



REPUBLIC OF KENYA



KENYA LAW

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**Wambui v Kinuthia & another (Civil Appeal E725 of 2021)
[2024] KEHC 7899 (KLR) (Civ) (2 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 7899 (KLR)

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

CIVIL

CIVIL APPEAL E725 OF 2021

DAS MAJANJA, J

JULY 2, 2024

BETWEEN

SIMON MAINA WAMBUI APPELLANT

AND

JULIUS MBURU KINUTHIA 1ST RESPONDENT

SAMUEL GICHARU KAHWAI 2ND RESPONDENT

(Being an appeal from the Ruling and Order of Hon. J.A Aduke RM dated 21st October 2021 at the Magistrates Court at Milimani, Nairobi in Civil Case No.8442 of 2017)

JUDGMENT

Introduction and Background

1. This is an appeal against the Ruling of the Subordinate Court dated 21.10.2021 dismissing the Appellant's suit against the 1st Respondent for want of prosecution ("the Ruling"). The appeal is grounded in the memorandum of appeal dated 04.11.2021 and has been canvassed by the parties by way of written submissions.
2. From the record, the Appellant filed the suit on 24.11.2017 claiming that the 1st Respondent's motor vehicle had rammed into his motor vehicle causing it extensive damages. He sought Kshs. 86,184.00 as special damages. The 1st Respondent filed a defence under protest on 20.06.2018. On 17.06.2021, he filed an application to dismiss the suit for want of prosecution stating that the Appellant had neglected and/or otherwise failed to set down the suit for hearing and/or failed to take any steps to prosecute the same for a period of over one year. In response, the Appellant stated that the matter came up for pre-trial conference on 08.05.2019 where the Appellant had fully complied with Order 11 of the *Civil Procedure Rules, 2010* ("the Rules") and he prayed for a hearing date. That the 1st Respondent was



granted 30 days to comply with Order 11 of the Rules and the Appellant was directed to regularize the position of the 2nd Respondent before the next pre-trial conference date for the reason that it was unclear whether default judgment had been entered against the 2nd Respondent.

3. The Appellant claimed that he had continuously attempted to get a response as to whether judgment was entered against the 2nd Respondent however he was informed that the same had not been forwarded to the learned magistrate for consideration since there were no original summons attached to the Affidavit of Service. That as per Para. 4 of the Affidavit of Service sworn on 11.06.2018 by Onesmus Wambua, he indicated that during service of the Summons to Enter Appearance together with the Complaint, the 2nd Respondent abruptly got into his matatu and drove off at high speed with the original summons to enter appearance which he was unable to return to court. The Appellant averred that he had on several occasions sought, through actual visits to the court's registry in the year 2019 and early 2020 and thereafter through telephone calls to the court personnel after March 2020 when the Covid-19 pandemic was first reported in Kenya, that the Request for judgment be taken for consideration by the court to no avail. That it is for these reasons together with the directions of the court issued on the said 08.05.2019 that the Appellant had been unable to proceed with prosecution of this matter. The Appellant thus urged that he was keen on prosecuting this claim and had not by his own accord delayed the prosecution of this matter and asked the court to dismiss the application and he be allowed to proceed to prosecute the matter.
4. In its ruling, the Subordinate Court held that the reasons advanced by the Appellant were insufficient as the court had not seen any copies of letters written to the court administrator seeking to set down the suit for mention or hearing from 08.05.2019 upto the date of the Ruling. Further, it had not seen any correspondence seeking to follow up on entry of an interlocutory judgment against the 2nd Respondent as alleged in the Appellant's response. This Ruling dismissing the suit forms the basis of the instant appeal which I now proceed to determine below.

Analysis and Determination

5. In the Ruling, the learned magistrate was exercising discretionary jurisdiction thus before this court can interfere with the trial magistrate's discretion, it must be satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision or, that she misapprehended the law or failed to take into account some relevant matter (see *Mbogo v Shah* [1968] EA 93).
6. Under Order 17 Rule 2(1) of the Rules, a suit may be dismissed if no cause is shown to the court's satisfaction as to why no steps had been taken for one year to prosecute the suit. The Court of Appeal in *Moses Muriira Maingi & 2 others v Maingi Kamuru & another* NYR CA Civil Appeal No. 151 of 2010 [2013] eKLR adopted and endorsed the test for dismissing a matter for want of prosecution as set out by Chesoni J.,(as he was then) in *Ivita v Kyumbu* [1984] KLR 441 as follows:

“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 he 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.”

7. The Court of Appeal in *Pkiech Chesimaya v Limakorwai Achipa* ELD CA Civil Appeal No. 16 of 2017 [2020] eKLR also stated that this discretion under Order 17 is upon the trial court and not an appellate court. The question is thus whether the Appellant provided a satisfactory explanation for the delay in prosecuting the suit. As stated, the Appellant advanced the grounds that it was following up on the status of the 2nd Respondent as directed by the court on 08.05.2019 and that this had been curtailed by inter alia non-responsiveness from the court and the Covid-19 pandemic.
8. Going through the record, I cannot fault the trial magistrate's conclusion that the reasons advanced by the Appellant were insufficient. Between 08.05.2019 and 14.07.2021 there appears to have been no activity in the file and there is no evidence of any follow up by the Appellant on the status of the 2nd Respondent as claimed. There is also no evidence of how the Covid-19 pandemic prevented the Appellant from prosecuting his case or following up with the court on the status of the 2nd Respondent. Whereas it is common knowledge that court operations were scaled down for some time due to the pandemic, courts were however not closed down entirely. Parties were still able to take steps to prosecute their matters. Without any documentary evidence over the three years to support the contention that his counsel would make telephone calls to the court, this assertion by the Appellant is self-serving. Ultimately three years of no action is prejudicial to the Respondent.

Disposition

9. I therefore find and hold that the Subordinate Court in its ruling dated 21.10.2021 exercised its discretion judiciously. The appeal is dismissed. The Appellant shall pay costs assessed at Kshs. 15,000.00.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JULY 2024.

D. S. MAJANJA

JUDGE

