



**Wanga & another (Suing as the administrators of the Estate of  
Lavender Achieng) v Tawfiq (K) Limited & 2 others (Civil Appeal  
E221 of 2021) [2025] KEHC 1777 (KLR) (4 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1777 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E221 OF 2021  
JK NG'ARNG'AR, J  
FEBRUARY 4, 2025**

**BETWEEN**

**JOYCE ODHIAMBO WANGA ..... 1<sup>ST</sup> APPELLANT  
SAMUEL BOKELO GOR (SUING AS THE ADMINISTRATORS OF THE  
ESTATE OF LAVENDER ACHIENG) ..... 2<sup>ND</sup> APPELLANT  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF LAVENDER  
ACHIENG**

**AND**

**TAWFIQ (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT  
KAHIYA MUKTAR AFEY ..... 2<sup>ND</sup> RESPONDENT  
MOHAMED M KALMIE AKA MOHAMED M KUZMIA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. J. Nyariki (SRM) delivered on 3rd  
November 2021 in Mombasa Chief Magistrate's Court Civil Suit No. 1722 of  
2012, Joyce Adhiambo Wanga & Another v Tawfiq (K) Limited & 2 Other)*

**JUDGMENT**

1. The appeal herein is against a ruling of the trial court issued on 3<sup>rd</sup> November 2021 dismissing the Plaintiffs/Appellants' application dated 26<sup>th</sup> July 2021 for reinstatement of suit.
2. Grounds in the Plaintiffs/Appellants' application were that the matter was in court on 24<sup>th</sup> February 2016 and that the advocate in attendance did not inform Mr. Odhiambo of the case having been fixed for hearing on 19<sup>th</sup> April 2016. That on 19<sup>th</sup> April 2016, the case was dismissed for want of prosecution and non-attendance, directions which the advocate was not aware of. That since dismissal of the suit



on 19<sup>th</sup> April 2016, the file could not be traced. That several letters were written to court and visits made to the court registry and archive to find the file but it was in vain. That the advocate only learnt of the said dismissal on 15<sup>th</sup> July 2021 when the file was finally retrieved from the archives.

3. The trial court in determining the application issued a ruling dismissing it on the basis that the Plaintiffs/Appellants had been indolent in prosecuting the case and that after the matter was dismissed on 19<sup>th</sup> April 2016, it took them 3 years to write their first correspondence which was dated 8<sup>th</sup> April 2019. That inability of the Plaintiffs/Applicants to take prompt action was not only an abuse of the court process but an attempt to administer injustice on the part of the Defendants/Respondents.
4. Being dissatisfied, the Appellant appealed against the ruling through the Memorandum of Appeal herein dated 15<sup>th</sup> November 2021 on grounds that the learned magistrate erred both in law and in fact in dismissing the Appellant's application. That the learned magistrate erred in law and in fact in failing to appreciate the provisions of the Civil Procedure Rules in respect to dismissal and reinstatement of suits. That the learned magistrate erred both in law and in fact in finding that the Appellant's application did merit granting of the orders sought. That the learned magistrate failed to properly consider the Appellant's application and submissions thereto.
5. The appeal was canvassed by way of written submissions. The Appellants in their submissions dated 18<sup>th</sup> September 2024 stated that failure to attend court for hearing was not intentional. They relied on Sections 1A, 1B and 3A of the *Civil Procedure Act*, Article 48, 50 (i) and 159 of *the Constitution*, and the holdings in the case of HCCA No. 25 of 2020, HAM v SOS and HCCA No. 20 of 2018, Catherine Kigasia Kivai v Ernest Ogesi Kivai & Others. The Plaintiffs/Appellants urged the court to exercise its appellate jurisdiction in their favour.
6. As at the time of writing this judgment, the Respondents had not filed their submissions. This court therefore went ahead and determined the appeal on merit.
7. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co. (1968) E.A 123* as follows: -

“... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ...”
8. I have considered the Record of Appeal dated 28<sup>th</sup> August 2024 and submissions by the Appellants. The issues for determination are: -
  - a. Whether the ruling of the trial court delivered on 3<sup>rd</sup> November 2021 dismissing the application dated 26<sup>th</sup> July 2021 for reinstatement of the suit should be set aside
  - b. Costs of the application
9. This court has perused proceedings of the trial court and established that on 24<sup>th</sup> February 2016, the trial court made remarks that the matter was filed in the year 2012 and there was no justification as to why it was still pending in court. That parties seemed to be dragging their feet towards expeditious disposal. The court the ordered the 3<sup>rd</sup> Defendant to comply with Order 11 of the CPC, in default the matter was to proceed on 19<sup>th</sup> April 2016. There was no appearance for both parties on the said 19<sup>th</sup> April 2016 and the suit was dismissed for want of prosecution and non-attendance in accordance with Order 12 Rule 1 of the Civil Procedure Rules.



10. The Plaintiffs/Appellants filed the application dated 26<sup>th</sup> July 2021 for reinstatement of suit which was placed before the court on 4<sup>th</sup> August 2021 and directions were issued for inter parties hearing on 18<sup>th</sup> August 2021. Ruling was then reserved for 3<sup>rd</sup> November 2021 on which date there was no appearance by parties and the court dismissed the application for reinstatement of suit.

11. Factors to consider in reinstating a suit have ben set out in the case of Ivita v Kyumbu (1984) KLR 441 as follows: -

“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.”

12. This court notes that indeed dismissal of the suit arose from non-appearance of parties which gave the impression of lack of interest in prosecuting the case. The Appellants have stated that the file could not be traced which was not a fault of their own. However, sufficient reasons have not been given as to why it took them 3 years to write to court in an attempt to trace the file.

13. The issue of reinstatement of a suit is an exercise of discretion which must be exercised judicially and fairly. The court has the fundamental task of serving substantive justice to all parties as enshrined in Articles 50 and 159 of *the Constitution*. I therefore find that reinstating the suit will serve justice.

14. Accordingly, I make the following orders: -

- a. I set aside the ruling issued on 3<sup>rd</sup> November 2021 dismissing the application dated 26<sup>th</sup> July 2021 for reinstatement of suit.
- b. The Plaintiffs/Appellants shall set down the suit in the trial court for hearing within 30 days failure to which the suit shall stand dismissed.
- c. No orders as to costs.

**DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2025**

.....

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

..... Advocate for the Appellants

..... Advocate for the Respondents

Court Assistant – Shitemi

