



REPUBLIC OF KENYA



**Njoroge v Kubania (Civil Suit 16 of 2010) [2025] KEHC 6917 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6917 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET**

**CIVIL SUIT 16 OF 2010**

**E OMINDE, J**

**MAY 21, 2025**

**BETWEEN**

**DUNCAN NJOGU NJOROGE ..... APPLICANT**

**AND**

**CATHERINE NTINYARI KUBANIA ..... RESPONDENT**

**RULING**

1. The Applicant herein filed a Chamber Summons application dated 20/09/2024, seeking;
  1. Spent.
  2. That the Honourable Court be pleased to set aside vary and/or review the orders dismissing the Application herein and reinstate it for hearing and determination on merit and for fair and just ends of justice.
  3. That such sought orders to be made are just and expedient in the interest of justice.
2. The application is premised on the ground therein and is further supported by the Applicant sworn on the same date.
3. The Applicant deposed that this suit was dismissed for want of prosecution and non-attendance on 14/11/2023, that the failure by him to attend court was inadvertent and excusable as his Advocates on record were unaware that the file had been found and given a date, that even though the matter was filed in 2010, it progress has been hampered by circumstances beyond and his Advocates and that this file has been missing for considerable amount of time, specifically since 2011 and despite efforts to trace and locate it have been impossible.
4. The Applicant further deposed that at some point, the law firm was made to believe that the matter had been transferred to the Chief Magistrate's Court Eldoret, which made the firm make tremendous efforts to locate it there.



5. The Applicant maintained that despite writing a letter requesting that the matter be transferred from the lower Court to the High Court, there was no response from the Court side and that letters have been written to the Deputy Registrar over the same issue but no response was made.
6. The Applicant further deposed that he only came to learn with great shock that the file had been dismissed after his Advocates on record informed him that they had been served with a Bill of Costs from the Respondent.
7. In conclusion, the Applicant urged the Court to consider the challenges explained above that made it impossible to proceed with the necessary legal steps and reinstate the suit and the same be heard meritoriously. Annexed to the supporting Affidavit are a copies of the various correspondences marked as DNN1 - 4 and MOI 1and 2 that the Counsel has had with the Court in seeking to know the whereabouts of the file and a way forward in the event that the file could not be availed

### **The Response.**

8. The Application is opposed by the Respondent vide her Replying Affidavit dated 14/11/2024.
9. According to the Respondent, the Applicant's application is made in bad faith, it is frivolous, vexatious and an abuse of the process of Court, that her Advocates were served with the Notice of dismissal of the suit for want of prosecution by the Court registry and that the suit had been pending in Court since the year 2010 and the Applicant has never prosecuted the same for a period of (13) years.
10. The Respondent contended that no sufficient reasons have been adduced by the Applicant on his failure to attend Court on 14/11/2023 when the matter was listed for dismissal for want of prosecution, that the contumelious delay to file the application has not been satisfactorily explained by the Applicant and that the Application lacks merit and is an afterthought as it was filed just (2) days after the Applicant was served with the Taxation Notice dated 18/09/2024. According to the Respondent, it apparent that the Applicant herein lost interest in the prosecution of this suit and has only been awakened by the service of the Taxation Notice.
11. The Respondent maintained that the Applicant is clearly guilty of inordinate delay and indolence and that the Court is vested with powers to dismiss the suit for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules. 2010.

### **The Submissions.**

12. The Application was canvassed vide written submissions. The Applicant filed submissions on 3/02/2025 while the Respondent filed on 21/02/2025.

### **The Applicant's Submissions.**

13. Counsel for the Applicant only framed two issues for determination: whether the Court should reinstate the Applicant's suit and who should bear costs for the Application.
14. With regard to reinstatement of the suit, Counsel for the Applicant relied on the proviso of Order 12 Rule 7 of the CPR and Section 3A of the CPA. Counsel submitted that in dealing with an application for reinstatement, the Court must caution itself not exercise its discretion in a manner that will result in an injustice as was observed by Hon. Lady Justice M. Thande in *HAM vs. SOS* [2021] eKLR.
15. Regarding the factors to be taken into account or consideration for purposes of reinstatement of suits, Counsel cited the case of *Ivita Vs Kyumbu* [1984] KLR 441 whose sentiments were echoed in the case of *Jim Rodgers Gitonga Njeru Vs. Al- Husnain Motors Limited & 2 Others* [2018] eKLR.



16. Counsel further submitted that the failure to attend court on 14/11/2023 was not deliberate or indicative of neglect, that the Applicant's Counsel had been making diligent efforts to trace the file and upon hearing of the dismissal, acted expeditiously and filed the present application for reinstatement of the suit. Counsel urged that a mistake and/or inadvertence on the part of Counsel should not be visited on the innocent litigant. Counsel further relied on the holding in *HAM vs. SOS* (supra) where the Court observed that the door of justice should not be closed to the Applicant for the mistake of Counsel. The reinstated the holding in *Belinda Murai & Others - v- Amos Wainaina* (1978) LLR 2782 (CALL).
17. Counsel further urged that the Applicant has been desirous, zealous and vigilant and/or active in prosecuting this claim in order to be redressed and that this is evidenced by the numerous letters addressed to the Deputy Registrar, inquiring on the whereabouts of the file. Counsel maintained that this application has been brought timeously after dismissal of the Applicant's suit which infers that the Applicant is not indolent but a vigilant party who is interested in prosecuting his suit.
18. In conclusion, Counsel urged that the Applicant herein has offered sufficient/cogent and/or excusable reasons to deserve the orders sought. In view of the Applicant's Constitutional rights being at stake, Counsel urged the Court to intervene by reinstating the case so as to be decided on merits.

### **The Respondent's Submissions.**

19. On whether the suit should be reinstated, Counsel for the Respondent submitted that the factors to be taken into account or consideration for purpose of reinstatement of suits were addressed in *Ivita vs. Kyumbu* [1984] KLR 441 (supra) which was followed in case of *Jim Rodgers Gitonga Njeru Vs. Al-Husnain Motors Limited & 2 Others* [2018] eKLR, where Court observed that;
 

“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”
20. Counsel for the Respondent contended that no explanation has been given for the inordinate delay of (1) from the date of dismissal of the suit to the date of filing of the instant application. According to Counsel, the Applicant herein was only awakened by service of the Taxation Notice which conduct amounts to abuse of the process of Court.
21. Counsel further submitted that reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilba Ngonyo Isaac vs. Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J)). Counsel also relied on the holding in *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR (Warsame J) where it was held:
 

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”
22. According to Counsel, the Applicant herein only filed the instant application to frustrate the taxation of the Respondent's Party to Party Bill of Costs and to the detriment of the Respondent who has been



waiting for determination of this case for over 15 years. Counsel urged that litigation must come to an end.

23. Counsel further submitted that from the record it is clear that the letter written to the Deputy Registrar on inquiry of the file was way back in 2019. Counsel contended that for close to six years no other action was taken by the Applicant to follow up on the same. Counsel urged that he who seeks equity must approach with clean hands. According to Counsel, the application herein is actuated on unclean hands, it lacks merit and is made in bad faith.
24. Counsel added that the Court herein is legally empowered to dismiss matters or want of prosecution under Order 17 Rule 2 of the CPC. Counsel urged that equity does not aid the indolent and that having failed to attend Court on 14/11/2023 when the matter was listed for dismissal for want of prosecution and been served with taxation notice dated 18/08/2024, the filing of the instant application was such an afterthought hence an abuse of due process of this Court.
25. In the end, Counsel submitted that contrary to the averments made by the Applicant, the Respondent has indeed been greatly prejudiced by the delay in concluding the suit and therefore this Application has been made with the sole intention of delaying justice at the expense of the Respondent. Counsel urged that justice delayed is justice denied.

#### **Determination.**

26. I have carefully considered the application as presented and the submissions made by counsel for both the Applicant and the Respondent. In my considered opinion, the only issue for determination is whether the Applicant has satisfied this court to move it to reinstate the suit
27. From onset it must be noted that the court, litigants, and advocates all have an obligation to make sure that cases are resolved quickly and without unjustifiable delay. This is in accordance with Sections 1A and 1B of the Civil Procedure Act, Cap 21, Laws of Kenya.
28. Under order 17 Rule 2 of the Civil Procedure Rules the court has unfettered discretion to dismiss the suit filed for want of prosecution if the following conditions have been met.
  - (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.”
29. Order 12 Rule 7 of the Civil Procedure Rules provides:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.
30. The test of whether or not the provisions of under Order 17 Rule 2 of the CPR wholly applies to the facts of each case was laid down in the case of *Ivita v Kyumbu* [1975] eKLR, Chesoni J), (Supra) where the court 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.”

31. The Principle involved for reinstatement of a suit is as endorsed by Visram J as he then was in the case of *Agip (K) Ltd v High Land Tyres Ltd* 2001 KLR 630

“Where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity to have his case determined on merit, the court must also consider whether the defendant has been prejudiced by the delay.”

32. In the instant case, having considered the reasons for the delay and having perused the communication between the Counsel for the Applicant and the court as per the annexures to the Affidavit in support of the Application, I am well satisfied that the delay to prosecute this matter lies squarely with the court for reasons that the said communication clearly shows that the file had gone missing for a long time to the extent that at some point Counsel requested that a skeleton file be opened to enable them proceed with their case.

33. Given these circumstances it is my considered opinion that the Applicant is not to blame at all for the delay in prosecuting this case. Further, I find it very wrong unjust and unfair that when the file eventually re-surface, the court instead of responding to the numerous letters inquiring on the whereabouts of the file by the applicant and informing the said applicant that the file is now available for their action, instead lists the matter for dismissal for want of prosecution.

34. For the above reasons, I am satisfied that the Application by the Applicant has merit and the same is accordingly allowed with costs in the cause.

**READ DATED AND SIGNED AT ELDORET ON 21<sup>ST</sup> MAY 2025**

**E. OMINDE**

**JUDGE**

