



REPUBLIC OF KENYA



**Jomo v Coramandele Resort t/a Kinondo Kwetu Beach Hotel & another
(Civil Suit 183 of 2015) [2023] KEHC 22212 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 22212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 183 OF 2015
F WANGARI, J
JUNE 16, 2023**

BETWEEN

DICKSON MWALIMU JOMO APPELLANT

AND

**CORAMANDELE RESORT T/A KINONDO KWETU BEACH
HOTEL 1ST RESPONDENT**

ANDREW LEKANDURO JUMAMOSI 2ND RESPONDENT

RULING

1. The Applicant moved the Court through a Notice of Motion dated March 21, 2022 and. The application sought the following orders;
 - a. That the Honourable court be pleased to set aside the ruling made on the January 28, 2022 dismissing the Appellant/ Applicant's appeal for want of prosecution.
 - b. That the Appellant/ Applicant's appeal be reinstated
 - c. That costs of this application be in the cause.
2. Upon service of the application, the Respondents filed a replying affidavit opposing the application on grounds that the appeal having been foiled in 2015, the Appellant took no steps in prosecuting the same and it was until June 2022 when the Record of Appeal was filed. They stated that the delay was inordinate, hence the application should be dismissed.
3. The basis of this application is that the Plaintiff the Memorandum of Appeal against the Judgment and Decree of Hon Njagi, Resident Magistrate in Kwale Civil Suit No 118 of 2013, delivered on December 2, 2015. The appeal was dismissed for want of prosecution on January 20, 2022 by Mativo J (as he then



was). The Appellant has now moved this court to have the appeal reinstated on grounds that the delay was not inordinate as the typed proceedings had not been availed by the court despite the request for the same from year 2015 till January 19, 2022. The typed proceedings were finally availed leading to the filing of the Record of Appeal on June 2, 2022.

4. The Applicant stated that on January 20, 2022, when the matter was coming up for hearing of the Notice to Show Cause why the matter should not be dismissed for want of prosecution, the trial judge, Mativo J started the virtual court session at 8 am instead of 9 am as per the cause list for the day. The plaintiff later that day, came to learn that the appeal had been dismissed for want of prosecution.

Analysis and determination

5. I have considered the application, and filed submissions together with the authorities relied upon by the parties, as well as the law and in my respectful view, there is only one issue for determination which is whether the Applicant has made out a case for grant of orders it seeks. Corollary to this finding is the issue of costs.
6. Order 17 Rule 2 (3) of the [Civil Procedure Rules](#) provides, inter alia: -
 - ' In any suit in which no application has been made or step taken by either party for one year, the court may give Notice in writing to the parties to show cause why the suit should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.
7. The application was brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules. The provide as hereunder;

1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B.

Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) The just determination of the proceedings;
 - (b) The efficient disposal of the business of the Court;
 - (c) The efficient use of the available judicial and administrative resources;
 - (d) The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) The use of suitable technology.'



Section

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.'

8. The essence of dismissal of suits for want of prosecution is the need for expeditious dispensation of suits. In *Mobile Kitale Service Station vs Mobil Oil Kenya Limited & another [2004] eKLR*, it was held as follows;

' I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.'

9. This court has a duty to determine the application on merits. In *Mwangi S Kimenyi v Attorney General and Another, Civil Suit Misc No 720 of 2009*, the court on considering whether or not the suit should be dismissed for want of prosecution stated as follows: -

'When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- 1) Whether the delay has been intentional and contumelious;
- 2) Whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;
- 3) Whether the delay is inordinate and inexcusable;
- 4) Whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- 5) What prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.'

13. It is a fact that the Plaintiff took steps in following up the proceedings, that is from 2015 to February 4, 2020. It is not until the matter was listed for Notice to Show Cause as to why the suit should not be dismissed for want of prosecution that on January 19, 2022, a reminder was done on the status of typed proceedings. That is almost 2 years after the last communication to the court seeking to know the status of the typed proceedings in the lower court file.



14. Further, when the matter was dismissed for want of prosecution, it took the Plaintiff 2 months to file this application. There is no reason given as to why it took the Plaintiff that period before filing the application for reinstatement of suit. Considering that the appeal was filed in 2015, from the time the communication was done following up the typed proceedings i.e February 4, 2020 to January 19, 2022 as stated herein above, and the period taken from the time of dismissal of the suit to filing this application i.e January 21, 2022 to March 21, 2022, I find that the delay was inordinate and inexcusable, hence the application has got no merits.
15. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. In this case, each party is to bear its own costs.
16. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The application dated March 21, 2022 lacks merits and is hereby dismissed.
 - b. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JUNE, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Musyoki Advocate h/b for Nyabena Advocate for Applicant/ Appellant

Sangi Advocate h/b for Omwenga Advocate for Respondent

Barile, Court Assistant

