



**Kiboi v Kenya Power & Lighting Co. Limited & another (Civil Appeal
7 of 2017) [2023] KEHC 3860 (KLR) (24 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL 7 OF 2017
G MUTAI, J
APRIL 24, 2023**

BETWEEN

JOHN SENTEU KIBOI APPELLANT

AND

KENYA POWER & LIGHTING CO. LIMITED 1ST RESPONDENT

SHADES HORTICULTURE LIMITED 2ND RESPONDENT

JUDGMENT

1. Article 159 (2) of *the Constitution* of Kenya, 2010 lists principles under which Courts and Tribunals exercise judicial power. This Court notes with dismay that the principle least mentioned in applications before judicial and quasi-judicial bodies is that given in Article 159 (2) (b). In most matters before judicial bodies, including this one, reliance is placed on Article 159 (2) (a) and (d).
2. This appeal arises from the decision of the Honourable Chief Magistrate S.M. Shitubi delivered on 20th April 2017. The application before the Court, which the said Court dismissed sought to reinstate a suit that had been dismissed for want of prosecution on 29th November 2012.

Appellants submissions

3. The Appellant avers that he was not indolent in prosecuting the matter before the subordinate Court. He argues that the case before the subordinate court was dismissed for want of prosecution without his advocates being heard despite having filed Notice of Change of Advocates. It was urged that the Appellant was very keen to prosecute the case in the Court below and that the instant appeal ought therefore to be allowed.
4. The Appellant asserts that although the offending posts, that caused him to file the suit, were removed, compensation is still due. He placed reliance on *Christopher N. Omare & Another t/a Omare & Partners v Safaricom Ltd* [2016] eKLR.



Respondents submissions.

5. The 1st Respondent submits that the suit before the subordinated court had twice been dismissed due to the Appellant's failure to prosecute it. They state that the issue before court is one based on the exercise of discretion by the Court below. The Court cannot lightly interfere with the same it was urged. They place reliance on Peter Kipkurui Chemoiwo v Richard Chepsergon [2021] eKLR, in which the Court relied on Mbogo & Another v Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

6. The 1st Respondent opposes the appeal.
7. They argue that the issue of change of Advocate was considered at page 115 of the Record of Appeal. They place reliance on the cases of Fabio Luchetti & Another versus Maria Zaccagnino [2018] eKLR.
8. This matter came before me on 16th January 2023. As there were submissions in the Court file I fixed the same for judgment on 8th March 2023. There has been a delay in delivery of the same as I underestimated the number of files I handled in Kajiado and Machakos High Courts during the RRI exercise. My sincere apology for the delay.

Analysis

9. The application before the subordinate court was filed and served on 1st August 2012. A Notice of Change of Advocates was filed on 2nd August 2012. The Appellants also filed an application dated 7th August 2012 to transfer the suit to Machakos High Court on the ground that the court below lacked jurisdiction.
10. When the matter came up on 29th August 2012 the suit was dismissed for want of prosecution by the Hon. M.A. Ochieng, SRM. The Appellant then filed an application dated 23th November 2012. In the said application the Appellant relied, in the main, on Articles 50 and 159(2) of *the Constitution* of Kenya, 2010.
11. It is clear that the Appellant was indolent in his prosecution of the matter before the Court below. I have not seen a reasonable explanation for the delay. The Advocates on record having been served on record there was proper service. The new advocates, having filed Notice of Change a day later, knew or ought reasonably to have known the status of the file.
12. In any case, upon taking over, new advocates have opportunity to confirm status of the matter from three sources; the Court file, the defence advocates and the predecessor.
13. I abhor the idea that the Appellants right to change advocates should infringe on the Respondent's right to have their case heard and determined expeditiously. If this were to be case, parties will change advocates on the eve of a hearing and sit down waiting to be re-served, hence scuttling a hearing.
14. It should also be noted that the same fate that fell on Appellant's first advocates, befell the firm of Naikuni Ngah and Miench Advocates when Ms J. N Pareno advocates Advocates took over. They alleged that there were “inadequacies” in the application, in a Further Affidavit filed on 31st October 2016.



15. That affidavit telling. It is clear that the Appellant was having his cake and eating it. He was pursuing three other avenues, that is Energy Regulatory Commission, ombudsman and the High Court. The Appellant was doing everything else except to prosecute the suit in court.
16. I therefore concur with the court below that the Appellant was not keeping note of what was happening. This is an attitude that is anathema to the dispensation of justice. The Respondent are then left in a state of suspended animation. Their fate is left in limbo while be inundated with applications from all sorts of bodies.
17. The time provided under Order 17 Rule 2 (1) had passed. I concur that the court is required not only to do justice but to have expeditious disposal of the cases.
18. The current application and proceedings bear witness to the kind of malaise the applicant was suffering from. On 5th December 2012, the matter came to court and was sent back to the registry. On 20th February 2013 the Appellant took a date, that is 19th March 2013, but did not attend court.
19. The matter was left to lie till 18th November 2016 when the application was fixed for 23th November 2017. This is a whole 4 years and 8 months later. That is how a 2012 application ended being heard in 2017. I am convinced that the Appellant was not keen on the case.
20. A similar issue had been dealt with in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*, where Justice Law, J.A as then he was succinctly stated: -

“I am of the opinion that the provisions of the Civil Procedure Rules or the dismissal of suits for want of prosecution do not purport to be exclusive, and do not fetter the court’s inherent jurisdiction to dismiss the suits in circumstances not falling directly within those provisions, if it is necessary to do so to prevent injustice or abuse of the process of the court. With respect, I consider Saldanha’s case (supra) to have been wrongly decided, in so far as it holds that the court’s inherent jurisdiction cannot be invoked in cases falling outside those specifically provided for in the rules.”
21. I do find that the Appellant has not proved any of the grounds of appeal. Pendency of the suit is not useful to the parties. The Appellant should have expeditiously disposed of the Application for reinstatement. He didn’t.
22. In the circumstances this appeal is for dismissal.

Determination

23. The upshot of the foregoing is that: -
 - a. This appeal lacks merit and is consequently dismissed with costs of Ksh. 120,000/= to the 1st Respondent.
 - b. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF APRIL 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

GREGORY MUTAI

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Winnie Migot – Court Assistant

No appearance for the Applicant

No appearance for the Respondent

