# Wambua v Co-operative Bank of Kenya Limited (Civil Appeal E105 of 2021) [2025] KEHC 6397 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6397 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL E105 OF 2021**

**JM NANG'EA, J**

**MAY 16, 2025**

**BETWEEN**

**ANTHONY MWAU WAMBUA ............................................................ APPELLANT**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED .............................. RESPONDENT**

***(Being an Appeal from Ruling and order of Honourable C.K. Kisiangani (SRM) delivered on 30th January, 2019 in Machakos CMCC No. 237 of 2014)***

## JUDGMENT

1. The Respondent in Machakos CMCC No. 237 of 2014 moved the trial Court vide Notice of Motion dated 7th August, 2018 seeking dismissal of the suit for want of prosecution for the reason that for over 12 months the Appellant failed to take any step to prosecute the suit. The Appellant in his response dated 29th October 2018 explained that he had been ill and that his advocates had ceased acting for him during that period.

2. In dismissing the suit, the Court considered that the Appellant had for over five years failed to set down the action for hearing. The Advocates on record had filed an application to cease acting for him and duly served the Appellant therewith but he never appeared in Court. The Appellant did not also advance reasons for his continued failure prosecute the case even after discharge from hospital, according to the trial court.

3. The Appellant was aggrieved by the decision and appeals on five grounds which may be summarized as follows:

    i. That the Honourable Magistrate erred in law by not appreciating that the Appellant had been in and out of hospital;

ii. That the Honourable Magistrate erred in law in dismissing the Appellant's suit for want of prosecution yet the delay was due to his sickness.

4. The Appellant therefore prays that the Ruling of the trial Court be set aside; that he be given an opportunity to prosecute the matter and that the costs of the appeal be granted to him.

5. The appeal was directed to be disposed of by written submissions which were duly filed by learned Counsel for the parties. Counsel for the Appellant briefly submitted that the primary duty of the court is to determine disputes on merit. It is pointed out that the Respondent did not itself seek to fix the matter for hearing whilst the Appellant's previous advocate was on record. The Appellant laments that the Respondent took advantage of his advocate's withdrawal from the case to cause the suit's dismissal. It is maintained that the Appellant was and is still unwell and couldn't set down the suit for hearing.

6. The Respondent replies that the appeal is defective for the reason that an order granted to the Appellant in his Miscellaneous Civil Application No. E043 of 2020 to file appeal out of time is not included in the Record of Appeal. The court is urged to strike out the Appeal on this ground alone.

7. Regarding the merits of the appeal, the Respondent underscores its stance that no step was taken to set down the suit for hearing since 7th June 2017 when the previous advocate for the Appellant withdrew.

8. The Respondent also accuses the Appellant of lacking the necessary bonafides for inordinate delay to lodge the appeal, the lower court's ruling having been delivered on 30th January 2019.

9. Learned Counsel for the Respondent relies on the case of Mwangi S. Kimenyi vs Attorney-General & Another (2014) eKLR which set out inter alia the following principles to guide the exercise of the court's discretion in disposing of an application such as before the court;

   1) Whether there was inordinate delay to prosecute the suit.

   2) Whether the delay was intentional and therefore inexcusable.

   3) Whether the delay amounts to abuse of the court's process.

   4) Whether there is a risk posed to fair trial or prejudice occasioned to the opposite party.

   5) Whether reasonable explanation for delay has been given.

   6) Any prejudice that may also be occasioned to the plaintiff is an important factor as well.

   7) Despite proven delay, the larger interests of justice ought to be taken into account.

10. The above legal position was elucidated in Thathini Development Co. Limited vs Mombasa Water & Sewerage Company & Another ( 2022) and Argan Wekesa Okumu vs Dima College Ltd & 2 Others ( 2015) eKLR among other decisions cited by the Respondent's advocates.

11. Having considered the Record of Appeal, the sole issue for determination is whether the trial Court rightly and lawfully dismissed the suit.

12. Order 17 Rule 2 of the Civil Procedure Rules 2010 provides as follows:

> " (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."

13. The established principles guiding disposal of an application for dismissal of a suit for want of prosecution were restated in Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and Others & Another [2016] eKLR, as follows:

> "…. Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay".

14. This is legal position is reiterated in the case of Ivita vs Kyumba [1984] KLR 441 which espoused that:

> "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

15. A brief history leading to this appeal is necessary. The matter was instituted by way of Plaint dated and filed on 13th March, 2014. On 13th September, 2016 the Court directed the parties to comply with all pre-trial procedures to pave the way for hearing of the suit.

16. The Appellant's advocates later brought an application dated 9th May, 2017 seeking leave to withdraw from representing the Appellant. On 7th June, 2017 the application was granted, the Appellant having failed to contest it.

17. Thereafter the suit was dormant for over 12 months and on the 13th month, the application for dismissal thereof dated 7th August, 2018 was filed. That application was allowed, thus provoking this appeal.

18. The Appellant in his response dated 29th October, 2018 claimed that the reason for the delay was adjournments caused by both parties as well as his ill health.

19. I have perused the record including the parties' submissions and the impugned ruling. Upon perusal of the medical records exhibited, I note that the Appellant was admitted in hospital on 10th May, 2017 and discharged on 29th May, 2017, for diabetes mellitus. He thereafter continued to attend weekly clinics as evidenced by the appointment card from Machakos Healthcare Center from 3rd June, 2017 to 24th June, 2017, and later monthly from 1st July, 2017 to 30th December, 2017. The next appointment was after a year on 10th November, 2018.

20. The order allowing the Appellant's advocates to withdraw was issued on 7th June, 2017 when the Appellant was still unwell although he had been discharged on 29th May 2017. He has not explained why he did not make any effort to prosecute the matter thereafter, delay of slightly over 14 months,

having been discharged and even after completing the monthly check-ups. It would therefore be inaccurate for the Appellant to claim that the suit was dismissed while he was unwell or that the court disregarded that fact.

21. The power to dismiss a suit is discretionary and the Court considers a number of factors in exercising its discretion either way. I draw guidance from the case of Mwangi S Kimenyi vs Attorney General & Another [2014] KEHC 4220 (KLR) in which it was held in similar circumstances:

> " 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
>
> 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
>
> 1) whether the delay has been intentional and contumelious;
>
> 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court process;
>
> 3) whether the delay is inordinate and inexcusable;
>
> 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
>
> 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties".

22. Similarly, the Court of Appeal in Vintage Investments Limited vs Amcon Builders Limited & another [2021] KECA 259 (KLR) held that:-

> " [27]. In considering an application for dismissal of a suit for want of prosecution, a defendant (like the appellant herein) must show:-
>
> That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but should not be too difficult to recognize inordinate delay when it occurs.
>
> i. That this delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.
>
> ii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each other or between themselves and third parties. In addition to any interference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the

likelihood of prejudice at trial" (See Allan vs Sir Alfred Mc Alphine and Sons Ltd [1968] 1 ALL ER 543.)"

23. It is obvious that cases filed in court belong to litigants. Litigants have the responsibility to take charge of their cases and diligently help expedite hearing to avoid unnecessary costs. Once his advocate ceased acting, the Appellant had the responsibility of either finding another Counsel, or setting down the suit for hearing on his own.

24. Be that as it may, I have perused the Plaint dated 13th March, 2014 and the Respondent's Defence and Counterclaim dated 28th May, 2015. The suit involves a loan allegedly advanced to the Appellant and due to non-payment the Respondent proceeded to seize the Appellant's property through Auctioneers. The Counterclaim substantially prays for settlement of the loan allegedly owed by the Appellant.

25. The Court of Appeal in the case of John Harun Mwau vs Standard Limited & 2 others [2017] KECA 150 (KLR) had the following to say:-

The case of Ngwambu Ivita vs Akton Mutua Kyumbu (supra) makes it clear that,

> " The Defendant must however satisfy the court that he 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."

26. All the guiding principles supra are considered together. It is my considered opinion that reinstating the suit will not occasion prejudice to the Respondent who also has a counterclaim to prosecute. The interest of justice demand in the particular circumstances of this case that the suit be determined on its merits regard being had to the undisputed claim that the Appellant was unwell and his advocate had withdrawn from the case.

27. In the premises the appeal has merit and is allowed in the following terms:

    a. The lower court's ruling delivered on 30th January, 2019 dismissing Machakos CMCC No. 237 of 2014 is hereby set aside.

    b. Machakos CMCC No. 237 of 2014 is hereby reinstated for hearing and determination before a court with jurisdiction, other than Honourable C.K. Kisiangani - SRM.

    c. The Appellant is ordered to set down the suit for hearing within 15 days from the date hereof failure to which it will automatically stand dismissed as ordered by the trial court.

    d. The parties will bear their own costs of the appeal.

    It is so ordered.

**J.M NANG'EA, JUDGE.**

**JUDGEMENT DELIVERED VIRTUALLY ON THIS 16TH DAY OF MAY 2025 IN THE PRESENCE OF;**

The appellant, absent.

The Respondent's Advocate, Ms Kioko.

**J.M NANG'EA, JUDGE.**