



REPUBLIC OF KENYA



KENYA LAW
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**APA Insurance Limited v Mwangi (Civil Case 4 of 2018)
[2024] KEHC 5609 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 5609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL CASE 4 OF 2018
RL KORIR, J
MARCH 12, 2024**

BETWEEN

APA INSURANCE LIMITED PLAINTIFF

AND

ELIJAH GATHOGO MWANGI DEFENDANT

RULING

1. The Applicant, APA Insurance Limited filed a Notice of Motion Application dated 17th April 2023 which sought the following Orders:
 - I. That this Honourable Court be pleased to review and set aside its orders made on the 24th January 2023 dismissing the suit herein.
 - II. The suit herein be and is hereby reinstated and the Plaintiff/Applicant be allowed to prosecute the suit.
 - III. Costs be in the cause.
2. The Application was brought under Order 12 Rule 7, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and Section 3A of the *Civil Procedure Act*. The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Dancan Otieno Njoga on 15th April 2023.

The Applicant's Case.

3. The Applicant stated that the matter came up for mention before Justice Dulu on 4th March 2020 to confirm compliance with Order XI of the *Civil Procedure Rules*. That it had not complied with the said Order XI and were granted a further mention date on 4th May 2020.



4. It was the Applicant's case that on 4th May 2020, the matter did not proceed as the Chief Justice had directed the scaling down of court operations due to the COVID-19 pandemic. It was the Applicant's further case that on 16th January 2023, the Deputy Registrar of this court served it with a Mention Notice indicating that the matter was set for dismissal on 24th January 2023. That on 24th January 2023, their advocate logged into the court's virtual platform presided over by Dulu J. but he was unable to be admitted into the platform.
5. The Applicant stated that it was later informed that Justice Dulu had been transferred out of the station and that the matter had been handled by Justice Teresa Odera who had dismissed the suit for want of prosecution.
6. It was the Applicant's case that the non-prosecution of the suit was not its fault or mistake but due to the COVID-19 pandemic that necessitated the scaling down of the court's operations. Additionally, its advocate was not aware that Justice Dulu had been transferred out of the station and that his non-attendance was not a deliberate act but due to factors that were beyond their control.
7. The Applicant stated that if the suit was not reinstated, it would suffer irreparable loss. That it was in the interest of justice that its Application be allowed.
8. I have gone through the court record and I have noted that there was no response from the Respondent.
9. On 8th May 2023, I directed that the Application be canvassed through written submissions.

Applicant's submissions.

10. The Applicant filed its written submissions dated 12th April 2023. I have noted that the said submissions were in relation to the Notice to Show Cause why the suit should not be dismissed. Seeing that the suit was dismissed for want of prosecution on 24th January 2023, these submissions had been overtaken by events.
11. However, in my analysis, I shall consider the Notice of Application dated 17th April 2023 and its Supporting Affidavit dated 15th April 2023. I have noted that the Application was not opposed. The Applicant filed an Affidavit of Service dated 3rd January 2023 where it indicated that its advocate served the Respondent through Registered Post. The Applicant attached a forwarding letter marked as DON-1 and a Postage Receipt marked as DON-2. Based on the above, I am satisfied that the Respondent was properly served.
12. The only issue for my determination was whether the suit should be reinstated.
13. The law on dismissal of suits is provided under Order 17 Rule 2 of the [Civil Procedure Rules](#) which provides:-
 - (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.
14. In an application for reinstatement of a dismissed suit, an Applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. The Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* (2013) eKLR, stated:-
- “We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.....”
15. Similarly in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. 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 Kyumba* [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.”
16. I have gone through the proceedings and I have noted that the suit was instituted through a Complaint filed on 19th September 2018. The matter was in court on 19th September 2018, 25th September 2018, 5th December 2018, 25th February 2019, 29th March 2019, 14th May 2019, 2nd October 2019, 6th November 2019, 5th December 2019 and 4th March 2020. There was significant inactivity in the file and the matter next appeared in court was on 24th January 2023 when it was dismissed for want of prosecution.
17. The Applicant had stated that the reasons for the delay was that the court's operations had been scaled down due to the COVID-19 pandemic and that they were unaware that Justice Dulu who sat in this court station at that time had been transferred.
18. In my view, the reasons advanced by the Applicant were insufficient and an afterthought. This is so because even during the COVID-19 pandemic, court sessions were going on albeit on a scaled down level. The pandemic ended sometime in the year 2021 and the Applicant still had the opportunity to resurrect and prosecute his case. The Applicant was only woken up from his slumber by the court's Mention Notice dated 9th January 2023 which informed them that the matter was set for dismissal on 24th January 2023.



19. If the Applicant had been interested in prosecuting his suit, then he would have known that Justice Dulu had been transferred from Kericho High Court a while back. This court finds the excuse also not credible as the Applicant's advocates have appeared before this court in other matters and were therefore aware of the transfer changes.
20. All the factors above show that the Applicant had totally lost interest in prosecuting his suit. The delay of over 5 years was inordinate and inexcusable. In any event, as per order 17 rule 2 (5) of the *Civil Procedure Rules*, this suit stood dismissed two years after the last activity on the file.
21. In the final analysis, the Applicant had failed to give sufficient reasons as to why his suit should be reinstated. For over 4 years, the Applicant failed to take steps to prosecute its suit and the delay had not been inadequately explained. It is trite that equity does not aid the indolent.
22. The Notice of Motion dated 17th April 2023 is dismissed with no orders as to costs.
23. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 12TH DAY OF MARCH, 2024.

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Otieno Njoga for the Applicant and in the absence of the Respondent; and Siele(Court Assistant)

