



**Kamau v Nganga & 2 others (Civil Appeal 89 of 2017)
[2023] KEHC 21920 (KLR) (Civ) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21920 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 89 OF 2017

DO CHEPKWONY, J

JULY 4, 2023

BETWEEN

VIRGINIA WANJIRU KAMAU APPELLANT

AND

EDWARD NGANGA 1ST RESPONDENT

BENSON KARANJA KARURU 2ND RESPONDENT

ALFRED AUGUSTIN KIBAARA 3RD RESPONDENT

*(Being an Appeal from the ruling and orders of Hon. Mr. P. Muholi (SRM)
delivered on 8th February 2017 in Milimani CMCC No. 5531 of 2003)*

JUDGMENT

Background

1. The appellant filed a notice of motion application dated August 1, 2016 against the respondents seeking the following orders;-
 - a. That the court order given on dismissing the suit on March 6, 2015 herein with all consequential orders be set aside and the suit be reinstated and fixed for hearing.
 - b. That the costs of this application be provided for.
2. The application was based on the grounds on its face and supported by the affidavit of Joan Waruguru Gakuya sworn on August 1, 2016.



3. In the supporting affidavit, the appellant deposed that she is an advocate in conduct of the matter on behalf of the appellant. She avers that the suit was commenced on June 9, 2003. On February 4, 2008 the matter was set down for hearing and it was consolidated with CMCC No 12794 of 2006 and CMCC No 5531 of 2003 became the moving file.
4. On October 19, 2010 the matter came up for hearing but the same was not listed on the day's cause list. It was later fixed for hearing on October 8, 2015 when they were informed that the suit had already been dismissed. It is only then that they learnt that the suit was dismissed and tried to locate the file to file so as their application to re-instate it but their constant visit to the registry bore no fruit.
5. She deposed that they were never served with a notice to show cause why the suit should not be dismissed as required by law and therefore, they were not aware that the suit had been dismissed.
6. In response to the application, the 2nd respondent filed a replying affidavit dated October 31, 2016. In summary, he deposed that the application lacks merit and the court must dismiss it with costs. He averred that the appellant was guilty of laches as the application had been overtaken by events owing to effluxion of time. That the suit was filed in 2003 and the appellant was not keen in prosecuting the same as the application was brought 13 years after the filing of the suit.
7. He stated that between 2003 and 2008, the appellant took no action to prosecute the suit. That later, on February 14, 2008, they set down the matter for hearing when the suit was consolidated with CMCC No 12794 of 2006. Again when the matter failed to be listed for hearing on October 19, 2016, the appellant never took any steps to prosecute the matter for a further 5 years. It is then that the court dismissed the suit for want of prosecution.
8. According to the 2nd respondent, the appellant should not claim that they learnt of the dismissal of the suit on October 8, 2015 as they took the date themselves and court record shows that the suit had already been dismissed. And from the date they learnt that the suit was dismissed, no immediate steps were taken by the appellant. To have the same prosecuted.
9. The reasons cited by the appellant against dismissal of the suit for want of prosecution were not reasonable as the delay was inordinate and inexcusable.
10. The application was canvassed by way of written submissions. A perusal of the record shows that only the Appellant filed written submissions dated November 15, 2016. It seems the rest of the parties did not file any submissions.
11. Upon consideration of the pleadings and the submissions, the trial court delivered its ruling on February 8, 2017, in which it found that it did not see the reasons for reinstating the suit as the appellant was not eager to prosecute the suit and therefore dismissed the application with costs.
12. Being aggrieved and dissatisfied with the ruling and orders of the trial court, the appellant lodged an appeal before this court by a memorandum of appeal dated March 6, 2017, wherein she raised the following grounds in support of her appeal;
 - a. That the learned trial magistrate erred in law and in fact in by finding that the suit in CMCC No 5531 of 2003 ought to be dismissed.
 - b. That the learned trial magistrate erred in law in failing to reinstate the appellant's suit in CMCC No 5531 of 2003.
 - c. That the learned trial magistrate erred in law and in fact in failing to appreciate that the appellant is desirous in prosecuting this matter.



- d. That the learned trial magistrate erred in law and in fact in failing to critically examine the issues brought in the appellant's submissions which established that Milimani CMCC No 5531 of 2003 ought to be reinstated.
13. The appellant prays for the following orders that: -
- a. This appeal be allowed.
 - b. This honourable court do set aside the ruling delivered in the lower court and reinstate the appellant's suit in CMCC No 5531 of 2003.
 - c. The costs of this appeal be awarded to the appellant.
14. This appeal proceeded for hearing by way of written submissions. The appellant filed written submissions dated April 19, 2022. The respondents did not file written submissions. This court will proceed to consider the submissions in its determination of the four grounds of appeal.

Analysis and Determination

15. This being a first appeal, this court is minded of its duty to re-analysing, re-evaluating and reconsidering the evidence that was adduced before the trial court so as to draw its own inference (See case of *Selle & another v Associated Motor Boad Co Ltd & others* [1968]EA 123)
16. This court has considered the record of appeal alongside the grounds of appeal, the submissions by the appellant and the cited authorities. It finds the following issues arise for determination:-
- a. Whether or not the appellant's appeal is merited?
 - b. Who bears the costs of this appeal?
17. On the first issue, the relevant provision of the law to guide on dismissal of suits for want of prosecution is anchored on order 17 rule 2 (1) of the *Civil Procedure Rules, 2010*. It provides as follows:-
- “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.”
18. According to the provisions of order 17 rule 2 of the *Civil Procedure Rules*, a suit can be dismissed for lack of prosecution if no action is taken for a period of one year prior to presenting the application for dismissal. In the wording of the said provision, the court can also *suo moto* list the matter for dismissal where no action is taken for a period of one year.
19. Further guide is on the case law in the case of *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015]eKLR, the court set out the principles for dismissal of a suit for want of prosecution 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.”

20. On the question of discretion of the court, the parameters on the exercise of court’s discretion were enunciated by the Court of Appeal in the decision of *Alex Wainaina T/A John Commercial Agencies v Janson Mwangi Wanjibia* [2015]eKLR. In that case the court held that;

“The principles governing the exercise of judicial discretion were well set out by Ringera JA (as he then was) in the case of *Gitbiaka v Nduriri* [2004] 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is to do justice to the parties before it. The parameters for interference with the exercise of such a discretion were well put by the predecessor of this court in the decision in the case of *Mbogo and another v Shab* [1968] EA.93, namely, for an appellate court to do so, it must be satisfied that the judge misdirected himself in some matter, and as a result arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been misjustice.”

21. Therefore, in considering whether or not to dismiss a suit for want of prosecution, the court is further guided by the finding in the case of *Ivita v Kyumbu* (1984) KLR 441, where the court observed as follows;

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.” (Emphasis added).

22. The legal implications of order 17 rule 2 of the *Civil Procedure Rules* are that a suit qualifies to be dismissed for want of prosecution if neither party has filed an application or taken any action in the suit for at least one year prior to presenting the application seeking dismissal thereof.

23. In her pleadings, the appellant explained that the suit was commenced on June 9, 2003. It was set down for hearing on February 4, 2008 but it did not proceed as it was consolidated with CMCC No 2794 of 2006. It again came up again for hearing on October 19, 2010 but it was not listed. The appellant learnt of the dismissal of the suit on October 8, 2015. She has urged that they were never served with a notice to show cause why the suit should not be dismissed for want of prosecution and neither was the notice of dismissal served as required by the law.



24. Through his replying affidavit, the 2nd respondent states that from the record, between 2003 and 2008, the appellant took no action to prosecute the suit. The appellant learnt of the dismissal of the suit on October 8, 2015 but took another one year to file the application to reinstate the suit.
25. This court has perused the record and indeed noted that the instant suit was filed in 2003 and no action was taken until it was dismissed for want of prosecution on July 4, 2008.
26. As stated above, the principles or test to be considered in dismissal of a suit for want of prosecution, is whether the delay is prolonged and inexcusable or can justice be done despite such delay. It is therefore imperative that the defendant must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court can exercise its discretion in his favour and dismiss the action for want of prosecution. Lastly, the prolonged delay and the plaintiff does not give sufficient reason for the delay, the court will presume that the delay is not only prolonged but it is also inexcusable.
27. In the court's considered view, the necessity of expediency in the prosecution of civil proceedings is the legal justification for dismissing claims for want of prosecution. This reasoning is supported by article 159(2) (b) of the *Constitution*, which states that justice shall not be delayed. In addition, sections 1A and 1B of the *Civil Procedure Act* grant courts the authority to ensure court proceedings are conducted in a manner that is fair, just and expeditious.
28. Upon considering the circumstances of this case, this court has come to the inevitable conclusion that the appellant has not satisfactorily explained the reasons for the delay in prosecuting the case before the trial court so as to warrant this court exercise its discretion in her favour. Justice should be served to both parties and it is not fair to hold the respondents in court for all this long. It is mind boggling to have such an old matter still pending in the judiciary system almost two decades after it was filed.
29. For the reasons given, the appellant's appeal dated March 6, 2017 is found lacking merit and is hereby dismissed with costs to the 2nd respondent. The rest of the respondents did not file any documents in this appeal, hence the court will not make any order as to costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF JULY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Waithaka holding brief for Mr. Safari for the Appellant

No appearance for Respondent

Court Assistant - Martin

