Wambia v Namuvuya (Civil Case 74 of 2013) [2023] KEHC 18918 (KLR) (23 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18918 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 74 OF 2013

JRA WANANDA, J

JUNE 23, 2023

BETWEEN

WYCLIFFE JACOB WAMBIA ..... APPELLANT

AND

ELIZABETH NAMUVUYA ..... RESPONDENT

RULING

1. Before the Court is the Appellant's Notice of Motion dated 14/06/2022 seeking the following orders;

   i. [Spent]

   ii. That this Honourable Court be pleased to vary or set aside its orders issued on the 5th day of April 2019 dismissing the Appeal for want of prosecution.

   iii. That in the alternative, leave be granted for the enlargement and/or extension of time to file the Record of Appeal out of time

   iv. That upon reviewing, varying and setting aside its orders of 5th April 2019, the Honourable Court be pleased to reinstate the instant Appeal for determination on merits and give directions on its disposal.

   v. That of this Application be provided for.

2. The Application is stated to be brought under "order 45 rule 51, order 51 rule 1 of the *Civil Procedure Rules*, section 3, 3B and 80 of the *Civil Procedure Act* and all enabling provisions of law". It is premised on the grounds set out therein and the separate Affidavits sworn by David Rioba Omboto, Advocate and Wycliffe Jacob Wambia, the Appellant, respectively.

3. In his Affidavit, Mr. Omboto depones that he has the conduct of this matter on behalf of the Appellant, the Applicant lodged the Appeal vide the Memorandum of Appeal dated 3/06/2013, the Applicant subsequently applied for copies of typed proceedings and Judgment for purposes of lodging the Record

of Appeal, between the year 2017 and 2019 the Court file went missing, efforts to trace the same were futile, the Respondent seemingly applied to have the Appeal dismissed for want of prosecution and the same was dismissed on 5/04/2019, the Respondent has set execution process in motion and has already issued a Notice to Show Cause against the Appellant, the parties are relatives, the Appellant stands to suffer injustice as dismissal orders are an affront to the Appellant's constitutionally entrenched right to be heard before condemnation and the right of Appeal, the rules of natural justice demand that a party to a suit ought to be heard before being condemned, dismissing the Appeal is an affront to the Appellant's right. He implored the Court to give directions on disposal of the Appeal on merits and added that the Court has unfettered discretion to grant the orders sought

4. In the second Affidavit, Mr. Wambia depones that he was dissatisfied/aggrieved by the Judgment delivered by the lower Court in favour of the Respondent on 24/05/2013 and lodged this instant Appeal, the Judgment arose out of a claim filed by the Respondent (his step-sister) for alleged malicious prosecution where the Respondent was acquitted, this Appeal was however dismissed on 5/04/2019 for alleged want of prosecution, the Respondent has set execution process in motion and has issued a Notice to Show Cause against him, he stands to suffer great loss and damage if a warrant of arrest is issued against him, rules of natural justice demand that a party to a suit should not be condemned unheard, the Appeal raises serious issues of points of law and fact which may result in the setting aside of the Judgment.

5. In opposing the Application, the Respondent swore the Replying Affidavit filed in Court on 1/07/2022. In the Affidavit, she deponed that it is not true that the Court file in respect of the Appeal went missing between the year 2017 and 2019 as alleged by the Appellant, there is no evidence that the Appellant ever wrote to the Court complaining of the missing file, the Court due to inaction in setting down the Appeal for hearing fixed the same for Notice to Show Cause for dismissal under order 17 rule 2, upon the Judge being satisfied that there had been an inordinate delay of 4 years since the last step was taken the Appeal was dismissed for want of prosecution, the Appellant's Advocate did not attend Court on 5/04/2019 when the matter was called out, a clear indicator that the Appellant and/or his Advocate were not interested in pursuing the Appeal, the Application to reinstate the Appeal was filed almost 3 years after the dismissal which period is inordinate and inexcusable, the Appellant was accorded every right to be heard but chose to ignore to attend the Notice to Show Cause in spite of service, the Appellant has been awaken by the Notice to Show Cause that is pending against him having failed to comply with the conditions issued on stay pending Appeal and not having settled the decretal sum which continues to accrue interest.

6. Pursuant to directions given that the Application be canvassed by way of written Submissions, the Respondent filed her Submissions on 30/03/2023 while the Appellant filed his on 2/05/2023.

Appellant's Submissions

7. In his Submissions, the Appellant's Counsel reiterated the matters already referred to in the Appellant's two Affidavits and added that under order 45 rule 1 of the *Civil Procedure Rules* 2010, the Court has powers to review the orders. He cited the cases of *Ajit Kumar Rath v State of Orisa & Others, 9* Supreme Court Cases and *Tokesi Mambili & Others v Simon Litsanga* and submitted that order 45 Rule 1 requires proof that there has been discovery of "new and important evidence", "mistake" or "any sufficient reason". He argued that in this case the Court has powers to review and/or set aside the orders on account of "any other sufficient reason" and that Courts also have powers to set aside orders dismissing a suit for whatever reason. He then cited the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)*, Civil Case No. 212 of 2009 reported in [2015] eKLR and added that the Appeal was dismissed without being heard on merit which is an injustice, the file went

missing and frantic efforts to recover became futile, this was not the mistake of the Appellant, the Appellant had already filed a Memorandum of Appeal and was ready to prosecute the Appeal were it for the missing file.

8. Counsel submitted further that the failure to file a Record of Appeal on time was purely a procedural issue. He cited the East African Court of Appeal case of *Ngoni Matengo Co-operative Marketing Union Ltd v Alimohamed Osman* (1959) EA 577 and added that section 3A of the *Civil Procedure Act* gives the Court inherent powers to issue orders to set aside. He also cited the case of *Karani v Bildad Wachira* [2016] eKLR.

9. Counsel submitted that the Respondent has opposed the Application on technicalities, the law has elaborately made provisions which cushion the Court from leaning on technicalities at the expense of doing justice, a party in a dispute must be given an opportunity to be heard, the decision to dismiss the Appeal is a violation of article 159 of the *Constitution* of Kenya which calls on this Court not to pay undue regard to procedural technicalities but strive to ensure that substantive justice is administered, the Appellant stands to suffer great loss and damage if the Respondent proceeds with execution as she has already issued a Notice to Show Cause.

Respondent's Submissions

10. The Respondent's Counsel, in his Submissions, also reiterated more or less the matters set out in the Respondent's Replying Affidavit. There is therefore no necessity to recite the same.

Analysis & determination

11. Upon considering the Application, the Affidavits and Submissions filed, I find the issue that arises for determination herein to be "whether the order dismissing this Appeal for want of prosecution should be set aside and the Appeal reinstated"

12. I have looked at the record and noted that the Memorandum of Appeal was filed on 4/06/2013, by the lower Court's letter dated 29/10/2013 the lower Court file was then forwarded to this Court, by the letter dated 25/11/2013 the Respondent's Advocates Mwinamo Lugonzo & Co. requested that since their Bill of Costs had not yet to be taxed before the lower Court, the lower Court file be returned there for such purpose, by the letter dated 10/06/2014 from the Deputy Registrar of this Court and addressed to the Appellant's Advocates, Rioba Omboto & Co., the following was communicated:

> " The above matter and our letter dated 31st October, 2013 refers.
>
> We informed you that we received the lower Court file Eldoret CMCC No. 262 of 2011 for appeal purposes and further requested you to prepare record of Appeal and Decree so that we can place the matter before the Honourable Judge for admission. You have not responded.
>
> Consequently, and pursuant to the request by M/s. Mwinamo Lugonzo & Company Advocates vide their letter dated 25th November, 2013 now return back the above lower Court file for taxation purposes and thereafter the same to be returned back to us."

13. The lower Court file must have then been received at the lower Court and the Respondent's Bill of Costs taxed since on 18/12/2014, the Appellant filed an Application under Certificate of Urgency seeking stay of execution on the ground that the Respondent had obtained a Warrant of Arrest from the lower Court in execution of the Decree. The Appellant then obtained interim *ex parte* orders of stay in this Court. The parties thereafter appeared in Court on several occasions in respect of the said Application between December 2014 and January 2016 but the Application does not appear to have

been prosecuted. From the record, it seems to have been left in abeyance. Seemingly, upon obtaining the interim stay orders, the Appellant's Advocates knowing that the orders protected their client from execution, tactfully and deliberately opted "to go to sleep".

14. In view of the Appeal remaining dormant since the year 2016, by its Notice dated 6/11/2018, the Court issued a "Notice of Dismissal for Want of Prosecution" to the parties. The Notice indicated that the Appeal had been listed for 6/12/2018 for the parties to show cause why the Appeal should not be dismissed for want of prosecution.

15. The Notice bears the stamps of the two law firms on record in the matter, Messrs Rioba Omboto & Co. and Messrs Mwinamo Lugonzo & Co. thus confirming that the same was served on both law firms on 28/11/2018.

16. As scheduled, the matter came up before Hon. Lady Justice G. Sitati on the said 6/12/2018. There was no appearance by both parties. At that point, the Judge obviously had all the right, reason and justification to dismiss the Appeal. She however did not do so and instead, stood over the dismissal to 10/1/2019. There is however no record in the file on whether the matter came up on 10/1/2019 as ordered. In fact, there is no record of any further action in the file until 5/04/2019 when the matter came up before Hon. Lady Justice H. Omondi on 5/04/2019. On that date, again neither of the parties attended Court and the same was accordingly dismissed for want of prosecution under order 17 rule 2 of the *Civil Procedure Rules*.

17. By their letter dated 8/04/2019, 3 days after the dismissal, the Respondent's Advocates requested the Court, pursuant to the dismissal, to return the lower Court file to the lower Court for the execution process to continue. The Respondent's Advocates apparently were not aware or had forgotten that the file had already been returned to the lower Court as earlier stated. However, the letter demonstrates that although they were not in Court on the said date of dismissal, they learnt about it almost immediately.

18. From the foregoing recital, it is evident that although the Appeal was filed on 4/06/2013, up to the date of dismissal on 5/04/2019, 6 years later, the Appellant had not yet filed a Record of Appeal. The only activity that was initiated by the Appellant since the Appeal was filed was in respect of the Appellant's Application for Stay of execution. The Application was filed on 18/12/2014, attracted a few Court appearances and after the last appearance in January 2016, was also forgotten about by the Appellant and presumably abandoned.

19. The above recital also demonstrates that although the lower Court file was forwarded to this Court in October 2013 for the purposes of "admission" and the Appellant invited to use it to prepare the Record of Appeal, the Appellant never bothered to do so. As a result, and upon notification to the Appellant in June 2014, the lower Court file was returned to the lower Court for purposes of taxation of the Respondent's Bill of Costs.

20. Up to the date of the dismissal of the Appeal, the lower Court file had not been re-transmitted back to this Court for "admission". Needless to state, it is an Appellant's obligation to initiate and follow up on the process of typing of the lower Court's proceedings and ensure certification thereof and transmission of the lower Court file to the High Court for purposes of "admission" and prosecuting of the Appeal. Without an Appellant's zeal, vigilance and resolve to follow-up on the above, the said process cannot gather steam. I say all these to demonstrate that the Appellant must bear all the blame for the delay to prosecute the Appeal.

21. From my recital of the chronology of events, it is also evident that the Appellant's Advocates consistently failed to attend Court, on one occasion even after the Court went out of its way and used its own process server to serve them with a hearing notice. A case in point is the non-attendance

on 6/12/2018 despite the Court serving the Advocates with the "Notice of Dismissal for Want of Prosecution".

22. In the present Application, the Appellant's Counsel has cleverly ignored all the above matters that I have recited and has instead, chosen to dwell exclusively on the allegation that that they were not served for the Court attendance of 5/04/2019 when the Appeal was dismissed. Granted, there may be no conclusive evidence in the record proving that the Appellant's Advocates were served or notified to appear in Court on 5/4/2019. However, should this only one event be isolated from the rest of the equally relevant events making up the history of the matter? Would it be fair to only consider this one event instead of looking at the entire record holistically. I do not think so.

23. In any event, my view is that when the Appellant was served with the Notice to attend Court on 6/12/2018 for dismissal and failed to attend, the Court reserved the option of dismissing the Appeal either on the same date or on any other date thereafter without any further reference to the Appellant. The bottom line is that the failure by the Appellant to attend Court on 6/12/2018 meant that cause was not shown why the Appeal should not be dismissed. This position cannot be deemed to have changed simply because the dismissal was not made on the same 6/12/2018 but subsequently on 5/04/2019.

24. One more glaring point that goes against the Appellant is that although the Appeal was dismissed for want of prosecution on 5/04/2019, the present Application was filed on 11/06/2022, a whole 3 years after the dismissal. Either the Appellant's Advocates deliberately chose not to act expeditiously or were not even aware of the dismissal for 3 years. To my mind, if the latter is the explanation as alluded to in the Supporting Affidavit, then it is a serious indictment demonstrating glaring and inexcusable lethargy on the part of the Appellant and his Advocates. Is it possible that a vigilant, focussed and serious Appellant would file an Appeal in the year 2013, make his last attendance in Court in 2016, not make any further effort to move the Court until the year 2022 upon learning that his Appeal had been dismissed for want of prosecution 3 years earlier in the year 2019?

25. Compare the above to the speed of the Respondent's Advocates, who despite also not being in Court on 5/04/2019 when the Appeal was dismissed, apparently learnt of the dismissal almost immediately thereafter and acted accordingly. I say so because as aforesaid, only 3 days after the dismissal, they delivered a letter to the Court requesting that pursuant to the dismissal, the lower Court file be returned to the lower Court for execution. Had the Appellant's Advocates demonstrated similar industry, then they would have moved the Court at a much earlier date.

26. In the circumstances, I agree with the submissions of the Respondent's Advocates that the Appellant and his Advocates were only woken up from their "deep slumber" and deceptively "comfort zone" when pursuant to the dismissal, the Respondent commenced steps to execute the lower Court Decree as a result whereof a Warrant of Arrest was issued and served upon the Appellant. Clearly, had there been no threat of execution, the Appellant and his Advocates would have continued with their "sleep" to date.

27. The Appellant's allegation that the delay to prosecute the Appeal was caused by the fact that the Court file in this matter "went missing" and that "frantic efforts to recover it became futile" is as absurd as it is laughable. I have perused the file and nowhere can I find any evidence that the file went missing at any time prior to the dismissal of the Appeal. It is no wonder therefore that no single correspondence of any kind has been exhibited to prove this bare allegation. I dare term the allegation that the Court file "went missing" to be nothing but a deliberate dishonest statement made with the full knowledge that it is untrue.

28. The Appellant's Counsel describes the decision to dismiss the Appeal as a violation of Article 159 of the Constitution which calls on this Court not to pay undue regard to procedural technicalities but strive to ensure that substantive justice is administered. With all the chronology of events and history set out hereinabove, can one justifiably really still describe the serious lethargy and inaction demonstrated herein as a mere procedural technicality? Unless the definition of "procedural technicality" has since changed, terming the above scenario as a mere procedural technicality cannot at all be correct.

29. In conclusion, I quote the following observations made by Hon. Justice W. Musyoka in *Nzoia Sugar Company Limited v West Kenya Sugar Limited* [2020] eKLR:

> "4. The application is premised on order 17 rule 2 of the *Civil Procedure Rules*, which provides:
>
> "Notice to show cause why suit should not be dismissed;
>
> (1) 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.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order."
>
> 5. The exercise of the power to dismiss a suit for want of prosecution under order 17 is a matter that is within the discretion of the court. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat and others & another* [2016] eKLR, the court stated as follows:
>
> > "11. Nonetheless, article 159 of the *Constitution* and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumbu* [1984] KLR 441 espoused that:
> >
> > "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

6. ....."

7. What then is the threshold? In *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR, the court considered the principles for dismissal of a suit for want of prosecution, where it stated as follows: -

> " The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution; see the case of *Ivita v Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

8. In *George Gatere Kibata v George Kuria Mwaura & another* [2017] eKLR, the court stated:

> " My understanding of the framework contained in Order 17 Rule 2 is that a court may suo moto dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.

9. Besides the legal framework set out in order 17 rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of *Ivita v Kyumbu* (1984) KLR 441 where it is summarized as follows:

> " The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."

9. .....

10. In *Mwangi S. Kimenyi v Attorney General and Another*, (2004) eKLR, the court stated:

    1. 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.

    2. 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."

11. .....

12. On whether the delay is inordinate and inexcusable, the court in *Mwangi S. Kimenyi v Attorney General & another* (*supra*) considered what constitutes inordinate delay, and said as follows:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable ...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."

13. In the present case, a period of two years had lapsed between the filing of the suit and the filing of the present application. Order 17 Rule 2 provides that a matter should have been pending for twelve months before the court, either on its own motion or on the application by a party, makes an order for its dismissal for want of prosecution. The last time the instant matter was in court was on the 31st October 2017, when the court dismissed the plaintiff's application for temporary injunction. The plaintiff has not offered any reason as to why the suit has never been prosecuted save for the fact that they are no longer in operation, averments which have not also been proved. It is, therefore, my finding and holding that the delay is inordinate and inexcusable. See *Jimmy Mutuku Kiamba v Nation Media Group Limited & 2 others* [2020] eKLR.

14. .....

15. .....

16. .....

17. .....

18. Balancing the positions of the two parties, I take the view that delay of two years in prosecuting a matter is inordinate and unreasonable. The plaintiff has not explained it. The mere fact that the defendant has not demonstrated prejudice is not sufficient to sustain a suit that the plaintiff has shown no interest in prosecuting for the two years before the application for dismissal was made. It would appear that the suit was filed for the sole purpose of obtaining injunctive orders, and once the same were denied the plaintiff lost interest in the matter.

19. Parties should file suits in court with a view to prosecute them. It should never be the case that suits are filed for the sake of it. They should not remain parked in the court's registry, filling space and creating a false sense of backlog of cases. A suit should be prosecuted, failing which it should meet the fate of dismissal for want of prosecution ....."

30. Applying the above principles to this instant case, I am not persuaded that the Appellant has demonstrated that he has been actively desirous to prosecute the Appeal. I find that the delay to prosecute the Appeal and also the delay to file the Application to reinstate the Appeal, after dismissal,

is too prolonged and inexcusable such that it will cause grave injustice to the Respondent if I were to allow the present Application. Accordingly, I decline to reinstate the Appeal.

Conclusion

31. In the premise, I order as follows;

    i. The Appellant's Notice of Motion dated 14/06/2022 is hereby dismissed.

    ii. The Appellant shall bear the costs of the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 23RD DAY OF JUNE 2023

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WANANDA J.R. ANURO

JUDGE