



REPUBLIC OF KENYA



KENYA LAW
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**Muhoro v Abdullahi (Civil Suit 91 of 2016)
[2025] KEHC 2763 (KLR) (Civ) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2763 (KLR)

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

CIVIL

CIVIL SUIT 91 OF 2016

TW OUYA, J

MARCH 13, 2025

BETWEEN

FRANCIS NDEGWA MUHORO PLAINTIFF

AND

AHMEDNASIR ABDULLAHI DEFENDANT

RULING

1. This ruling is in respect to the Notice of Motion dated the 28th of October, 2024. The notice of motion application emanates from the ruling of this court delivered on the 23rd of July, 2024. Prayer I of the Motion is now spent, and what is pending this court's determination are the following prayers:
 - i. That the honourable court be pleased to vary, review, and/or set aside the court's orders of 23rd July, 2024, directing that the suit be prosecuted within six (6) months ending on the 23rd October, 2024, failure to which the suit would stand dismissed for want of prosecution;
 - ii. That upon grant of prayer (ii) above, the honourable court be pleased to reinstate the suit and extend the time within which the plaintiff/applicant may prosecute the same;
 - iii. That the honourable court be pleased to allocate a date for hearing of the suit on priority basis;
 - iv. That the costs of this application abide in the cause.
2. The application is anchored on the grounds stated on its face, and on the depositions made in the supporting affidavit sworn by the applicant on the 28th of October, 2024. The applicant averred that this court, by its ruling delivered on the 23rd of July, 2024, had enlarged the time within which he could prosecute his suit by a period of six (6) months, with effect from 5th of April, 2024 to the 23rd of October, 2024, failure to which the suit would stand automatically dismissed for want of prosecution. Thereafter, the court proceeded to fix the matter for hearing on the 18th of September, 2024.



3. He contended that on the 20th of August, 2024, his then legal counsels, Mbigi Njuguna & Co. Advocates, filed an application seeking to cease from acting on his behalf, which application was allowed by this court on the 25th of September, 2024; and further, that his suit had also been identified for disposal through the Rapid Results Initiative (RRI), and a mention date was fixed for the 23rd of October, 2024, to fix a hearing date for the main suit.
4. The applicant averred that he has not been indolent in prosecuting his suit after the issuance of the orders by this court on the 23rd of July, 2024; and that the delay in prosecuting the same within the time stipulated by this court, was due to circumstances that were beyond his control, as such, this court should exercise its wide and unfettered discretion and review the orders issued on the 23rd of July, 2024.
5. The applicant further averred that no prejudice will be suffered by the respondent should the orders sought be granted, as the respondent will be granted costs should the suit fail; on the other hand, he stands to suffer irreparable loss and damage as he will be condemned unheard without fault on his part, and despite having put effort to prosecute the suit.
6. The application was opposed vide a replying affidavit sworn by the respondent on the 30th of October, 2024. In the affidavit, the respondent contended that there is no basis for varying or reviewing the orders issued by this court on the 23rd of July, 2024, as the applicant was well aware of the said orders, and yet failed to take any steps to set the matter down for hearing.
7. He further contended that the applicant instructed his new firm of Advocates on the 22nd of October, 2024, which was a day before the time stipulated by the court for prosecuting his suit had lapsed; and that this delay on the part of the applicant is not only calculated and deliberate, but also confirms that the applicant is not interested in prosecuting his suit.
8. The respondent averred that no valid reasons have been given by the applicant as to why he has not prosecuted his case for a period of 8 years and 6 months since filing his suit in March, 2016; and that the applicant is undeserving of the exercise of the court's discretion as the court has on two occasions exercised its discretion and extended the time to prosecute the case on strict timelines and conditions.
9. The respondent urged this court to dismiss this application with costs, as the applicant is abusing the court's process by filing a third application to vary the third dismissal order.
10. The application was canvassed by way of written submissions following the directions issued by this court on the 11th of November, 2024; The records of this court shows that the applicants submissions dated the 19th of November, 2024, were filed on his behalf by his learned counsel CM Advocates LLP, whereas those by the respondent were filed on his behalf by his learned counsels Issa & Company Advocates.
11. I have carefully considered the application, the written submissions filed on behalf of the parties together with the authorities cited therein, having done so, I find that the first issue for determination is whether the applicant's prayer to vary/review and/or set aside this court's order of 23rd July, 2024, is merited, as my determination on this prayer will determine the fate of the prayer to reinstate the suit and extend the time within which he can prosecute the same.
12. It is a well settled principle in law, that an application to set aside a judgement or an order for dismissal of a suit is discretionary, and is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error.



13. This principle was re-stated in the case of case of Shah V Mbogo (1967) EA 116; 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.”
14. Applying the above principle to the present case, the applicant in his affidavit attributes the delay in prosecuting his suit within the timelines set by this court in its ruling delivered on the 23rd of July, 2024, to the fact that his learned counsel at the time, filed an application to cease acting for him in this suit, which application was allowed on the 25th of September, 2024; and also to the fact that the suit was given a mention date on the 23rd of October, 2024, to fix a hearing date for the main suit, which was the date the six month period set by this court for prosecuting his suit was set to expire.
15. I have perused the court’s records, and the same reveals that after this court enlarged the time within which the applicant could prosecute his suit, no steps were taken by him to set down the suit for hearing. It is this inaction on the part of the applicant, that led his former advocate Mbigi Njuguna & Company Advocates, to file an application dated the 20th of August, 2024, seeking leave to cease from acting for the applicant.
16. One of the reasons that the applicant’s former counsel had cited in his supporting affidavit for seeking leave to cease from acting for the applicant, is that they had repeatedly sought instructions from him to enable them prosecute the suit, but the applicant had neglected to issue any instructions to them, prompting the filing of the application to cease from acting; which application was allowed on the 25th of September, 2024.
17. I have also noted from the court’s record, that the applicant waited several days after his former advocate was granted leave to cease acting on his behalf, to appoint another advocate to represent him in the suit. I say so because, when the matter came up for mention on the 23rd of October, 2024, Ms. Jane Okoth, an advocate from the newly appointed firm of advocates instructed by the applicant to represent him in the matter, had indicated to court that they received instructions from the applicant to represent him in the suit on the 18th of October, 2024. However, the court’s record shows that his newly appointed counsels filed a Notice of Appointment on the 22nd of October, 2024, which was a day to the expiry of the date that had been set by this court for the prosecution of the suit.
18. The applicant, in his application did not offer any explanation as to why he had failed to prosecute his suit between the 23rd of July, 2024, when this court extended the time within which he could prosecute his suit and the 20th of August, 2024, when his then advocate filed an application to cease from acting on his behalf. The applicant should have issued instructions to his advocates to immediately set down the matter for hearing, but he failed to do so, and this prompted them to cease from acting on his behalf. The applicant cannot therefore now turn around and claim that the delay in prosecuting his suit was due to circumstances that were beyond his control.
19. Furthermore, the applicant had sufficient time within which he could have instructed another firm of advocates to act on his behalf, after his former advocate was granted leave by this court on the 25th of September, 2024, to cease from acting for him, but he chose not to do so, and only waited to officially appoint another advocate a day to the deadline that had been set by this court for the prosecution of his suit.



20. Given that the applicant, in the present application is appealing to this court's discretion to enable him extend the time within which he can prosecute his suit, it was of paramount importance that he offers to this court a plausible explanation as to why the suit was not prosecuted within the timelines that had been issued by the court in its ruling delivered on the 23rd of July, 2024, so as to unlock this court's discretion.
21. The court of appeal in the case of Andrew Kiplagat Chemaringo versus Paul Kipkorir Kibet [2018] KECA 701 (KLR); stated thus: "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."
22. Taking into account that no satisfactory explanation was given by the applicant for failing to prosecute his suit within the stipulated time. I am therefore of the considered view that this court should not exercise its discretion in favor of the applicant.
23. Furthermore, it is evident from the conduct of the applicant since the inception of the suit, that he has lost interest in prosecuting the suit and the same should be put to rest. This court finds no basis to exercise its discretion to set aside the orders dated the 23rd of July, 2024, dismissing the suit for want of prosecution. Taking the direction of setting aside the order would be unjust to the respondent, considering that this court has on two other occasions varied its orders to dismiss the suit for want of prosecution.
24. From the foregoing, this court finds that the prayer to vary/review and/or set aside the order dated 23rd of July 2024, has failed and that the present application lacks in merit and should therefore be dismissed.

Determination

25. This application is hereby dismissed. This suit therefore stands dismissed for want of prosecution in line with this court's orders granted on 23rd July 2023. Costs of the suit to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH, 2025

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Plaintiff.....jane Okoth

For Defendant/respondent...mrs Maina

Court Assistant.....jackline

