



REPUBLIC OF KENYA



KENYA LAW
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**Orange & another v Osomo & another (Civil Appeal 75 of 2022)
[2024] KEHC 1092 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1092 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 75 OF 2022
DKN MAGARE, J
FEBRUARY 7, 2024**

BETWEEN

JOSEPH MOBEGI ORANGE 1ST APPELLANT

**GODFREY ONDUSO MOREGI (SUING AS PERSONAL REPRESENTATIVE OF
ESTATE OF ROBERT MOINDI MOBEGI - DECEASED 2ND APPELLANT**

AND

EVANS OSOMO 1ST RESPONDENT

BENARD OCHIENG Omoth 2ND RESPONDENT

JUDGMENT

1. This Appeal arises from the Ruling and Order of Trial Court delivered on 19th September 2022 in Kisii CMCC No. 203 of 2010 by Hon. P.K Mutai, SRM.
2. The Trial Court dismissed the Appellant’s suit for want of prosecution on 19th September 2022. The Appellant being aggrieved lodged a Memorandum of Appeal on the Grounds as follows:
 - a. The Learned Magistrate erred in law and fact in dismissing the Plaintiff’s suit for want of prosecution even after the Plaintiff had testified in Court.
 - b. The Learned Magistrate erred in law and fact in failing to allow the Appellant to call the eye witness.
 - c. The Learned Magistrate erred in in law and fact in dismissing the suit for want of prosecution without basis as the suit had all through been active.
3. The Appellant therefore sought the following reliefs:
 - a. The Appeal be allowed



- b. The Order dismissing the suit for want of prosecution be set aside to reinstate the suit.
4. The matter came up on 19th September 2022 for hearing. The Plaintiff applied for adjournment to enable the Plaintiff to avail an- eye witness to record a statement. The court noted that the case was a 2010 matter that had earlier been dismissed on 15th December 2015 for want of attendance and subsequently reinstated on 1st August 2018. The court declined the reason given for adjournment and proceeded to dismiss the suit for want of prosecution.
5. Aggrieved, the Appellant lodged the Memorandum of Appeal on 30th September 2022.

Submissions

6. The Appellant submitted that the Trial Court erred in dismissing the suit for want of prosecution when the suit was all through active.
7. Applicant submitted that the Plaintiff was denied the right to be heard by dismissing the suit. Reliance was placed on the right of administrative action under Article 47 of the *Constitution*. It was also submitted that there was no inordinate delay as to entitle the court to dismiss the suit.
8. Applicants submitted that the court improperly exercised its discretion and relied on the case of *Utalii Transporters Company Limited & 3 Others v. Thethini Development Co. Ltd & Another* (2014) eKLR where it was stated as follows:

In exercising discretion to dismiss a suit for want of prosecution the principles applicable were:

Whether the delay was inordinate

Whether delay was intentional and inexcusable

Whether delay amounted to abuse of the court process

Whether it would be prejudicial to parties

Whether a reasonable explanation was given for delay

9. Applicants prayed that the Appeal be allowed.
10. The Respondent did not file submissions.

Analysis

11. This Court has considered the Record of Appeal filed in Court, submissions and authorities relied on by the Appellant in support of the Appeal. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.
12. Further, in the case of *Mbogo and Another v Shah* [1968] EA 93 where 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 it 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.”



13. The issue in this case is whether the court should set aside the Trial Court's Order dismissing the suit for want of prosecution and reinstate the suit.
14. I note that the matter came up on 19th September 2022 for hearing when the Plaintiff's counsel applied for adjournment to enable the Plaintiff to avail an- eye witness. The eye witness was to be called to first record a witness statement. The court noted that the case was a 2010 matter that had earlier been dismissed on 15th December 2015 for want of attendance and subsequently reinstated on 1st August 2018. The court declined the reason given for adjournment and proceeded to dismiss the suit for want of prosecution.
15. The Applicant thus has the burden to prove reasons to justify setting aside of the dismissal order. The setting of dismissal orders under Order 12 Rule 7 of the Civil procedure Rules is typically a matter of discretion. The Applicant has to demonstrate that the trial court fettered its discretion and acted contrary to justice. This discretion has to be exercised judiciously, as was stated the case of *Shah v Mbogo* [1979] EA 116 quoted with approval in the case of *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

16. The jurisdiction to dismiss cases for want of prosecution is both regulatory, and inherent in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, the Court of Appeal, Law JA stated as doth: -

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 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.

17. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Supreme Court stated that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the



judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

18. The common denominator is that the dismissal of a suit for want of prosecution is a matter of judicial discretion. The Trial Court noted that what was on record did not support the Plaintiff's request to keep the suit active. The test on dismissal of suits for want of prosecution was also laid in Mwangi S. Kimenyi v Attorney General and Another, [2014] eKLR, when the court restated the test as follows: -

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; 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.”

19. The Plaintiff's Applicants had attended court and applied for adjournment to call an eye witness. I note that the Plaintiff had testified on 28th January 2013. This is more than 10 years ago. In the case of Utalii Transport Co. Ltd and 3 Others v N.I.C. Bank and Another [2014] eKLR, the court held that:

“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

20. I am inclined to find that the Appellant failed to take steps to have the suit prosecuted. The delay of 10 years has not been explained. I find no basis to fault the Trial Court in its finding that the Appellant had not demonstrated the intention to prosecute the suit.

21. Parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in Gideon Sitelu Konchella v Daima Bank Limited [2013] eKLR where the court while citing the case of Mobil Kitale Service Limited v Mobil Oil Kenya Limited, held that: -

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiouslythe overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



22. Clearly, the Appellant was not keen in prosecuting the suit. There is no eye witness who was said to be called as per the Plaintiff's List of Witnesses filed in the Lower Court. The Court cannot be taken in turns over witnesses wished but not availed. This jeopardizes justice which is the core business of the Court.

23. In *Harris Horn Senior, Harris Horn Junior v. Vijay Morjaria* Nyeri Civil Appeal No. 223 of 2007 the Court made observations therein inter alia as follows:

(32) As for the need to do justice to the parties before it, we have no doubt that this is the core business of the Court. However, a court of law cannot ignore principles of substantive law or case law governing the particular aspect of justice sought from its seat. Its primary role is to ensure that the justice handed out is kept anchored on both the law and the facts of each case."

24. I am inclined to find that the Trial Court judiciously exercised discretion in dismissing the suit. The facts as depicted on the Trial Court's record and the conduct of the parties dictated that eventuality which I hereby uphold. As was held in the case of *Ruth Wambui Gichuru v Crossways Car Hire Tours & Travel Ltd & Another* [2007] eKLR:

From the court record it cannot be said that the suit was dormant. There was some activity though minimal. The act to dismiss a suit for want of prosecution is draconian and should only be resorted to in undeserving cases only.

25. In the circumstances, I find no merit in the Appeal.

Determination

26. In the upshot, I make the following Orders.

- a. The Appeal is dismissed.
- b. As the Respondent did not participate in this Appeal, I make no order as to the costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Onyingwa & Co. Advocates for the Appellant

Otieno Oyoo & Co. Advocates

Court Assistant - Brian

M.D. KIZITO, J.

