



**Nyaga & another v Kavango & another (Civil Appeal E883 of 2022)
[2024] KEHC 5900 (KLR) (Civ) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E883 OF 2022

HI ONG'UDI, J

MAY 24, 2024

BETWEEN

JESEE NJAGI NYAGA 1ST APPELLANT

STELLA M. NYAGA 2ND APPELLANT

AND

JOSHUA MUTWII KAVANGO 1ST RESPONDENT

NAIROBI CITY COUNTY 2ND RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. L.T. Lewa
Obura Senior Resident Magistrate in Milimani Chief Magistrate's
Court CMCC No. 4649 of 2008, delivered on 5th March 2020)*

JUDGMENT

1. This appeal arises from a Ruling and Order issued in Milimani CMCC No. 4649 of 2008 on 5th March, 2020. In the said suit, the appellants (who were the plaintiffs) sued the respondents (who were the defendants) for payment of kshs. 562,874/= being the refund of purchase price for Plot 3/B 40.1 Umoja Inner-Core Sector 1-3 Nairobi plus 20% of the said amount together with any incidental costs the appellants might have incurred. Additionally, they prayed for costs of the suit plus interest at 30% and any other relief the court deemed fit.
2. On 11th May 2017 the trial court noted that the parties had failed to prosecute the suit for a period of 1 year, and thus dismissed it pursuant to Order XV11B of the Civil Procedure Rules 2010. By an ex-parte application dated 29th August, 2019 the appellants sought for the orders made on 11th May, 2017 to be set aside and/or reviewed. Additionally, that the suit be reinstated and directions of its hearing



- be issued. The trial court on 5th March, 2020 rendered its ruling where it dismissed the said application for not being merited.
3. Being aggrieved with that Ruling the appellants lodged the appeal dated 27th October, 2022 on the following grounds:
- i. That the learned magistrate erred in law and in fact in his holding that the appellants application for the review of the order dismissing the suit and for reinstatement of the suit was a non-starter and frivolous.
 - ii. That the learned magistrate erred in law and in fact in failing to find, and therefore review the order dismissing the suit, that the explanation given why the suit was not set down for hearing was plausible and acceptable.
 - iii. That the learned magistrate erred in law and in fact in failing to find that if there was any mistake or inadvertence, on the part of the appellants' advocate the same could not, in the interest of justice, be visited upon the appellants whose role in fixing the suit for hearing was minimal.
 - iv. That the honourable magistrate erred in law and in fact in visiting the appellants advocate's purported mistake or indolence on the appellants and by so doing drove the appellants away from the seat of justice without the case being heard on merit.
 - v. That the honourable magistrate erred in law and in fact in failing to be alive to the fact that court diaries for fixing cases for hearing get filled fairly quickly each year as well as failing to take into account the period in the year when time does not run, and by not being so alive she came to a wrong conclusion.
 - vi. That the learned magistrate erred in law and in fact by failing to appreciate that the delay was not prolonged, and even if it was prolonged, the same was excusable and justice could be done despite the delay.
 - vii. That the learned magistrate erred in law and in fact in exercise of her discretion when she dismissed the appellants' application instead of granting the application and reinstating the suit but penalizing the appellants with costs.
 - viii. That the learned magistrate erred in law and in fact in failing to take into account material facts placed before her but considered materials she ought not to have taken into account and by so-doing came to a wrong conclusion.
 - ix. That the learned magistrate erred in law and in fact by deciding the appellants' application on considerations not otherwise known to law.
 - x. That the learned magistrate erred in law and in fact by awarding costs of the application to the respondents.
4. The appellant urged the court to set aside the ruling delivered on 5th March 2020 and substitute the same with an order allowing their application dated 29th August 2019. They also prayed that the respondents be condemned to pay for costs of the appeal.
5. The Appeal was canvassed through written submissions.

Appellants' submissions

6. The appellants' submissions were filed by Masore Nyang'au advocates and are dated 18th January, 2024. Counsel condensed the grounds of appeal into three.



7. On the first issue, on whether there was reasonable explanation for the delay in moving the court to set aside the order of dismissal, counsel submitted that the trial court dismissed the appellants' suit suo moto without service of notice to the appellants' counsel to show cause why the suit should not be dismissed. That the same was contrary to the provisions of Order 17 Rule 2 (1) of the [Civil Procedure Rules](#) which obligates the court to give notice in writing to the parties to show cause why the suit should not be dismissed.
8. Counsel submitted further that the main reason that impeded further prosecution of the suit was the appellants counsel's ailment which was quite prolonged and severe. Further, that the trial magistrate made an error in her conclusion that it was the appellants' initial advocate who made the application for setting aside/review when the same was made by Nyandieka & Co. Advocates. He added that the said application could not be made earlier because no one was aware that the suit had been dismissed on 11th May 2017. Therefore, it was his Submission that the delay if any was satisfactorily explained and the trial magistrate ought to have been persuaded and set aside the dismissal order.
9. On the second ground, on whether the mistake of the advocate, in the present suit and the illness of Paul Mwangi Ndungu ought to be visited upon the appellants. Counsel while relying on the case of [Lucy Bosire v Kebanicha Division Land Dispute Tribunal & 2 others](#) [2013] eKLR, submitted that the sin of an advocate should not be visited upon the client.
10. In conclusion, he submitted that there was sufficient reason advanced to the learned trial magistrate which ought to have made him set aside/review the dismissal order made on 11th May 2017. He urged the court to allow the appeal.
11. The respondents did not file any submissions.

Analysis and Determination

12. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law. I have identified one issue for determination which is whether there was any merit in the Notice of Motion dated 29th August, 2019 seeking review of the dismissal order.
13. The appellants' counsel argued that the trial court dismissed their suit suo moto without service of notice to their counsel to show cause why the suit should not be dismissed. That the same was contrary to the provisions of Order 17 rule 2 (1) of the [Civil Procedure Rules](#). They argued further that the main reason that impeded prosecution of the suit was their counsel's ailment which was quite prolonged and severe.
14. The learned trial magistrate in her ruling faulted the appellants for frivolous adjournments without cause and failing to file the application within a reasonable time.
15. Order 17 Rule 2 of the [Civil Procedure Rules](#) 2010 gives the court the discretion to dismiss a suit where no step has been taken in the matter for a period of one year. The rule provides as follows:

“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...”
16. Perusal of the record of appeal reveals that indeed on 11/05/2017 the appellant's suit was dismissed for reasons that it had not been prosecuted for over one (1) year. Further perusal of the record reveals that:
 - i. On 29/4/2014 the matter was confirmed ready for hearing.



- ii. On 3/03/2015 the matter was fixed for hearing on 7/05/2015 by the plaintiff.
 - iii. On 7/05/2015 the matter could not be heard because the 2nd defendant had not been served with the hearing notice.
 - iv. No action was taken by the plaintiffs to prosecute the case until 11/05/2017 when it was dismissed under order XVII Civil Procedure Rules.
 - v. From 7/05/2015 – 11/05/2017 when the suit was dismissed was exactly two (2) years.
 - vi. After the dismissal order of 11/05/2017, the appellants only filed the Notice of Motion dated 9/08/2019 on 3/09/2019. This was exactly two (2) years plus four (4) months after the dismissal
17. It is true no Notice to show cause was issued prior to the dismissal. Is such Notice mandatory under Order XVII Rule 2 of the Civil Procedure Rules 2010? The period mentioned in the said Rule is one (1) year and the word used is “may”. In this case the delay had subsisted for two (2) years. There was a further delay of almost two and a half (2½) years making it four and half years (4½ years) delay.
18. The learned trial magistrate considered all this before making a decision. Even if the appellant’s advocate was for whatever reason unable to follow up the matter, what steps did the appellants take as owners of the case? A waiting period of four and a half (4½) years with no good reason advanced is an unjustified inordinate delay.
19. I find no reason to make this court fault the learned trial court. I therefore find no merit in this Appeal which I dismiss with costs.
- The lower court’s orders dismissing the appellants’ case are upheld.
20. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 24TH DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

