



Taib v Sheikhan (Civil Appeal E202 of 2022) [2025] KEHC 12145 (KLR) (7 July 2025) (Judgment)

Neutral citation: [2025] KEHC 12145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E202 OF 2022**

F WANGARI, J

JULY 7, 2025

BETWEEN

MOHAMED A TAIB APPELLANT

AND

SALIM SHEIKHAN RESPONDENT

*(Being an appeal from the Ruling by Hon. Gideon Kiage
dated 25/11/2022 in Mombasa SRMCC No. 2955 of 1999)*

JUDGMENT

1. The Plaintiff/ Appellant instituted the suit in the lower court vide a Plaint dated 24/06/1999 where he claimed Kshs. 200,000/= being the amount due and owing from the Defendant/ Respondent in respect of goods sold and delivered to the Defendant at his request.
2. The Defendant filed a Statement of Defence dated 13/08/1099 denied owing the said money. It was pleaded that the Plaintiff sent his employee/ agent to go collect the Kshs. 200,000/= from the Defendant. Since the employee was well known to the Defendant, he gave the money to the Plaintiff's employee as he was acting purely on Plaintiff's instructions.
3. The matter proceeded before the trial court. The last appearance by the parties was on 25/09/2015 when the matter was fixed for bearing by consent on 25/11/2015. The matter came up for hearing as scheduled on 25/11/2015 but the parties did not appear in court. The matter was fixed for mention on 22/01/2016, 29/03/2016, 02/08/2016 but none of the parties appeared on the said dates.
4. On 11/07/2022, the suit was dismissed for want of prosecution under Order 17, Rule 2 (5) of the Civil Procedure Rules, as no action had been take since 02/08/2016.
5. The Plaintiff filed a Notice of Motion application dated 29/07/2022 seeking orders to set aside the orders dated 11/07/2022, the case be re-opened and the Plaintiff be granted unconditional leave



to prosecute his case. The application was dismissed vide the ruling dated 24/11/2022 (and not 25/11/2022 as stated in the pleadings),

6. Being dissatisfied with the said Ruling, the Plaintiff filed the Memorandum of Appeal dated 25/10/2023, hence this appeal. The Appellant stated that the Magistrate had erred in law and fact in dismissing the application on grounds that he was responsible for the delay in the hearing of the suit. He prayed that the appeal be allowed.
7. The appeal was canvassed by way of written submissions. Only the Respondent complied by filing the written submissions dated 19/01/2024.

Analysis

8. I have considered the Record of Appeal and filed submissions together with the authorities relied upon, as well as the law. The issues for determination are;
 - a. Whether the Applicant has made out a case for grant of orders it seeks.
 - b. Corollary to this finding is the issue of costs.
9. Order 17 Rule 2 (5) of the Civil Procedure Rules provides, inter alia: -

“A suit stands dismissed after two years where no step has been undertaken”.

10. The essence of dismissal of suits for want of prosecution is the need for expeditious dispensation of suits. In *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR, it was held as follows;

“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.”

11. This court has a duty to determine the application on merits. In *Mwangi S. Kimenyi -vs- Attorney General and Another*, Civil Suit Misc. No. 720 of 2009, the court on considering whether or not the suit should be dismissed for want of prosecution stated as follows: -

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.

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;



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.”

13. It is not in dispute that the matter was last in court on 02/08/2016. It is not until the suit was dismissed for want of prosecution that the Plaintiff/ Appellant woke up from its slumber and filed the application dated 29/07/2022. There were other options available to the Plaintiff to have his case prosecuted despite the loss of the court file, which includes but not limited to having a skeleton file constructed. I find the delay was inexcusable and inordinate.
14. The Appellant stated that the court file had gone missing and he had made all efforts to have the file traced. He produced the letters written to the Executive Officer, Mombasa Law Court dated 14/02/2018 06/04/2018, 23/08/2018 and 07/11/2018. Thereafter, no further action was taken. The Appellant took a further 4 years before taking action, and which was to seek the reinstatement of the suit.
15. The Plaintiff is seeking to have a suit filed 26 years ago be reinstated. That would be prejudicial to the Defendant and against the spirit of Article 159 (2) (b) of the Constitution where this court is mandated by the Constitution to expeditiously dispense justice. I have perused the Ruling of the Trial Magistrate, and I find no reason to interfere with his exercise of discretion in dismissing the application seeking to have this suit reinstated.
16. This matter having been filed in year 1999, litigation must come to an end. The Appellant had the opportunity to prosecute his case but they took no action until when the suit was dismissed for want of prosecution. It would be (See Mobile Kitale Services Station case above).
16. On the issue of costs, Section 27 of the Civil Procedure Act decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. The Respondent having been dragged to court 6 years after they last appeared in court, I find no reason to deny him costs of this appeal.

Determination

17. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The appeal lacks merits and is hereby dismissed.
 - b. Costs awarded to the Respondent.
 - c. File is closed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2025.

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F. WANGARI

JUDGE



In the presence of;

Mr. Odipo Advocate h/b for Mr. Taib Advocate for the Appellant

N/A by the Respondent

Ms. Getrude, Court Assistant

