



**Mukuba v Hassan & another (Civil Appeal 48B of 2020)
[2023] KEHC 19961 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 48B OF 2020
EM MURIITHI, J
JULY 13, 2023**

BETWEEN

WINFRED MUKUBA APPELLANT

AND

JOSEPH GITHINJI HASSAN 1ST RESPONDENT

ANN KITHINJI 2ND RESPONDENT

*(Being an appeal from the Ruling of Honourable M. A Odhiambo
(RM) delivered on 28/5/2020 in Meru CMCC No. 156 of 2016)*

JUDGMENT

1. The Appellant herein, the Plaintiff in the trial court, sued the Respondents vide a plaint dated February 1, 2016 seeking general damages for pain, loss of amenities and suffering, special damages, costs of the suit and interests.
2. By an application dated January 13, 2020, the Respondents sought dismissal of the Appellant's suit for want of prosecution. On May 28, 2020, the trial court rendered thus, "I take note that since May 26, 2016 when the plaintiff's suit was filed no steps have been taken to ensure that the suit is prosecuted. As such I find that there is inordinate and inexcusable delay on the part of the plaintiff/respondent. The upshot of this Ruling is that the defendant's Notice of Motion dated January 13, 2020 satisfies the mandatory one-year threshold stipulated under Order 17 Rule 2 of the Civil Procedure Rules. The application has merit the same is allowed. The plaintiff/respondents case is dismissed for want of prosecution."



3. Aggrieved by the said dismissal of her suit, the appellant filed a memorandum of appeal in this court on June 29, 2020 raising 5 grounds as follows:
 1. The learned trial magistrate erred in law and fact in dismissing the appellant's suit for want of prosecution.
 2. The learned trial Magistrate erred in law and fact by failing to consider both the events and explanation for the failure to have the suit prosecuted.
 3. The learned trial magistrate had regard to and relied on procedural technicalities in utter disregard of the law and constitution in dismissing the appellant's case for want of prosecution.
 4. The learned trial magistrate erred in law and fact by failing to have regard that order 11 had not been complied with and the suit was not ripe for hearing.
 5. The learned trial magistrate erred in law and fact by failing to consider the injustice and considerable loss that would be occasioned to the appellant by dismissing the suit when she had no hand in the failure to have the same prosecuted.

Submissions

4. The appellant submits that she had to have a second medical examination before anything else hoping for an out of court settlement. She urges that since Order 11 had not been complied with, the suit was not ripe for hearing hence it was not her laxity but the position of the law. She faults the court for misconceiving Order 17 Rule 2 before dismissing the suit, and cites *Trinity Investment Bank Limited & another v Guardian Bank Limited* [2015] eKLR and *Invesco Assurance Company Limited v Oyange Barrack* [2018] eKLR. She urges that she had no hand in the circumstances leading to failing to set the case for hearing, and cites *Bank of Africa v Put Sarajevo General Engineering Co Ltd & 2 Others* [2018] eKLR and *Martha Wangari Karua v IEBC & 3 Others* [2018] eKLR.
5. The respondents urge that this court lacks jurisdiction to hear this appeal, because leave was not obtained before the same was filed, as required by Order 43 Rule 1 of the *Civil Procedure Rules*, and cite *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara* (2021) eKLR and *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR. They urge that failure to prosecute the case for 4 years has not been sufficiently explained, therefore the appellant is undeserving of the orders sought, and cite *Josephat Muthui Muli v Ezeetec Ltd* [2014] eKLR. They urge the court to uphold the trial court's decision and dismiss the appeal with costs.

Analysis and determination

6. The court considers the sole issue for determination to be whether the dismissal of the appellant's suit for want of prosecution was erroneous.
7. There is no doubt that the appellant needed to obtain leave of the court before filing this appeal. Nonetheless, the court considers that since the appeal has already been lodged, responded to, directions taken as to the hearing and a judgment date reserved, no prejudice will be occasioned to either party if the same is fully determined on its merits.



8. Order 17 Rule 2 of the [Civil Procedure Rules](#) provides for Notice to show cause why suit should not be dismissed as follows:

“(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) A suit stands dismissed after two years where no step has been undertaken.

(6) A party may apply to court after dismissal of a suit under this Order.”

9. The appellant faults the trial court for disregarding the explanation for her failure to prosecute her suit. She contends that the delay in prosecuting the suit was occasioned by the difficulties in securing an appointment with the respondents’ doctor for purposes of undergoing a second medical examination and the fact that the suit was not ripe for hearing as Order 11 had not been complied with.

10. In considering the appellant’s explanation for the delay, the trial court observed thus, “In my view, a defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one-year threshold stipulated in Order 17 Rule 2 of the [Civil Procedure Rules](#). From the chronology of events it is clear that the plaintiff/respondent has not taken any steps to prosecute his suit. In his replying affidavit counsel for the plaintiff/applicant stated that he had difficulties with booking appointments with the defendant’s doctor. That they tried booking the appointments on several occasions with no success. He attached a copy of the letter as DGM 1. The plaintiff/respondent is not being genuine. If at all there were any difficulties in booking an appointment with the defendant’s medical doctor this issue would have been brought to the attention of the defendant’s counsel. Further if at all there was any difficulties as claimed then the plaintiff should have notified this court. There are no correspondences to the defendants/applicant raising this issue. From the court records plaintiff/respondent has never set down the matter for mention or brought the issue to the attention of this court. The reasons advanced are here nor there.”

11. The appellant filed this suit on May 26, 2016 and she did nothing else. She was woken up from her slumber by the respondents a year later on September 14, 2017 when she was required to undergo a second medical examination. She then went back to her slumber until January 13, 2020 when the respondents moved the court to have the suit dismissed for want of prosecution.

12. This court is satisfied that the appellant inordinately delayed in having her suit prosecuted and its subsequent dismissal for want of prosecution in accordance with the provisions of Order 17 Rule 2 of the [Civil Procedure Rules](#) was warranted.

Orders

13. Accordingly, for the reasons set out above, the Court finds that the appellant’s appeal herein is without merit and it is dismissed.

14. There shall be no order as to costs in the appeal.



Order accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JULY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

M/S Gichunge Muthuri & Co. Advocates for the Appellant.

M/S Kimondo Gachoka & Co. Advocates for Respondent.

