Owiti v Kariuki (Civil Appeal E1152 of 2023)
[2025] KEHC 8230 (KLR) (Civ) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1152 OF 2023

DKN MAGARE, J

JUNE 5, 2025

BETWEEN

PHOEBE ACHIENG OWITI ..... APPELLANT

AND

SILVANUS K. KARIUKI ..... RESPONDENT

(Being an appeal of Ruling and Orders of Hon. Ruguru N. (S.P.M) delivered on 29th September, 2023 in Nairobi MCCC No. 1050 "B" of 2007)

JUDGMENT

1. This is an appeal from the ruling and order of Hon. Ruguru N. (S.P.M) delivered on 29th September, 2023 in Nairobi MCCC No. 1050 "B" of 2007. The court dismissed a Notice of Motion application dated the 18th July, 2022. The same was for review. It resulted in this appeal wherein the appellant set fort the following grounds of appeal:

    a. The learned magistrate erred and misdirected herself in fact and in law in in the exercise of her discretion in dismissing the Notice of Motion application dated the 18th day of July 2022 ("hereinafter the application").

    b. The learned magistrate erred in fact and in law in failing to appreciate, consider and apply the legal principles governing an application seeking for the review and/or setting aside an order dismissing a suit or want of prosecution and as a result arrived at a wrong conclusion.

    c. The learned magistrate erred in fact and in law and misdirected herself in her interpretation and application of the principles governing the application that was before her for determination and, in so doing, arrived at wrong conclusions.

d. The learned magistrate erred in fact and in law in failing to consider and appreciate the fact that the appellant was not served with the notice to show cause as to why the suit should not be dismissed before the suit was dismissed for want of prosecution on the 23rd day of July 2018. In so doing, the learned magistrate failed to consider and appreciate the manifest, flagrant and blatant violation of the appellant's right to fair hearing safeguarded by *the Constitution* of Kenya, 2010.

e. The learned magistrate erred in law and in fact in failing to consider and appreciate the fact that the court file went missing at some point and it was not until the 8th day of July 2016 that the appellant's application for reconstruction of the court file was allowed. In so doing the learned magistrate came to the wrong conclusion that the appellant had failed to attend court for almost eleven (11) years for the hearing of her case.

f. The learned magistrate erred in fact and in law in failing to consider and appreciate that the reconstructed court file also went missing and that despite the appellant's best efforts to trace the court file the appellant did not receive any response from the court. In so doing the learned magistrate arrived at a wrong conclusion in finding that the appellant had not provided any justifiable reasons for not being aware that the suit had been dismissed for want of prosecution after almost four (4) years.

g. The learned magistrate erred in fact and in law in failing to consider and appreciate the fact that when the suit was dismissed for want of prosecution on the 23'd day of July 2018, the appellant was not aware that the missing reconstructed court file had been traced and that the same was to be placed before the court for the purpose of taking directions on the said date. In so doing the learned magistrate arrived at a wrong conclusion.

h. The learned magistrate erred in fact and in law by finding that the appellant had not provided any justifiable reasons for not being aware that the suit was dismissed for want of prosecution on the 23rd day of July 2018 until the 23rd day of May 2022.

i. The learned magistrate failed to consider and appreciate that the court was yet to respond to the appellant's letter dated the 18th day of January 2018 seeking assistance in tracing of the missing reconstructed court file and that it was not until the appellant's counsel made a follow-up of the said letter that they realized that the matter had been dismissed for want of prosecution. In so doing the learned magistrate arrived at a wrong conclusion.

j. The learned magistrate erred in fact and in law by blanketly considering the duration between the filing of the suit and the point of the dismissal of the suit for want of prosecution while failing to consider and appreciate the circumstances and reasons for the lapse in prosecuting the suit. In so doing the learned magistrate arrived at a wrong conclusion.

k. The learned magistrate erred and misdirected herself in law by failing to uphold the doctrine of stare decisis in light of clearly established legal principles from the superior courts with respect to reinstatement of a suit and as a result arrived at a wrong conclusion.

l. The learned magistrate erred in fact and in law in considering matters which she ought not to have considered and failing to consider relevant matters in arriving at her decision.

m. The learned magistrate erred in law in failing to give effect to the overriding objective in Sections 1A, 1B of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya, 2010 in denying the Appellant an opportunity to ventilate its case.

n. The learned magistrate erred in law in failing to consider the Appellant's written Submissions and List of Authorities in relation to the application before her. In so doing, the learned magistrate arrived at a wrong decision.

o. The learned magistrate erred in fact and in law in arriving at conclusions that were inconsistent, detached, and at complete variance to the evidence that was before her for consideration. In doing so, the learned magistrate arrived at a wrong conclusion.

2. They prayed that the appeal be allowed, and the ruling delivered on the 29th day of September 2023 in respect to the appellant's application dated the 18.07.2022 and all consequential orders arising therefrom be set aside.

3. The appellant filed submissions stating that the court did not exercise proper discretion. He relied on the case of Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia [2015] eKLR, the court of Appeal [Waki, Nambuye & J. Mohammed, JJA] stated as follows:

This is a first appeal on an interlocutory application which called for the exercise of discretion of the trial court. The principles governing the exercise of judicial discretion were well set out by Ringera JA (as he then was) in the case of Githiaka v Nduriri [2004] 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the Court, that is to do justice to the parties before it. The parameters for interference with the exercise of such a discretion were well put by the predecessor of this Court in the decision in the case of Mbogo and Another v Shah [1968] EA.93, namely, for an appellate court to do so, it must be satisfied that the judge misdirected himself in some matter, and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been misjustice.

4. They further relied on the decision of Kokwo v Akokor (Environment and Land Appeal E016 of 2022) [2023] KEELC 20783 (KLR) (18 October 2023) (Judgment), where the court stated as follows:

I am alive to the fact that before any court can dismiss a suit for want of prosecution, the test to be applied is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. In other words, if the court is satisfied with the Appellant's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties, and hence the action would be not to dismiss the suit but direct that it be heard at the earliest time possible and available.

18.This test was elucidated in the case of Nilesh Premchand Mulji Shah & Another T/A Ketan Emporium v MD Popat and Others & Another [2016] eKLR, the court stated as follows:"Nonetheless, 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. This is what the case of Ivita v Kyumbu [1984] KLR 441 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."

Analysis

5. The memorandum of appeal is humongous and runs contrary to Order 42 Rule 1 of the Civil Procedure Rules, which provides are doth: -

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

    (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

6. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

7. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

8. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court erred in dismissing the application for review.

9. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

10. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another v Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

11. In the case of Peters v Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

12. While addressing a scenario where the court below did not have advantage, Kiage JA stated as follows in the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR:

> " I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary.

13. The matter is basically a question of review. Section 80 of the *Civil Procedure Act* states that:

> " Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

14. The provisions of section 80 of the Civil Procedure Rules are cemented in Order 45 of the Civil Procedure Rules as follows:

> "(1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

15. Kuloba J (as he then was) in Lakesteel Supplies v Dr. Badia and Anor Kisumu HCCC No. 191 of 1994, opined as follows as regarding review:

> "The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1[now 45 Rule 1], of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of

evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

16. The suit was filed in 2007. There was a defence filed in 2007. Nothing else appears to have been done. The appellants filed an application in the same file to reconstitute the file in 2016. This means that the file was available. The matter was dismissed on 23.07.2018. It is not until 28.1.2022 that they asked for reconstitution of the file. Subsequently they made an application dated 23.05.2022 for review of the order dismissing the suit. They sought the following order:

    a. That this Honourable Court may be pleased to review, vary and/or set aside the orders issued on the 23rd day of July, 2018 dismissing the suit herein for want of prosecution.

    b. That this Honourable Court may be pleased to reinstate the plaintiff's suit that was dismissed on the 23rd day of July, 2018 for want of prosecution.

    c. That this Honourable Court may be pleased to issue any further directions as are necessary for the expeditious hearing of this suit.

    d. That the costs of this application be provided for.

17. The court found the delay of 11 years. She stated that there was no explanation for the delay. The court noted that the application was made 5 years after dismissal.

18. I have perused the file. I find that the appellant filed suit and went to sleep. She halfheartedly filed an application to reconstitute a file, in the same file. This means that the file was available. Whether or not the appellant was aware that the matter was dismissed, she has not explained why she waited for 4 years before moving the court. If the appellant was keen, she would have discovered the dismissal earlier. The court was correct in exercise of its discretion.

19. The Appellant never pursued the hearing of the matter in the court below after institution of the case. They were jolted by the dismissal for want of prosecution. The court was thus under a duty to stamp its authority to obviate unnecessary hardship caused by suits that are taking too long in court. In the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969]EA 696:-

    In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha's case purported to follow the decision of Windham m C.J. in Mulji v Jadavji, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an l alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed.

20. The matter herein is a classic study of how not to deal with a suit. The period of 11 years is too long for a suit to be pending. The Appellant did nothing for a period of eight years. They did nothing further for four years. Such kind of prosecution was the raison d'être for introduction, vide L.N. 22/2020, rule 15 of Order Rule 17 rules 2(5) of The Civil Procedure Rules. The suit rules 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.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

(5) A suit stands dismissed after two years where no step has been undertaken.

(6) A party may apply to court after dismissal of a suit under this Order.

21. I find no evidence of any effort to prosecute the suit for a period of 11 years. The excuses given are lame and are no basis for maintaining a suit that serves only to delay the ends of justice. The effect is that the appeal lacks merit and is consequently dismissed.

22. As regards costs, Section 27 of the *Civil Procedure Act* provides as follows: -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

23. In this case the Respondent did not participate. The appeal is dismissed with no order as to costs.

Determination

24. The upshot of the foregoing is that I make the following orders:

a. The Appeal is dismissed for lack of merit.

b. Each party shall bear their own costs.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF JUNE, 2025.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Onyango for the Appellant

No appearance for the Respondent

Court Assistant – Michael