



**Mokaya v Westland Property Limited (Civil Appeal 211 of 2020)  
[2023] KEHC 23809 (KLR) (Civ) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23809 (KLR)

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

**CIVIL**

**CIVIL APPEAL 211 OF 2020**

**JN NJAGI, J**

**OCTOBER 18, 2023**

**BETWEEN**

**DAVID MOKAYA ..... APPELLANT**

**AND**

**WESTLAND PROPERTY LIMITED ..... RESPONDENT**

*(Being an appeal from the order of Hon. E. Wanjala, SRM, in Nairobi  
CM's Court Civil Case No.6204 of 2013 delivered on 18/2/2019)*

**JUDGMENT**

1. The Appellant’s suit came up for hearing at the lower court on the 18<sup>th</sup> February, 2019 when his advocate applied for adjournment on the ground that he had not communicated the hearing date to the Appellant. The trial court was not satisfied with the explanation and proceeded to dismiss the suit for want of prosecution. The Appellant was aggrieved by the dismissal of the suit and filed the instant appeal. The grounds of appeal are that:
  - a. That the learned magistrate erred in law by denying the plaintiff an adjournment on 18/2/2019 and dismissing the reason given for adjournment sought.
  - b. That the learned magistrate erred in law and fact by dismissing the plaintiff’s suit for want of prosecution despite the plaintiff’s absence in court on 18/2/2019 being his advocates fault in failing to inform the plaintiff of the hearing date in advance.
  - c. That the learned magistrate erred in law and fact by failing to act judiciously when declining to adjourn the hearing on 18/2/2019 and instead ordering dismissal of the suit.



2. The Appellant thus prayed for the following orders;
  - (a) That the orders made on 18/2/2019 be set aside in their entirety and an order do issue restoring the suit for hearing on merits.
  - (b) That the costs of this appeal be provided for.
  - (c) Any other orders this honorable court shall deem fit to grant.
3. The brief facts of the case are that the Appellant brought a claim against the Respondent for breaching the terms and conditions of the tenancy agreement by failing to refund the deposits amounting to Kshs. 1,700,000/= owed to the plaintiff/ appellant.
4. The Appellant through the firm of Okoth & Kiplagat Advocates, submits that on the day of the dismissal of the suit, the Appellant's advocate was present in court and informed the court that the Appellant would not be present at the hearing of the suit as he had not been notified on the hearing date. That the Court dismissed the suit for want of prosecution despite the honest appeal by the advocate for the Appellant for request for an adjournment.
5. The Appellant submitted that the dismissal of the suit for want of prosecution was unwarranted as it did not meet the threshold set out in order 17 rule 2 of the Civil Procedure Rules that a suit can only be so dismissed where no application has been made or step taken by either party for a period of one year preceding the presentation of the application seeking dismissal of the suit. That this was accordingly a dismissal under the wrong provisions of the law. That in this case there was no delay by the Appellant's advocate to prosecute the matter as the actively attended court. That failure of the Appellant to attend court was not intentional or contumelious. That the non-attendance was justifiable and excusable and the same was not one that gave rise to a substantial risk to fair trial and prejudice to the Respondent. That the non-attendance was due to inadvertence mistake by counsel which was admitted and explained to the court. The Appellant in this respect relied on the case of *Mwangi S. Kaimenyi v Attorney General & another*, Misc Civil Suit No.720 of 2009 where the court restated the test for dismissal of suits as follows:

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.”



6. It was submitted that it is the discretion of the court to dismiss a suit for want of prosecution and that the discretion must be exercised judiciously. The case of *Naftali Opondo Onyango v National Bank of Kenya Ltd* (2005) eKLR was cited where it was held that:

However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.

7. It was submitted that the non-attendance was due to inadvertence mistake by counsel which was admitted and explained to the court. That the Appellant should not be punished for mistake of counsel. Reliance was made on the case of *Belinda Muras & others v Amos Wainaina* (1978) KLR where Madan JA held as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”

8. The case of *Philip Chemwolo & another v Augustine Kubede* (1882-1988) KLR 103 at 1040 was cited where Apaloo JA stated that:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit...”

9. Also cited was the case of *Martha Wangari Karua v IEBC*, Nyeri Civil Appeal No.1 of 2017 where the Court of Appeal stated that:

The Rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.

10. The Appellant urged the court to allow the appeal and reinstate the suit for hearing so as to give the Appellant an opportunity to prosecute his claim on merit.
11. The Respondent on the other hand submits that the court correctly dismissed the suit for want of prosecution because the Appellant was unable to prosecute the same when it came up for hearing. That the record shows that on two different occasions on the 7/2/2017 and 28/3/2018 the matter had been adjourned at the instance of the Appellant. On the former date the Appellant was said to be bereaved while on the latter date he was said to be sick. That the court had on those occasions accommodated the Appellant. The Appellant then took an ex parte hearing date for 19/2/2019 when he did not turn up again this time with the excuse that the lawyer had not informed him of the hearing date.
12. The Respondent submits that the hearing dates had been taken at the instance of the Appellant. That there was no time that the Appellant was ready to proceed with the suit. That it was clear from the record that the Appellant was not keen to prosecute the case. It was submitted that it is trite that litigation must come to an end. That it is not fair in this case for the Respondent to be kept in court since 2013. Therefore, that the court had in the circumstances properly directed itself in dismissing the suit for want of prosecution. The Respondent urged the court to uphold the ruling of the lower court and dismiss the appeal.



13. In supporting the dismissal of the suit, the Respondent made reliance on the case of *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* (2021) eKLR where the court held that:

Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac vs. Kumbu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah vs. Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

14. I have considered the grounds in support of the appeal, the grounds in opposition thereto and the rival submissions of the advocates for the parties. The sole issue for determination is whether the trial court properly exercised its discretion to dismiss the suit for want of prosecution.

15. It is trite that the decision on whether a suit should be reinstated for trial is a matter of judicial discretion that depends on the facts of each case. The principles that should guide the court when dealing with such an issue were well laid out in the case of *Ivita Vs Kyumbu* [1984] eKLR 441 which are;

...the reasons for the delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay.

16. On the reasons for the delay, Appellant attributed the delay to the fact that his Advocate on record had inadvertently not communicated to him the hearing date. That the mistake of the Advocate should never work to the detriment of the client. He thus urged this court to uphold justice by exercising its discretion to set aside the learned magistrate’s ruling and have the matter reinstated for hearing. He further urged the court to invoke its power under the overriding objective principle and allow for the just, expeditious, proportionate and affordable resolution of this matter on merit.

17. The Respondent on the other hand, submits that this matter has been prolonged. That the Appellant is not keen on prosecuting this matter, thus the court should not allow the appeal as it is a clear abuse of the court process.

18. The constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of *the Constitution*. It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay - Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya.

19. Section 3A of the *Civil Procedure Act* gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. It provides as follows:-

“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.”

20. I am in agreement with the submission by the Advocates for the Appellant that a matter can only be dismissed for want of prosecution where the threshold set in order 17 rule 2 of the *Civil Procedure Rules* has been met, i.e., where no application has been made or step taken by either party for a period



of one year preceding the presentation of the application seeking dismissal of the suit. This was not the case in this matter. The case was coming for hearing on the day it was dismissed. It cannot therefore be said that no step had been taken for a period of one year so as to warrant the dismissal of the suit for want of prosecution. The fact of the matter coming up for hearing was a step taken towards the hearing of the case. The dismissal therefore did not accord with the provisions of order 17 rule 2 of the Civil Procedure Rules 2010.

21. Order 12 rule 3 of the Civil Procedure Rules provides as follows:

When only defendant attends

If on the day fixed for hearing, after the suit has been called on the hearing outside the court only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

22. The above was the applicable rule in the circumstances of the case. The trial Magistrate did not consider the application for adjournment by counsel for the Appellant in light of the above said rule. She did not consider whether there was good cause shown for non-attendance by the Appellant. The Magistrate instead applied a different rule for dismissal of the suit for want of prosecution which was not applicable in the circumstances of the case. I therefore find the appeal to be merited on this ground and reinstate the suit for hearing.

23. It is the Advocates for the Appellant who were to blame for failing to communicate the hearing date to the Appellant. Having conceded to the blame, it is my considered view that they should be ordered to meet the costs of the appeal to the Respondent.

24. I thereby make the following orders:

- (a) That the orders made by the trial court on 18<sup>th</sup> February 2019 dismissing the suit herein for want of prosecution are hereby set aside and the suit is reinstated for hearing.
- (b) That the Advocates for the Appellant, Okoth & Kiplagat Advocates, do pay the Respondent throw away costs of Ksh.20,000/- to be made within 30 days of the date herein.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18<sup>TH</sup> OCTOBER 2023**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Miss Wanjihia for Appellant

Ms Nakel HB for Dr. Kakula for Respondent

Court Assistant – Amina

30 days Right of Appeal

