



Mombasa Water Supply and Sanitation Company Limited v Kuva & another (Civil Appeal 118 of 2019) [2023] KEHC 23630 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 118 OF 2019
DKN MAGARE, J
SEPTEMBER 19, 2023**

BETWEEN

MOMBASA WATER SUPPLY AND SANITATION COMPANY LIMITED APPELLANT

AND

**ALICE KAVUKA KUVA 1ST RESPONDENT
COUNTY GOVERNMENT OF MOMBASA(FORMERLY,MUNICIPAL COUNCIL OF MOMBASA) 2ND RESPONDENT**

RULING

1. This is a ruling from an application letter 12 May 2023 seeking to reinstate their application that was dismissed on 8 March 2023 for want of prosecution.
2. The main ground that supports the application is that judgement was delivered on 4th April 2019 and an appeal filed on 20th June 2019.
3. There was an application for stay which was complied with except the order requiring filing of record of appeal within 60 days from 18th July 2019 that is by 18th September 2019.
4. Nevertheless, the matter was listed for dismissal on 8th of March 2023 be for me. the applicant has given reasons why they have not been prosecuting the Appareal that is they need a fair hearing and have a right to be heard there was a genuine human error between the form of advocates representing the appellant.
5. 7 x 2 the application the memorandum of appeal filed on the 1st June 2019 and the Lotus of buhari from the court below. together with warrants which had been able to issue.
6. The issues that have been raised have been opposed by the respondent.



7. The respondent file a replying affidavit through Monday through advocate he stated that they kept reminding the applicant would take steps but they did not. the an appeal and they were informed by letters dated 15 June 2020 and 1st July 2021 to fix the mother for hearing and also this resulted in an application the day that 1st October 2022 the motion was filed network ahold here to remind the applicants to prosecute the matter the advocate that is selling karaoke duly received their with their with their ring the stamp on 8 March and on night my there's no attendance and the dismissal happened the applicant that over three years to prosecute the matter and also it is important that the applicant to enjoy the fruits of his labour which one which one is 213 acres in 2011 it is in the interest of Justice according to the applicant to have the matter concluded One Way or Another.
8. Also filed briefs of missions relying on the 40 g of 30 Construction Ltd was solely on hotels where the court stated as follows the Vue there for that we need to allow the application to dismiss the application with costs.

Submissions

9. The applicant all submissions soap in support of the application. the submissions basically are setting out the grounds in the same application online par for the renowned authority of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR, where the Court, F. Gikonyo, stated as doth: -

“These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Dances” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
10. The applicant stated that the court drew the first blood and drove the applicant from the seat of justice. The submit further that no Prejudice has been the most rated and they use the case of Joseph Kenya versus geology on the ground that there is no Prejudice that has been demonstrated.
11. Initiate the applicant is proceeding on the premise that the application has not been dismissed and therefore dismissed was a draconian step personal true. what is true is that the application is already dismissed it is not the respondent to demonstrate Prejudice it is the applicant labour's is why the application should be reinstated.
12. I have painstakingly red their submissions application and next year's and come to a conclusion that the applicant has no played ground completely foreign statement what they needed to establish was that the court acted capriciously. They were valid reasons for known for not allowing the application and that the respondent was at fault in one way or another. in this case there is no crown completely why there has been no prosecution it is not the duty of the courts to prosecute matters on behalf of parties. the applicants brought their appeal to court and the duty to ensure its prosecuted and failure to do so Leeds to dismissal.



13. This was the issues raised earlier in the case of *Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd* [1969] EA 696.

“On appeal against the order disallowing the preliminary objection, the court held:-

- (i) That the court had inherent power to dismiss the suit notwithstanding that the case did not fall within any of the specific provisions of the Civil Procedure (Revised) Rules 1948 which do not purport to be exclusive (*Saldanha and Others v. Bhailal and Co. & Others* ([1968] EA 28) overruled.
- (ii) Application to dismiss a suit for want of prosecution should be made by motion, and also that when both parties contribute to the delay in having the suit prosecuted, a court would not dismiss the suit for want of prosecution. The court then went ahead and set out the circumstances under which a suit may be dismissed for want of prosecution, which are similar to the present Order 16 of the *Civil Procedure Rules*.”

Analysis

14. The applicant used the allegory that the court drew first blood. As many morticians will tell, blood is only draw from living organisms. In this case, there was blood to draw. The appeal was a dead edifice hanging precarious on the sword of justice. The court only gave the edifice decent send off. The Appeal had long died and forgotten. The Applicant gave no note of numerous ‘irritating’ letters from the respondent, beseeching the applicant, to be merciful and fix the matter for hearing. Since the Appeal was dead as a dodo, there was no response.
15. Stay pending Appeal gave the Applicant impetus to buy an extra layer of blankets and sleep further. It is over 4 years since the Appeal was last in court. Even the last time it was in court, the parties were alive to the need to file a record of appeal and entered into a consent for provision of security pending appeal. No other action had been taken.
16. What is the error, counsel is said to have committed? There is no error. Some of the issues raised herein, ought to have been filed in an affidavit in response to the delay. Sometimes proceedings are used as an excuse. This is far from the truth. Proceedings once paid for, it is easy to track their progress.
17. In any case, the issues raised in this application, had they been raised in the application for dismissal or notice to show course, the court will have still dismissed the appeal. There is no plausible explanation for the delay in prosecution of the Appeal.
18. I am aware that the court ought to hear parties. ion merit. However, the parties should be available to be heard. The Applicant was not available to be heard.in the case of *Phill Limited & another v Mbeke Muisyo and Francis Mutinda Muisyo (Suing on Behalf of The Estate Of Walter Musyoki Muisyo (Deceased))* [2022] eKLR, the court stated as doth: -

- “19. The principles to be followed when a court is considering whether or not to reinstatement a suit were outlined in the case of *John Nabashon Mwangi vs. Kenya Finance Bank Limited* (in Liquidation) [2015] eKLR as follows: “The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of



reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial "Sword of the Damocles" which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated."

19. The respondent is greatly prejudiced. He has been beseeching the Applicant to fix the matter for hearing, all in vain. The primary matter was filed in 2011. Though the amount involved is not much, it is according to the parties involved. There is nothing absolutely wrong with execution proceeding when it is due. the issue of handover notes is really relevant property tax over from one mother to another it's our duty to ensure it's done. it is also the duty of the client to ensure that their mother is prosecuted or logical conclusion.
20. The question before me is whether the applicant has raised enough grounds to show that he needs to be hard on the notice in the former application. The same was considered on fact and law. Nothing has changed to date the applicant, despite being served, chose to absent themselves, to test the respondent's resilient. That is a tragic thing to do. There has been not even a lame excuse. There is absolutely no reason why the matter has been pending in court for the last 5 years and there is no explanation to that effect. affect any other issue it by the client been informed he. it is not true that the proceedings are missing because there is no one next year related to proceedings there is no receipt for payment of proceedings.
21. Lastly there is no explanation as to why the applicant did not attend court on 8 of March 2023, file an affidavit to explain the delay to enable the court exercise discretion. The rationale for dismissing matters is to avoid respondents being dragged through the courts forever I know this is a matter that arose in 2011 and it's been hanging like a Damocles Sword on the Respondent. The 1st respondent has a judgment that crystalized. They ought to enjoy fruits of their labour.
22. It is preposterous to presume that the internal affairs of the client should make the court beg to hear parties who voluntarily come to court. A 4- year delay is not only inordinate but is also inexcusable. It is not a delay that will invite this court to exercise its discretion in favour of the applicant. the nature of the appeal is that it's only of a small amount of about 500,000, costs and interest that were awarded.
23. There is no irreparable loss, is the application is dismissed. It is my considered view the offer that the applicant has failed miserably to persuade the court to exercise discretion in their favor.
24. Consequently, the application dated 12th May 2023 lacks merit and is therefore dismissed with costs to the respondents. Pursuant to section 27 of the *civil procedure act*, costs of Ksh 20000 payable by the Applicant to the 1st Respondent will suffice.
25. The Applicant to pay the said costs together with the sum of Ksh. 80,000 already awarded within the next 15 days failing which execution shall proceed the file is closed.

Determination

26. The upshot of the foregoing is that I make the following orders: -



- a. The application dated 12/5/2023 is dismissed with costs of 20,000/=.
- b. The said costs together with the sum of Ksh 80,000/= already awarded be paid within 15 days, failing which execution do issue.
- c. The 1st respondent be at liberty to liquidate the amounts offered as security pending appeal and execute for the balance forthwith.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

