



**Mahando v Chelagat & 2 others (Civil Appeal E001 of 2022)
[2024] KEHC 12185 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E001 OF 2022
F GIKONYO, J
OCTOBER 15, 2024**

BETWEEN

VINCENT ODHIAMBO MAHANDO APPELLANT

AND

EMILY CHELAGAT 1ST RESPONDENT

BENARD CHERUIYOT 2ND RESPONDENT

KEBENEI JOSEPH 3RD RESPONDENT

*(Being an appeal from the ruling of the Hon. A.N. Sisenda (R.M.)
in Narok CMCC No. 237 of 2015 delivered on 24/01/2022)*

JUDGMENT

Impugned ruling

1. The subject of this appeal is the dismissal of the appellant's Notice of Motion application dated 03/11/2021 by the trial court in a ruling in Narok in Civil Suit No 237 of 2015 delivered on 24/01/2022. But, essentially, the relief sought in the appeal is reinstatement of the suit.

Background

2. The appellant instituted the instant suit against the respondents vide a plaint filed on 28/10/2015, seeking general and special damages based on a road traffic accident that occurred on 12/10/2012 in which the plaintiff sustained serious injuries.
3. The 3rd respondent entered appearance. After several failed attempts by the appellant to trace the 1st and 2nd respondents sought leave of court through the application dated 20/08/2018 to serve them through substituted service. Failure by the 1st and 2nd respondents to enter an appearance resulted



in the appellant requesting for default judgment against them which was endorsed by the court on 18/12/2021.

4. Thereafter the court directed that the matter be set down for a formal proof hearing. The court did not issue a date for the hearing hence the plaintiff sought for the same through the court registry.
5. The interlocutory judgment was entered on 18/12/2018. In 2019 they started physical following up with the registry for a date to no avail as their clerks were informed that the court file was missing. In 2020 when COVID-19 hit the country they could no longer pursue the court file as court operations were paralyzed by the pandemic.
6. In 2021 when the judiciary streamlined court operations, they wrote to the court registry inquiring whether the court file had been found to enable them to fix a hearing date for the suit vide letter dated 20/03/2024 and received by the registry on 01/10/2021. On the said date their clerk was informed that the court file had been traced and upon perusal of the file, they realized that the case had been dismissed by the court on its own motion.
7. Consequently, on 16/11/2021 they filed an application to reinstate the suit. The application was dismissed by the court hence the current appeal seeking to set aside the subordinate court's ruling of 24/01/2022 and orders that the matter proceed to full hearing.

The appeal.

8. Vide memorandum of appeal dated 21/02/2022, the appellant has cited 3 grounds of appeal as follows;
 - i. That the learned trial magistrate erred in law and fact in dismissing the appellant's application to reinstate the suit.
 - ii. That the learned trial magistrate erred in law and fact in not considering the affidavits submissions and authorities cited by the appellant.
 - iii. That the learned trial magistrate erred in law and fact in not considering the appellant had reasonable grounds to reinstate the suit.
9. In the end, the appellant urged this court to allow the appeal with costs and set aside the ruling of the subordinate court dated 24/01/2022 and order the matter to proceed to a full hearing.

Directions of the court.

10. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

11. The appellant invited this court to re-evaluate the case in both fact and law and set aside the ruling dated 24/01/2022 ought for having been decided on wrong principles and in disregard of the evidence tendered before the court. The appellant relied on the case of *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR
12. The appellant submitted that the circumstances leading to the dismissal of the appeal herein were neither deliberate nor intended to delay the course of justice. Thus, urging this court to allow the appellant's case to be heard on merit; compensation for the pain and suffering he sustained as a result of the accident that is the subject matter of the suit. The appellant relied on Order 12 Rule 7 of the *Civil Procedure Rules, Thyaka Nthenya Jane & another v Mulandi Mutanda* [2021] eKLR, *Shah v Mbogo & another* [1967] EA 116, *Philip Keipto Chemwolo And Mumias Sugar Co. Ltd v Augustine Kubende*



[1982-88] KAR 1036, and *Richard Nchapi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR.

The Respondent's Submissions

13. The respondent did not file written submissions despite having been served.

Analysis And Determination

Duty of court

14. This being a first appeal will reevaluate the evidence adduced before the trial court and facts arising therefrom; and arrive at its own conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify first-hand- a benefit this court did not have. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
15. This court has considered the record of appeal, and the appellant and respondent's submissions.

Issues for determination

- i. Whether this court should set aside the ruling of January 24, 2022 and reinstate the suit for hearing.

Setting aside dismissal of, and reinstating suit.

16. The appellant argues that the circumstances leading to the dismissal of the appeal herein were neither deliberate nor intended to delay the course of justice. The appellant contends that he attempted to fix this matter for hearing but the court file could not be traced; and COVID-19 caused further delay in the prosecution of the case as the court's operations had been paralyzed.
17. The appellant contended further that, although the court indicated that the appellant was served with a notice to show cause why the suit should not be dismissed for want of prosecution, the notice was never received by the appellant.
18. The appellant acknowledged the need for an end to litigation, but which should never be at the expense of serving justice- a belief encapsulated in the words of the famous lord Atkin' Finality is a good thing, but justice is better'.
19. For those reasons, the appellant prayed for the suit to be reinstated for hearing so that he be compensated for the pain and suffering he sustained as a result of the accident that is the subject matter of the suit.
20. Reinstatement of a suit that had been dismissed, is a calm request to the discretion of the Court; not to send the aggrieved party away from the judgment seat unheard. Justifying caution not to exercise judicial discretion in a manner that will result in an injustice. This broader approach has been fortified in jurisprudence starting with *Shah v Mbogo*, coming through subsequent building blocks- judicial decisions without number- culminating into robust underpinning provided by the constitutional imperatives on access to justice (art. 48), protection and equal benefit of the law (art. 27) as well as right to fair hearing (art. 50) and principles of justice in article 159 of the *Constitution*; clearly emphasizing on service of substantive justice to avoid an injustice.



21. See a pointedly assertion of this approach in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal 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. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.

22. The appellant has, nonetheless, fastened a quarrel; that he was not served with the notice for dismissal of his suit. Notices for dismissal of suits are ordinarily given by the court through such mediums as a party's email address (where provided), cause lists and notices in the court's notice boards and other digital forums which are accessible to the public as well as the parties in the suit. It has not been shown of a strict requirement of personal service of the notice for dismissal of suit for want of prosecution.
23. Be that as it may, the circumstances of this case as have been succinctly stated and explained by the appellant, show quite an enthusiastic litigant who intended to have his suit heard, except, he was prevented by factors beyond his control.
24. The reasons given are sufficient and persuade the Court that the non-attendance by the appellant at the hearing of the dismissed suit was not a deliberate attempt to obstruct or delay justice. Accordingly, he deserves an opportunity to be heard on the merits of his suit.
25. In the upshot, this court finds that the appeal succeeds and is allowed in the following specific terms:
- i. The ruling of the subordinate court dated 24/01/2022 is hereby set aside.
 - ii. The suit is reinstated for hearing on merit.
 - iii. The trial court file is hereby remitted back for hearing and disposal by any competent magistrate.
 - iv. In the circumstances, a fair order on, is that each party shall bear their respective costs on the appeal.
26. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 15TH DAY OF OCTOBER, 2024.

F. GIKONYO M

JUDGE

In the presence of: -

1. Ms. Njoroge for appellant
2. Murimi Ndumia Advocates for respondent-absent
3. Otolu C/A

