, in my view, **Sections 3 and 3A** of the **Civil Procedure Act** would come to the aid of a party aggrieved by such a decision. In order for a Court to exercise discretion in favour of an applicant whose matter is dismissed under **Order 17** of the Rules, he has to show that there was sufficient cause that prevented him from moving the Court. However, in my humble view, when the Court sets out to consider the facts of each case as it should, it should do so at a higher bar or standard than in the case of setting aside an order made under **Order 12**. This is because, under **Order 12**, the party made some step towards moving the Court except that he failed to attend Court on the material date. This is different from the case of a party who fails to move the Court at all until a year or longer period lapses and the Court is caused to or is moved by a party to dismiss the suit because of it lying idle. The latter situation, unless material is placed by him before the Court to the contrary, is a manifestation of a party has lost interest in the suit or knows that it is not worth pursuing the suit anymore. Then why should he/she be given opportunity to keep the Court busy over his matter? In my humble view, such a party has a higher obligation or heavier burden to discharge before a Court so as have the suit brought back on track. Matters are not filed to clog the justice system.

28. The Plaintiff argued that he was not made aware of the hearing of the suit so as to attend Court. First, this Court notes that the suit was not for hearing on **10/02/2016**. Second, the Plaintiff did not explain why the suit had lain inactive or idle for two and half years before being prosecuted. The Plaintiff attempted to blame it all on his former Advocate. However, he neither showed the cogent efforts he made to follow up the matter with his former advocates. All he did was to say that the Advocate did not inform him of the suit having been dismissed but rather that all along his Advocate keep assuring him that all was fine with his suit until he became suspicious. The Applicant wanted to convince the Court that on his part he was clean and active but his Advocate ‘well paid’, that is to say, with his full fee pocketed, did not do anything to prosecute his case. I do not believe the Applicant at all. He presents to this Court a picture that his Advocate committed a mistake for which he (the Applicant) should not be blamed. That means the Advocate be blamed. Well, without any material before me to the effect that the previous law firm admitted that it made an error as stated by the Applicant, I will be and am hesitant to conclude so. That would amount to condemning the Advocate unheard. The Applicant should have caused the said Advocate to swear an Affidavit that he was duly instructed all the time and failed to act. If the Advocate was unwilling to do so, nothing would have been easier for the Applicant to do than attaching to the Affidavit numerous correspondence to and from the Advocate about the progress of his case. That lacking, this Court cannot be convinced that the Applicant’s contention is not one of those many reeds drowning parties hang onto as they cling to dear life in the Court processes. I reject the argument.

29. Even if there could have been a mistake on the part of the Advocate, not all mistakes of Advocates absolve parties from blame when that occurs. Some of the mistakes can be remedied by actions as between the parties and their Advocates or by finding solutions between the client and Advocate while leaving the innocent adverse parties’ rights or fruits of judgment intact. In other jurisdictions lawyers are sued for malpractice: actually, those are some of the reasons why from the recent times lawyers in our Country are required by law to take out professional indemnity covers.

30. Again, where can the Court draw the line between a mistake of the lawyer and one of his client? Is the client’s case the lawyer’s? Certainly not. It is upon the party to demonstrate that he took all reasonable steps to prosecute his case but the Advocate failed him. It is not enough for a litigant to shout, “lawyer’s, lawyer’s” while he does not show the steps he took on his part. Charity begins at home: in like manner, activeness begins with the client. When a client hires a lawyer to act for him, the lawyer is his agent. The agency relationship in the law of contracts does not operate differently from the agency relation between a client and his lawyer. In the law of agency, there are exceptions, but few and specific ones, when the actions of agent do not bind the principal. Thus, the beginning point in all cases of legal representation is that actions of the lawyer bind his client. The client has to demonstrate clearly that his lawyer’s actions (or failures for that matter) do not and should not bind him. The Applicant herein failed to do this.

31. I am inclined to be guided by the persuasive holding of *Ringera J* as he then was in **OMWOYO –VS- AFRICAN HIGHLANDS & PRODUCE CO. LTD [2002]1 KLR**, where he stated as follows:-

“Time has

come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant’s advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment”.

32. That is what I have alluded to when I indicated that in this age of professional responsibility seriously, it is time both the client and Advocate sat at one table and discussed on how and what went wrong and found their solutions without affecting the rights of or the orders in favour of the adverse party, unless in the clearest of and rare cases. In actual sense, the holding in the **Omwoyo** case seems to depart from the

earlier holdings of *BELINDA MURAI & 6 OTHERS –VS- AMOS WAINAINA [1978] KLR* in which Madan JA as he then was stated as follows: “A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate” and *PHILLIP CHEMWOLO & ANOTHER –VS- AUGUSTINE KUBEDE [1982-88] KLR 103 at 1040* where Apaloo JA held that “*Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit*”.

33. In *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR*, the Court of Appeal held that:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

34. It does not imply that the door should be closed to all parties simply because Advocates are their agents and the lawyers’ mistakes bind them. Each case has to be considered on its own facts. However, one thing that should not be lost sight of is that there has to be a clear distinction between a lawyer’s mistake and a client’s. Where there is an allegation of such on either or other, it must be brought out with precision that this or that was the Advocate’s mistake or error, and he/she has actually owned to it or there is unmistakable demonstration of the same and that the client’s hand was or was not in it. Thus, while acknowledging that learned counsel’s mistake can attach to his client and also that there are exceptions thereto, in *Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR*, the Court of Appeal held as follows:

“In this case however, counsel for the appellant explained himself as to why he was late in availing himself in court. The reason was plausible. Clearly, this is a case where the sins of counsel should not have been visited upon a litigant.”

35. Given the above analysis, it is my humble view that a party who wishes the Court to grant him an order of reinstatement of a suit dismissed for want of prosecution should meet a higher standard of proof that his Application merits than just laying blame on his lawyers. Thus, in *Edney Adaka Ismail v Equity Bank Limited [2014] eKLR* the learned judge held:

“It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter. From the Plaintiff’s Supporting Affidavit of 6th May, 2013, it is clear that the Plaintiff was keen on his case as he followed up on the dates of the hearing of the application, a fact that has not been disputed by the Defendant.”

36. Again, in my view nothing can be further from the truth about why the Applicant did not proceed with his matter, especially where he wants to convince the Court, as he deposed in the supporting Affidavit, that the defendants were still encroaching his parcels of land and greatly prejudicing him. A person who is negatively affected by conduct of parties such as the Applicant portrays in the instant Applicant will ‘torment’ both the Court and his Advocate by way of incessant inquiries both in writing, by calls and even physical visits to offices to inquire why his matter should not be progressing. Such is not the conduct shown by the Applicant, before and even after dismissal of his suit. He did not demonstrate to Court that he called on his then Advocates in writing to ask what was happening in his suit.

37. Moreover, the Applicant did not sufficiently explain to the Court any steps he took in the suit from **February 2016 to 2021** a period longer than five (5) years. That coupled with the period between the time the matter was last in Court, that is to say between **04/07/2013 to 10/02/2016**, the Applicant failed to give sufficient cause why he did not move the Court for a period of over eight (8) years.

38. The Applicant claims and submitted that he was not aware of or that he was not informed that the suit had been fixed for hearing on **10/02/2016**. He submitted further that the dismissal was never communicated to him. In my understanding of the law, all that the court needs to do where a party fails to take steps to prosecute his matter is to “give notice” of the intent to dismiss it. The notice may be published through Cause Lists, Websites or even court notice boards. (see the cases of *Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR* and *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others [2018] eKLR*). This was done in the instant case. A notice to show cause why the suit should not be dismissed for want of prosecution was sent out and served on the lawyers. There was nothing else the Court could do. Moreover, the Applicant did not demonstrate by Affidavit or other document from his previous Advocates that they did not receive the notice issued on **22/01/2016**. Again, of curiosity is that the occasion of the notice to dismiss the suit for want of prosecution was not the first time this suit has been subjected to the process. On **16/08/2011** and on **1/11/2011**, the Respondents had moved the Court by way of Application to dismiss the suit for want of prosecution for reason that from **18/07/2007** the Plaintiff had not taken any steps to fix it for hearing. After the Court handling the application on two occasions, on **13/06/2012** the judge (even in absence of the Applicant) exercised discretion *suo motto* to put the application in abeyance and fix the suit for hearing. While the Applications filed on **16/08/2011** and **01/11/2011** were spent, the totality of the conduct of the Plaintiff is that he has never moved the Court for fixing this suit for hearing. Even the on the **04/07/2013** it was not the Applicant who moved the Court but rather the Defendants whose application dated **01/11/2011** for dismissal of the suit for want of prosecution was stood over generally. The totality of it is that the Applicant herein wished the Court to believe that from **2007 to November 2021**, he was waiting for his Advocates to prosecute his matter until he became “suspicious”!

39. Upon this background I restate the law on the setting aside of a matter dismissed for want of prosecution. In such an instance the Court is called upon to exercise discretion. The discretion is very wide. However, it should be exercised judiciously and on a case by case basis. The facts of each case and the circumstances of both the dismissal and application for setting aside should be carefully evaluated. The Court should consider the reasons advanced for failure to prosecute the case and for delay in bringing the application to set aside the order.

40. In **Ivita vs. Kyumbu [1984] KLR 441** the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.

41. Courts should be willing to provide a forum to parties to settle disputes before them. But at the same time, courts should not be used as fora to breed injustice to parties who exercise diligence in proceeding with their matters. In the instant case, the record shows that even on occasions previous to the time the Court dismissed this suit for want of prosecution, the Applicant had not moved the Court appropriately. Justice should be meted swiftly while we are here on earth. Ours is a short duration of life and it is not just to delay matters until parties either die or just lose confidence in Courts being able to be quick in doing their business. A sad case, if it is proven to be true, is akin to what I saw in the social media today that in one of the subordinate Court's stations' Criminal Registries, despite a suspects being released on bond and bail, there often is not staff in the relevant offices to merely issue a receipt for payment of cash bail and that the absence is so loud that suspects are taken to remand to spend a night there for a receipt to be issued the following day. If that is true, then it is a very sad situation indeed: not to be in the modern era. Courts can do better! Justice delayed by whichever means is justice denied however pure it may look. I am not convinced that this Application herein is merited.

a. What orders to issue and who to bear costs?

42. The Application herein was and is unmerited. I therefore dismiss it with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 8TH DAY OF MARCH, 2022

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.