



REPUBLIC OF KENYA



**Tahir Sheikh Said Transporters Ltd v Odari (Civil Appeal
E031 of 2023) [2024] KEHC 8628 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E031 OF 2023
SM GITHINJI, J
JULY 16, 2024**

BETWEEN

TAHIR SHEIKH SAID TRANSPORTERS LTD APPELLANT

AND

LILIAN MCHANJI ODARI RESPONDENT

*(Being an Appeal from the Ruling and Orders of the Senior Resident
Magistrate's Court at Mariakani – Hon N.Chepchirchir dated
21st February, 2023 in Mariakani SRMCC No.193 of 2018)*

RULING

1. For determination is the Notice of Motion dated August 30, 2023 seeking the following the orders;
 1. Spent.
 2. The order for dismissal of the appeal made on August 28, 2023 by Hon. Justice John Chigiti be set aside and replaced with an order for the reinstatement of the Appeal.
 3. Costs of this application be in the appeal.
2. The application is founded on the grounds on its face and the supporting affidavit of Angela Cheruiyot the Appellant's advocate who deponed that the matter was listed for hearing before Hon. Justice John Chigiti on August 29, 2023 during the service week. That on the hearing date, the Appellant remotely attended court for hearing and was told to follow up with the registry. She stated that upon follow up, the appeal had been heard on August 28, 2023 and the appeal dismissed for non-attendance for both parties being absent. She added that both parties had filed their submissions on the appeal and were ready to proceed and the court ought to have considered the same before condemning them unheard thus the appeal should be reinstated.



3. The Respondent did not file any response to the application. The Applicant filed written submissions to the Application. I have considered the submission and find that the sole issue for determination is whether the prayer for reinstatement is merited.
4. Section 3A of the [Civil Procedure Act](#) gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. Section 3A reads:

"3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."
5. The factors taken into account or considered for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

" The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."
6. *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J) was followed in [Jim Rodgers Gitonga Njeru vs. Al-Husnain Motors Limited & 2 others](#) [2018] eKLR (Muchemi J), where the court said:

" It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation."
7. In James [Mwangi Gathara & another vs. Officer Commanding Station Loitoktok & 2 others](#) [2018] eKLR (Nyakundi J), the court said:

" Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the adjudication processes. In my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point."
8. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in [Bilba Ngonyo Isaac vs. Kembu Farm Ltd & another](#) & another [2018] eKLR



(JN. Mulwa J), which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

" The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."

9. I have considered the grounds raised by the applicant. I am convinced that non-attendance on its part on the day the matter came up for hearing was not occasioned by fault of its own. I have also taken into account the fact that by the time the matter came up for hearing, parties had filed written submissions in respect of the Appeal. In the circumstances, I will allow the application to reinstate the appeal. Costs shall abide by the outcome of the appeal.

10. Since both parties have filed submissions, Judgment will be on 8th October, 2024.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Kongere for the Appellant/Applicant.

2. Ms Obunga for the Respondent.

