Ahmed v Bisher & another (Civil Appeal E084 of 2014)
[2024] KEHC 14303 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E084 OF 2014

RN NYAKUNDI, J

NOVEMBER 15, 2024

BETWEEN

MOHAMED AHMED .... APPELLANT

AND

ABDULMALIK AHMED BISHER & ANOTHER .... RESPONDENT

RULING

Representation:

M/s Kiplagat J. Misoi & Co. Advocates

M/s D.L Were & Co. Advocates

1. Before me for determination is the Appellant's application dated 7th June, 2024 expressed to be brought under the provisions of Section 3A and Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 and 2 of the Civil Procedure Rules. The applicant seeks the following reliefs:

    a. Spent

    b. That this Honourable court be pleased to review and/or set aside the orders made on 12th July, 2022 dismissing this appeal for non-attendance of the counsel on record.

    c. That consequently this appeal be and is hereby listed for directions for purposes of fixing a Hearing date.

    d. That the costs be in the cause.

2. In support of the application is an affidavit sworn by Kiplgat J. Misoi together with grounds as enumerated hereunder:

    a. That the Appellant has not preferred any Appeal against the order of dismissal

b. That the Appellant is still interested in having this Appeal heard and determined on merit.

c. That the order of dismissal was not the mistake of the Appellant/Applicant but a mistake on the part of his counsel, Mr. Marube, who failed to attend court and inform the Appellant of the orders made.

d. That the mistake on the part of counsel should not be revisited on the Appellant/Applicant.

e. That in the interest of justice, the application should be allowed.

3. I have perused through the record and I have not had a glimpse of any response from the Respondent.

4. In further support of the application, the Appellant filed submissions dated 30th June, 2024. According to Learned Counsel Mr. Misoi, the applicant instructed a counsel to file this appeal but counsel relocated to Nairobi without informing the Appellant and as a result the matter was unattended. He was of the view that the previous Advocate ought to have communicated to his client on issues touching the matters in court, and not to withdraw from service without the knowledge of his/her client.

5. Learned Counsel argued that the absence of counsel amounts to sufficient cause to warrant a review and setting aside of the orders made on 12th July, 2022. He also submitted that the court has discretion to evaluate the circumstances and allow the application in the best interest of justice.

Determination.

6. I have considered the application, the affidavit on record, and submissions by counsel and the law. The law concerning dismissal of an appeal for want of prosecution is contained in Order 42 Rule 35 (1) & (2) which provides as follows: -

1. Unless within three months after the giving of directions under rule 13 the appeal shall be set down for hearing, the Respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

2. If, within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

7. Further, when a party wishes to set aside an order of dismissal of suit for want of prosecution are guided by the provisions of Order 12 Rule 7 of the Civil Procedure Rules. It provides that, "Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just."

8. The Legal substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assist in clearing backlogs in court and the ever increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – "Justice delayed is justice denied" Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable.

9. The Provisions of Order 17 Rule 2 (3) of the Civil Procedure Rules provides, inter alia: -

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. ....

3. any party to the suit may apply for its dismissal as provided in Sub-rule 1”.

10. In order for these legal principles to be applicable the following need to be demonstrated: -

    a. That no application has been made or step taken by either party for one (1) year from the time of filing the suit and

    b. That the Respondents have failed to comply with the directions of the court clearly.

11. It is the duty of court to do justice between the parties, Section 1B of *Civil Procedure Act*, Cap. 21 provides that there should be just determination, effective and timely disposal of proceedings and effective use of judicial time and resources. It is upon this duty of overriding objective does this court, take time and puts in resources to dismiss suits that have been unprosecuted for more than one year to ensure that other active cases have ample time to be determined. The court will not allow matters to be filed and whereby once the parties obtain interim orders then proceed to keep the file idle. This causes the clogging the justice system and unacceptable for nothing.

12. In the case of Ivita – Versus - Kyumbu [1984] KLR 441 the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated: -

> “ 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 it 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 favor 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, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.

13. The applicant's counsel claimed that the indolence was a mistake of counsel who never communicated to his client on the progress in the present matter. For the Court to exercise its discretion in favor of the Applicant, he or she has to satisfy it that there is sufficient cause or reason to warrant it to be put into use in setting aside the order of dismissal and subsequently reinstate the suit. Sufficient Cause was defined by the Supreme Court of India in Parimal vs Veena which was cited with approval in the case of Wachira Karani v Bildad Wachira [2016] eKLR. In the case, the said Supreme Court stated that: -

> “ sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in

view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

14. I have gone through the record and it is evident that the previous advocate appeared on few occasions and when the matter came up for mention on 12th July, 2022 there was no representation for either parties seemingly because the said Advocate had relocated as averred by the Applicant. There appears to have been some lack of diligence on the Applicant's part and or its advocates in following up the matter, yet it cannot be said that the appellant has totally lost interest in prosecuting the appeal given his efforts to have the same re-instated so that it can be admitted and heard.

15. Having said that, I am of the considered view that the appellant should have a chance to prosecute his appeal. I am conscious of the fact that dismissal of a case is a draconian judicial act and should be done sparingly and in cases where dismissal is the feasible and just thing to do. Courts should strive to sustain rather than dismiss suits especially where justice would still be done in a fair trial despite the delay. For that reasons the application dated 7th June, 2024 is allowed with directions as follows:

    a. The order made on 12th July, 2022 dismissing the appeal for want of prosecution is herein set-aside and the appeal is hereby reinstated.

    b. The Appeal shall be disposed of by way of written submission wherein, the Appellant shall file and serve its written submissions to the Appeal within 14 days of the date hereof and the Respondent shall file his written submissions to the appeal within 14 days of service.

    c. A status conference shall be held on 18th December, 2024

    d. Costs of the application shall be borne by the applicant.

16. It is so ordered

DATED SIGNED AND DELIVERED AT ELDORET, THIS 15TH DAY OF NOVEMBER 2024

....

R. NYAKUNDI

JUDGE

In the Presence of:

Mr. Misoi, Advocate