



**Maua v Heritage Insurance Company Limited (Miscellaneous Civil Application  
69 of 2017) [2025] KEHC 117 (KLR) (Civ) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION 69 OF 2017**

**CW MEOLI, J**

**JANUARY 16, 2025**

**BETWEEN**

**JACKSON MAUA ..... APPLICANT**

**AND**

**HERITAGE INSURANCE COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. For determination is the motion dated 20.09.2024 by Jackson Maua (hereafter the Applicant) seeking inter alia that the Court be pleased to review and set aside the orders dismissing his application dated 14.02.2017. The motion is expressed to be brought under Sections 3A of the Civil Procedure Act (CPA) and Order 51 Rule 1 of the Civil Procedure Rules (CPR). And is premised on the grounds on its face as amplified in the supporting affidavit sworn by Martin Mutisya Muthengi, counsel having conduct of the matter on behalf of the Applicant.
2. The gist of his deposition is that the Court served his firm with a Notice to Show Cause (NTSC) why the suit ought not to be dismissed of which was not served on time. That the NTSC was served on 15.12.2022 way after the same was heard and determined. He states that the motion dated 14.02.2017 was dismissed yet the Applicant was not given a chance to be heard contrary to Article 50 of the Constitution. That the Applicant shall suffer irreparable loss if the motion is not allowed as the matter stood dismissed without the Applicant being afforded an opportunity to be heard. And therefore, the motion ought to be allowed as prayed.
3. Despite service Heritage Insurance Company Limited, (hereafter the Respondent) failed and or opted not to participate in the instant proceedings. The Applicant agreeing, the motion was to be determined on the basis of the Applicant's affidavit material.



4. The Court has considered the material canvassed in respect of the motion and has equally taken the liberty of perusing the entire Court record. Undoubtedly, the instant matter was dismissed for want of prosecution vide a short order and or ruling delivered on 13.10.2022 on the premise of the NTSC dated 03.08.2022. The NTSC was issued pursuant to Order 17 Rule 2 of the CPR. The Applicant's motion invokes inter alia the provisions of Section 3A of the CPA, which reserves the inherent power of the Court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". This provision was addressed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR.
5. Nevertheless, the more relevant provision, Order 17 Rule 2 of the CPR, not invoked by the Plaintiff, provides that: -
  - "(1) 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.
  - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
  - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
  - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
  - (5) A suit stands dismissed after two years where no step has been undertaken.
  - (6) A party may apply to court after dismissal of a suit under this Order."
6. Rule 2(6) of the foregoing Order grants the Court jurisdiction to entertain an application of this nature. However, it must be noted that the discretion of the Court to set aside a dismissal order while unfettered, obligates a successful applicant to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in their favor.
7. In the case of *Shah -vs- Mbogo and Another* [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

"The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."
8. The principles enunciated in *Shah -vs- Mbogo (supra)* were further amplified further by Platt JA in Boucharde International (Services) Ltd vs. M'Mwereria [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal measure in this matter. Indeed, the dismissal order issued herein on 13.08.2022 is equivalent to a judgment, as it conclusively determined by way of dismissal the instant cause brought by way of the application dated 14.02.2017.
9. The sole explanation in the advocate's affidavit material is that counsel was served with the NTSC way after it came up for hearing before this Court. Thus, the Applicant was condemned unheard. To contextualize that contention, it is apposite to revisit the record and restate the pertinent events. The



Applicant instituted the instant matter by way of an application dated 14.02.2017 seeking inter alia leave to file an appeal out of time. The motion at the outset came up for inter partes hearing before Njuguna, J. on 26.04.2017. And later before Mbogholi, J. (as he then was) on 30.10.2017, 07.11.2017, 06.12.2017, 24.01.2018, 21.06.2018 and 18.09.2019 the court directing on the latter dates that two (2) lower Court records be availed before the Court for purposes of the motion before it.

10. On 07.10.2019, Mbogholi, J. (as he then was) confirmed availability of the two (2) lower Court records appertaining to the leave being sought to file an appeal out of time. The Applicant's motion thereafter came up before him on 11.11.2019, 13.11.2019, 03.12.2019 and 22.01.2020, with the Court directing on the latter date that the file be returned to the registry. There was no subsequent activity in the matter until the Court issued the NTSC dated 03.08.2022. The NTSC was listed on 13.10.2022 before me, and the Court upon being satisfied by the return on service on record, and in the absence of the Applicant, proceeded to dismiss the matter for want of prosecution, by stating as follows; -

“Notice having been given to show cause why this suit should not be dismissed and there being no satisfactory response, the suit is hereby dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules.” (sic)

11. The Case Tracking System (CTS) reveals that it was not until 24.09.2024 that the Applicant moved this Court via the present motion. The date of postage on the face of copy of the NTSC exhibited by the Applicant (See Annexure marked MMM-1), appears to contradict the contents of the return of service dated 16.09.2022 by the Court Process Server and the NTSC itself, both which indicate that the NTSC was presented to the High Court Mail Registry Section for postage on 24.08.2022. Annexure MMM-1 relied on by the Applicant which bears a franking stamp which indicates postage of the NTSC on 25.11.2022 well after the scheduled hearing of the NTSC on 13.10.2022.
12. This suggests that inexplicably the NTSC was posted more than a month after the NTSC was scheduled to come up for hearing, despite the NTSC being received at High Court Mail Registry section for postage on 24.08.2022. This appears strange and unlikely. It is equally simply unbelievable that upon counsel's late receipt of the NTSC, and his realization of the alleged discrepancy regarding the date of the hearing of the NTSC and actual service of the NTSC, would wait close to two (2) years to present the instant motion. That said, on the basis of the copy of the NTSC and affidavit of service on record as of the date of the hearing of the NTSC, and in the absence of cause being shown the Court was entitled, to dismiss the matter as it did.
13. The discretion to set aside a dismissal order involves exercise of discretion which is “intended to avoid injustice or hardship resulting from accident, inadvertency or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”. The supporting affidavit while going to great lengths to explain the deponent's failure to attend to the NTSC on 13.10.2022 is reticent on the delay in this cause since inception in 2017, and the attempts made to prosecute the matter in the two-year hiatus between 22.01.2020 and 13.10.2022 when the same was dismissed for want of prosecution. Or the further delay of two years between 15.12.2022 when counsel allegedly actually received the NTSC and 24.09.2024 when he presented the instant motion.
14. It is trite that the period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the Court's discretion. The Court of Appeal



in Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR succinctly addressed the argument of delay as follows; -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”

15. There is no evidence here that between 22.01.2020 and 13.10.2022 the Applicant attempted to progress the matter filed in 2017 seeking to enlarge time for filing an appeal. The record between 15.12.2022 and 24.09.2024, is devoid of any evidence of any step taken by the Applicant, who in addition opted not to swear the supporting affidavit, instead remaining in the shadows of his advocate. Cases ultimately belong to the litigants who lodge them in Court. Thus, it is the litigant’s duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim. This position was fortified by the Court of Appeal in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR when it held that:

“.....Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

16. As correctly observed in *Shah -vs- Mbogo* (supra), this Court’s discretion “.....is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.” At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute their cases at leisure. It is now almost seven years since the motion seeking leave to appeal ought of time was filed and more than twenty (22) years since the original cause of action arose in respect of the lower court suit. The latter is premised on the fact that the primary suit was filed in 2002 while the declaratory suit was filed in 2012, hence the directions by Mbogholi, J. (as he then was) for the two (2) lower Court records to be availed. Which records had been confirmed as received on 7.10.2019, some three years prior to the NTSC, and during which period, no serious efforts were made to prosecute the pending motion.

17. Notwithstanding the allegations of late service of the NTSC, which itself appears doubtful on the surrounding facts, the delay period herein is contumaciously inordinate. More so in view of the prayers sought in the dismissed motion. Parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the *CPA*. While the constitutional right of the Applicant to be heard on the merits of his application is undisputable, it is not absolute and must be balanced against the Respondents’ equal right to have the cause to which they have been dragged determined expeditiously. Considering all the foregoing, the Court is of the firm view that the justice of the matter lies in dismissing the Applicant’s motion dated September 20, 2024 with no orders as to costs. It is so ordered.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JANUARY 2025.**

**C. MEOLI**

**JUDGE**

In the presence of

For the Applicant:



For the Respondent:

C/A: Erick

