Maloba v Odebero (Civil Appeal 11 of 2012) [2025] KEHC 7252 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 11 OF 2012

SC CHIRCHIR, J

MAY 22, 2025

BETWEEN

QUINCY MURUNDI MALOBA ..... APPLICANT

AND

STEPHEN ONYANGO ODEBERO ..... RESPONDENT

RULING

1. What is coming up for determination is the Notice of Motion dated 2nd February, 2023 and filed on 22nd February, 2023.It is premised on Order 22 Rule22 & 52, Order 12 Rule 7, Order 40 Rule 1 and 51 Rule 1 of the Civil Procedure Rules and Sections 1A& B and 3A of the *Civil Procedure Act*. It seeks orders as follows:

    1. Spent.

    2. Spent.

    3. That this Appeal be Ordered reinstated and be given a hearing date and canvassed on merit.

    4. That the costs hereof be in the cause.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the applicant. He avers that this appeal stood dismissed on 12th March, 2015 for lack of prosecution; that he could not prosecute the Appeal due to inability to obtain lower court proceedings on time. He further states that he was never served with the notice for dismissal contrary to the rules.He further states that the date of dismissal was taken by the respondent and no service was done. He avers that the appeal herein is critical and touches on the question of forged documents to obtain a judgment against a named defendant and the same judgment being enforced against a totally different person who is not the defendant.

3. The application is also supported by the affidavit of the Applicant and one sworn by Melab Nekesa Lora Masika, his wife. Her affidavit is focused on the execution proceedings in which her salary was

attached for purposes of satisfaction of the decree. It therefore has no bearing on the reinstatement the Appeal.

4. The respondent has opposed the application . In his replying affidavit sworn on 11th May, 2023,he contends that the application herein lacks merit and is an abuse of the court process. That the application as drawn is a non-starter, incurably defective, misconceived, bad in law and is thus unsuitable for orders sought. Further, the applicant has not demonstrated sufficient cause to warrant grant of the Orders sought.

5. On 13th June 2024, upon the request of the counsel for the respondent's the Applicant and his wife were cross- examined on the basis of their affidavits.

Cross-examination of the Applicant

6. On cross – examination the Applicant admitted that Justice Chitembwe had given him 45 days from 2/5/2013 to file the record of Appeal, and that since then he had not filed. He later stated that he filed the record on 29/9/2013; that he could not comply with the timeline as the court file was missing. He was not aware if his advocate wrote a letter to the court about the missing file. He did not know if his Advocate applied for the extension of time to file the record of Appeal when the timeline given by the judge lapsed. He stated that he got to know about the dismissal of the Appeal in December 2022. Upon being referred to paragraph 7 of the Affidavit in support of the Application, in which he stated that the appeal was dismissed in the year 2015, he admitted that he was prompted to come file the present Application by the attachment of his wife's salary.

7. The cross- examination of Melab Nekesa , the wife of the Applicant was on the execution proceedings, which is now spent.

8. The parties filed submissions which I have considered. In their submissions both parties have largely dwelt on the execution proceedings, which are already spent. The Applicant sought for stay of the execution orders emanating from Kakamega CMCC No. 343 of 2022 pending the hearing of this Application. Those prayers were granted by my brother Justice Otieno on 22/8/2023. What was pending , and hence left for this court to determine, is the reinstatement of the Appeal.

Analysis and determination

9. A brief background to this matter is necessary.

10. The respondent herein filed suit against the Applicant seeking for ksh. 239,800 which he had advanced to the Applicantt. In response to the suit the Applicant wrote a letter to the court stating that he was not the person appearing in the documents as his name is Quincy Murundi Maloba not Quintos Murundi t/a Dee Network services , named in the plaint.

11. However he never filed appearance and default judgment was entered against him. He later sought to set aside the default judgment, but the lower court declined. He appealed to the high court and in a Ruling delivered on 2/5/2013, Justice Chitembwe granted stay of execution and directed the Applicant to file a record of Appeal within 45 days of the ruling.

12. The record of Appeal was filed on 20/9/2013. Thereafter no action was taken, and on 12/3/2015 the Appeal was dismissed for want of prosecution . The Applicant filed the present Application on 22/2/2023 seeking for its reinstatement.

13. I have considered the Application , the respondent's , the oral evidence and the submissions of the parties. The only issue for determination is whether the Applicant has made a case for the setting aside of the order of dismissal.

14. The Appeal came up on 12/ 3/ 2015 and both parties were absent . The Juge dismissed the Appeal for want of prosecution . I have looked at the provisions of the law on which the Application is anchored on and noticed that all the provisions cited are in respect of stay. There is none cited as a basis for reinstating an Appeal that has been dismissed for want of prosecution.

15. Order 42 rule 35(2) provides that "If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."

16. It is the Applicant's case that he was not served with the Notice to show cause. I have perused the file, and noted that indeed no Notice was issued. The Applicant is therefore entitled, at this juncture, to be heard on the reasons for failing to prosecute the Appeal.

17. While considering whether or not to dismiss matters for want of prosecution and whether to order reinstatement, Chesoni J(as he then was) in the case of, Ivita v Kyumbu [1984]KLR 441 held as follows:

> " So 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 he 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 and that justice can still be done to the parties notwithstanding 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. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen v McAlpine, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied."

18. The Applicant has told the court that his Advocate applied for proceedings in the lower court and the said proceedings had not been supplied by the time the Appeal was dismissed. However during cross-examination by the respondent's counsel, he gave another reason; that the file was missing and that he did not know if his advocate ever wrote to the court about the missing file. Thus there is no evidence to support his assertion that the lower court file was not available; there is no evidence either that a request for proceedings had even been made.

19. Further the record shows that after Justice Chitembwe granted orders of stay on 2nd may 2013, he directed the Appellant to file the record of Appeal within 45 days from the date of the order. The record was filed on 20th September 2013, though it was already outside the timeline the Judge had given. The record contains the lower court proceedings, appearing on pages 92 to 122 of the record of Appeal. It

follows that since 20/9/2013, the Applicant has had the proceedings and therefore the non- availability of the lower court proceedings could not have been the reason for failure to prosecute the Appeal.

20. Further ,in terms of Order 42 rule 35(2) of the civil procedure Rules, it follows that the Applicant was expected to have served the record of Appeal on the respondents and list the Appeal for hearing within 21 days thereafter . In default the Appeal was due for dismissal

21. Further again, whereas the Applicant has given reasons of a missing file or/and delay in the procurement of proceedings which explanation I have found to invalid, those reasons applied to the period prior to the filing of the record of Appeal. The Applicant failed to explain , either on his affidavit or oral evidence the reasons for delay after service, presumably, of the record of Appeal after it had been filed on 20/9/2013. The Appeal was dismissed on 12/5/2015. That was a period of almost two years after the filing of the record. No explanation has been given for this delay.

22. The Applicant's counsel has urged the court not to punish the Applicant for the "sins " of his Advocate. Am alive to several findings of the courts that take that position. In this case however I refuse to be persuaded by that argument. A perusal of the record shows that the suit has had a turbulent journey, and any litigant in that position would be vigilant about what his Advocate was or is doing. It came out, during examination that the Applicant was unbothered about the progress of his case , save when execution proceedings came knocking. For instance he did not know whether the record of Appeal had been filed. It took the respondent's counsel to bring it to his attention that it had been filed; he did not know if extension of time had been sought for the filing of that same record; he did not know if his advocate had complained about the alleged missing file. Finally he told the court that he did not know that he Appeal had been dismissed until December 2022. His responses to the questions suggest that the Appellant filed the Appeal, and for close to eight years he went and slept . Equity has no place for the indolent.

23. The setting aside of exparte orders is at the discretion of the court and the onus is always on the Applicant to convince the court as to why the discretion should be exercised in his favour. In the case of Shah vs Mbogo Shah v Mbogo [1967] EA 116 at 123 B. Harris J stated: "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."(Emphasis added)

24. I have carefully gone through the entire record of proceedings both in the lower court and this court, and has come to the conclusion that the good Judge had in mind the person of the Applicant herein. His aim is to obstruct or delay the course of justice. My assessment is based on the following observations:

    a). when the Applicant was served with the lower court summons , he wrote a letter to the court instead of entering appearance. Even if for want of ignorance of the law , he made no follow up on his letter . The case thus proceeded in his absence. He only came to court, when he was arrested for failing to satisfy the decree.

    b). while in jail he sent his wife to negotiate with the respondent's counsel. The negotiation resulted in a consent . He later turned around and denounced the consent and his Advocate on record. His wife gave both Affidavit and oral evidence in support of the Applicant , wherein she denied , then admitted, in quick succession that she had negotiated with the respondent through their Advocate. Her testimony contradicted the Applicant who denied that he gave any instructions to his Advocate .

c). The second appearance in court, is again, when execution proceedings took place . This time through the attachment of his wife salary. He did admit , during cross- examination that he was prompted to come to court when the wife's salary was attached.

24. When one considers the Applicant's draft defence in which he has pleaded that he was wrongly sued, his manner of conducting his defence and a clear attempt to delay the conclusion of this matter is odd , and seem to be inconsistent with his plea . It is clearly evident that the Applicant's interest is not justice. It is to delay justice.

26. The Application is unmerited. It is hereby dismissed with costs to the respondent.

DATED , SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO ,THIS 22ND DAY OF MAY 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant