



**Omeli v Glassmart East Africa (Civil Appeal E625 of 2023)
[2024] KEHC 11738 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E625 OF 2023
AM MUTETI, J
SEPTEMBER 24, 2024**

BETWEEN

HENRY KAFUNJA OMELI APPELLANT

AND

GLASSMART EAST AFRICA RESPONDENT

*((Being an appeal against the judgement of HM. Lawrence. L. MUSIEGA
(MR) delivered on the 29th June 2023 in CMCC No. 4126 of 2015).))*

JUDGMENT

Introduction

1. The appellant in this matter has moved to this Court aggrieved by the Learned Honourable Magistrate’s decision to dismiss his suit for want of prosecution.
2. The suit arose out of personal injury suffered from an accident in the course of work. The appellant in the claim sought general and special damages against the Respondent.
3. The suit had been in the Court system for 5 Years before the Magistrate orders its dismissal.
4. The appellant has by his memorandum of appeal dated 11th July 2023 raised 3 grounds of Appeal to wit:-
 - a. That the learned trial Magistrate erred in law and fact by dismissing the suit for want of prosecution knowing very well that between 3rd day of December 2019 and 28th day of April 2023 the court lacked Jurisdiction to hear and determine all cases relating Work Injuries Benefits Act (WIBA).



- b. That the learned trial Magistrate erred in law and fact by dismissing the suit. The delay in prosecuting the case was caused by the court's lack of Jurisdiction between 3rd day of December 2019 and the 28th day of April 2023.
 - c. That the learned trial Magistrate erred in law and fact by dismissing the case for want of prosecution even when he knew that the Jurisdiction to hear and determine work injuries related matters was restored to the magistrates' court on the 28th day of April 2023 when the Chief Justice issued a gazette notice and therefore as at the time of dismissal the appellant had delayed to prosecute the matter for only 2 months.
5. The Appellant has filed submissions dated 7th June 2024 in which he contends that the learned Honourable Magistrate's decision occasioned a failure of justice because the Court failed to take into consideration the fact that the delay in the prosecution of the matter was not deliberate on the part of the appellant.
 6. According to the appellant the learned Honourable Magistrate ought to have taken into account the fact that the suit having been filed on or about 7th July 2024 , the same could not be immediately prosecuted since the jurisdiction of the Lower Court had been suspended over claims of his nature between 3rd December 2019 and 28th April 2023.
 7. It is the appellants argument that the Court having had no jurisdiction to hear and determine the matter, the claim could not be prosecuted thus the Court was wrong in its Ruling.
 8. The appellants maintains that he could not prosecute his matter until after the 28th April 2023 following the gazette notice number CXVV (99), of 28th April 2023 , 1889 issued by the Honourable Chief Justice.
 9. The appellant further urges that it would not have made any legal sense to prosecute a matter before a Court that had no jurisdiction. It is his position that the matter could only be prosecuted after the Supreme Court decision in Petition No. 4 of 2019 Law Society of Kenya Vs. Attorney General & Another (2019) eKLR which restored jurisdiction to the Lower Courts on Work-Men's compensation claims.
 10. The respondent on his part has opposed the appeal vide his submissions dated 13th June 2024.
 11. The respondent contends that the instant appeal is an abuse of Court process. He submits that the appellant has not furnished the Court with sufficient grounds to justify the setting aside of the order dismissing the suit.
 12. The respondent has placed reliance on the decision in IVITA Vs. KYUMBA (1984) eKLR in which the principles governing setting aside were set out as:-
 - i. That there was no inordinate delay.
 - ii. That the inordinate delay was excusable.
 - iii. That the defendant is unlikely to suffer prejudice by such delay.
 13. The respondent further relies on Article 159 [2] of *the Constitution* to amplify the point that justice should be delayed.
 14. The Respondent basically argues that the application for dismissal of the suit for want of prosecution was merited.



15. The respondent further contends that the duty to ensure that a matter is prosecuted timeously and expeditiously is that of the plaintiff and where he fails to do so the defendant may move to have the matter dismissed for want of prosecution or the Court may of its own motion issue notice under order 17 Rule 2 [1] of the civil procedure rules 2010 to parties to show cause why the suit should not be dismissed.
16. The respondent has also cited the following authorities in support of his argument:
 - i. Mwasa Biscuit Manufacturing Co. Ltd Vs. Wet End Distributors Ltd(1969) E.A 696 on the duty of the plaintiff to expeditiously prosecute his claim; and
 - ii. Mobile Kitale Services Vs. Mobil Oil Kenya Ltd & Another (2014) eKLR 1 in which Warsame J emphasized the need for the plaintiff to avoid being found guilty of laches and reiterating the defendant's right to move the Court for dismissal for want of prosecution.
17. The period of 5 years according to the respondent was in ordinate in the circumstances.
18. The respondent's other strong argument in opposition of the appeal is that the appellant record of appeal is incomplete and as such the appeal should be struck out for failure to annex the order appealed against. In support of the argument, he has relied on the case of Nicholas Kiptoo arap Korir Salat Vs. IEBC & 6 Others(2013) eKLR in which the Court emphasized that procedural rules are tools designed to facilitate adjudication of disputes and to ensure orderly management of cases.

Analysis And Determination

19. The parties to this appeal have properly identified the issues for determination which I would summarize as follows:-
 - a. Whether the Lower Court decision was proper taking into account the circumstances of the case.
 - b. Whether the delay was in ordinate and inexcusable to warrant the decision by the Magistrate to dismiss the suit.
 - c. Whether the Lower Court was competent to try the matter during the period of 5 years that the case remained pending before it.
 - d. Whether the failure to annex the order appealed against in the record of appeal renders the same incompetent.
20. The last issue highlighted above is key to the determination of the Appeal but that must be looked into together, together with the line all important question of jurisdiction raised by the appellant is the sole reason for the delay.
21. I shall deal with the issue of jurisdiction of the Lower Court to dismiss the matter because that in my view would go a long way in determining the final order I make in this appeal.
22. The question whether or not the Lower Court had jurisdiction to dismiss the matter is important because jurisdiction is everything as was held in the owners of motor vessel Lillian Vs. Caltex Oil (K) Ltd [1969] eKLR.
23. The suit herein was filed on 7th July 2024. As at the date of the institution of the suit the Lower Court had jurisdiction to hear and determine the suit.



24. An application for the dismissal of the suit for want of prosecution was filed on 26th March 2018. And served on the appellant's counsel of the 27th March 2018.
25. The appellant by way of an affidavit sworn and filed in Court on 3rd May 2018 opposed the application for dismissal on the ground that he was not able to prosecute the suit since he had lost contact with his advocate. The appellant vides that affidavit prayed for more time to prosecute the matter.
26. The record shows that the matter came up for hearing of the application on 25th April 2018 when the appellant's counsel indicated that he required 30 days for him to put in a submissions in reply to the respondent's submissions.
27. The Court allowed them 7 days to file the submissions in reply. That was despite an earlier order granted on 20th June 2018 requiring compliance by close of business that day.
28. On the 28th June 2023 when the matter came up counsel for the plaintiff brought to the attention of the Court the fact of there was an application for dismissal of the suit for want of prosecution.
29. The record does not show who was acting for the defendant then but it would appear that the Court despite being informed of there being an issue of jurisdiction, proceeded to record:-

“ Court : I have noted that the matter was pending why an application dated 26th March 2018 seeking to dismiss the suit for the want of prosecution. That is five years ago. I see no reason why the suit should not be dismissed. The application 26/3/2018 is allowed. Suit is dismissed for want of prosecution. File is closed.

Hon. R.L MUSIEGA.

Senior Resident Magistrate 28/6/2023.”

30. I have reproduced that part of the record to highlight the fact that the Court in dismissing the suit and did not hear the parties.
31. Although the application was to be disposed off by way of written submissions, the Court on the 28th June 2023 did not address the all-important question of jurisdiction that Ms. Asiga Advocate for the plaintiff raised.
32. The application was filed at a time when the Court had the jurisdiction to entertain it. However, in the intervening period between 3rd December 2019 and 28th April 2023 jurisdiction of the Lower Court was suspended. That would appear to me to be the reason why the matter was never brought up between 5th July 2018 and 28th June 2023.
33. It is the considered view of this Court that the learned Honourable Magistrate should have heard MS. ASIGA Advocate on the issue of jurisdiction and hear what she had to say about it.
34. The nature of the application necessitated a hearing because for the Court to properly exercise its power under Order 17 Rule 2 [1] of the civil procedure, the parties must show cause why the suit should not be dismissed for want of prosecution.
35. It was even more important for the Court to hear the parties since its jurisdiction had been restored barely 2 months before.
36. The Court had jurisdiction on the 28th June 2023 to hear the application. It should have heard the application but sadly the record shows that the Magistrate simply took note of delay of 5 years and dismissed the suit summarily.



37. In my view, justice was not served in the circumstances. It is rather strange why the magistrate did not consider dismissing the application for want of prosecution since this was the defendant's application and he was absent on that day. At least the record does not show representation on their part.
38. It is also not clear why the matter was before the Court on 28th June 2023. It is not possible to tell what was coming up that day.
39. The appellant in this appeal has sought to explain why they delayed in prosecuting the matter. He says that when the issue of jurisdiction of the Lower Courts was the subject of litigation in Court they could not proceed with the matter.
40. In my considered view that is an excusable cause for delay.
41. The appellant could not be expected to prosecute a matter before a Court that was not competent to try it.
42. The respondent in this appeal has carefully avoided wading into the arguments on whether delay was caused by want of jurisdiction on the part of the trial Court.
43. By failing to address this Court on that issue the respondent has left this Court with no choice but to accept the reasons advanced by the appellant.
44. I would have been interested to see how the respondent would have explained the period between 3rd December 2019 and 28th April 2023 when the Lower Courts' jurisdiction was in limbo.
45. It is the finding of this Court that the appellant has met the test for setting aside the order dismissing the suit. The period that was spent on resolving the issue of jurisdiction could not operate to disadvantage the appellant.
46. It was clear why the appellant did not prosecute the matter during the 5 year period.
47. What about the issue of the failure to annex the decree or order in the record of Appeal?
48. The Courts have spoken time without number on the need for parties to ensure that their pleadings are in order to assist the Courts in determining that matters that come before them.
49. The failure to include a decree or order in a record of appeal has been held to be a fatal omission which may culminate in the striking out of an appeal.
50. In considering the effect of that omission this Court looked at the overriding duty of the Court to do justice. The appeal raises an important issue of what caused the delay in this matter. Each case is to be judged on its own facts.
51. I have held that the issue of the time taken on litigation on jurisdiction of the Lower Courts was such an important reason that in my view the Court should have looked into before determining whether or not to dismiss the suit.
52. The failure by the Court to hear the appellant on that important question has weighed in heavily on the decision of this Court to allow the appeal
53. The right to a fair hearing being one of the non-derogable rights, the Court should have been show in dismissing the suit considering the totality of the circumstances.
54. This Court appreciates the responsibility of Courts to apply the provisions of the law in a manner that promotes the attainment of the highest standards of human rights and developing the law to give effect to a right or fundamental freedom.



55. The appellant was the victim of a hurried decision of the Lower Court that denied him the right to be heard. Article 25 of *the Constitution* of Kenya sets out the right to be heard as one of those rights that may not be limited. The appeal herein has simply been entertained in furtherance of this right because in the Court's view, to deny the appellant an opportunity to prosecute the appeal on account of failure to include the order dismissing the suit would amount to an aggravated injustice to him.
56. The Order complained of is only one. Dismissal of the suit for want of prosecution. The same is clear and can be gleaned from the record even without inclusion of a formal order.
57. In the end this Court allows the appeal and directs that the matter be immediately remitted to the Lower Court for hearing and determination.
58. It is further ordered that the costs of this appeal shall abide by the outcome in the Lower Court.
59. Further, considering the age of this matter the appellant is to ensure that the same is set down for hearing within 30 days from the date of its receipt by the Lower Court.
60. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

HON. A.M MUTETI

JUDGE

In the presence of

Kiptoo: Court Assistant

Kibuka Macharia & /co. for the Appellant

Mr. Macharia holding brief Muchiri for the Respondent

