



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MARSABIT**

**(Suing as the CIVIL APPEAL NO. E003 OF 2021**

**JAMES LENAWANCHINGEL (Suing as the Administrator of the Estate of  
the Late MAMBASA LANAUWAITINGEIL (Deceased).....APPELLANT**

**VERSUS**

**GULSAN INSAAT SANAYI TURIZM .....1<sup>ST</sup> RESPONDENT**

**GEOFFREY OLALE ..... 2<sup>ND</sup> RESPONDENT**

(Being an appeal from the ruling of Hon. Mbayaki Wafula, SRM, in Marsabit Civil Case No. 24 of 2021 delivered on 19<sup>th</sup> November, 2020)

**JUDGMENT**

1. The appellant`s suit at the lower court was dismissed for want of prosecution on the 14<sup>th</sup> November 2019. He thereupon filed an application dated 25<sup>th</sup> August 2020 seeking for the reinstatement of the suit but the same was similarly dismissed vide a ruling delivered on the 19<sup>th</sup> November 2020. The appellant was aggrieved by the dismissal and filed the instant appeal.

2. The grounds of appeal as per the memorandum of appeal dated 10<sup>th</sup> December 2020 are that:

- 1. The Learned Magistrate erred in law and fact in dismissing the Plaintiff`s case for want of prosecution yet the plaintiff`s case had not been inactive for one year as provided under 17 Rule 2 of the Civil Procedure rules.**
- 2. The learned Magistrate erred in law and in fact in failing to find that the Notice to Show cause why the suit should be dismissed was served upon the Plaintiff`s Advocate on a wrong postal address in Meru instead of Nairobi.**
- 3. The learned Magistrate erred in law and fact in failing to find that the plaintiff had been pursuing an out of court settlement with the Respondents` Insurer explaining why the suit had not been prosecuted for six months after the Court had issued an order for substituted service.**
- 4. The learned Magistrate erred in law and fact in failing to consider the plaintiff`s Constitutional rights of hearing and fair trial which right cannot be limited**
- 5. The learned Magistrate erred in law in disregarding the submissions and Authorities filed by the Plaintiff thus arriving at a perverse decision.**
- 6. The learned Magistrate erred in both law and fact in failing to appreciate wholly the application before him thus arriving at an unfounded and irrational finding.**

**Background facts -**

3. The appellant had sued the respondent claiming general and special damages. The matter came up for directions on the 25<sup>th</sup> June 2019 when counsel holding brief for the advocates for the appellant sought for substituted service on the respondents which application the trial court granted. The matter was then fixed for mention for directions on the 22<sup>nd</sup> July 2019 on which date there was no appearance by the parties.

4. The court registry subsequently gave further ex parte mention dates for the 10<sup>th</sup> September and 28<sup>th</sup> October 2019 during which dates there was no appearance by the parties. On the latter date the trial court made an order for a notice to issue on the parties to show cause why the suit should not be dismissed for want of prosecution. The court fixed the matter for mention on the 14<sup>th</sup> November 2019 during which date the appellant was absent and the suit was dismissed for want of prosecution.

#### **The Application for Reinstatement –**

5. The appellant's application for reinstatement of the suit was based on the grounds that the notice to show cause was never served on the advocates for the appellant. That the notice was served on the wrong address of 51100 Meru while the postal address for the advocates for the appellant is 51100-00100 Nairobi. Further that the issuance of the notice to show cause was pre-mature and contrary to the provisions of order 17 Rule 2 of the Civil Procedure Rules which provide that a suit may only be dismissed for want of prosecution if it has remained unprosecuted for a period of more than a year. That the last step in the matter was taken in court on the 25<sup>th</sup> June 2019 and therefore that the suit had not been inactive for a period of more than one year for it to be dismissed for want of prosecution. That the reason why no step had been taken for 5 months preceding the issuance of the dismissal order was due to an on-going discussion on an out of court settlement as evidenced by e-mail dated 12<sup>th</sup> March 2020 – marked "JL2".

#### **Submissions on the appeal –**

6. The advocates for the appellant, **Sagana, Biriq & Co. Advocates**, submitted that the learned trial magistrate disregarded the fact that the suit was not ripe for dismissal as it was last dealt with in court barely 5 months before the issuance of the notice for dismissal. That the magistrate failed to find that the notice was served on the wrong address of the advocates for the appellant. That the magistrate ignored the attached evidence showing that there had been on-going negotiations on an out of court settlement.

7. It was submitted that the appellant had demonstrated in the application dated 25<sup>th</sup> August 2020 that at no time of the suit was he inadvertently indolent or disinterested in prosecuting the claim that the reasons given for the reinstatement of the suit were sufficient.

8. Counsel submitted that the test to be applied in determining whether or not a suit should be dismissed for want of prosecution is as was stated in the case of **Skyview Properties Limited & Another v Kennedy Amos Njoroge & 3 Others** (2017)eKLR that:

**The jurisprudence criteria to be applied in determining whether or not a suit should be dismissed for want of prosecution was articulated by Chesoni, J (as he then was) in IVITA V KYUMBU, (1984) KLR 441 in the following words:**

**“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”**

**In MWANGI NEDANGI S. KIMENYI V ATTORNEY GENERAL & ANOTHER, the court restated the test as follows:**

**“1. When the delay is prolonged and inexcusable such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing Justice to all the parties – the plaintiff, the defendant and any other third or interested part in the suit, lest justice should be placed too far away from the parties.**

**2. 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 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.”**

**There are three questions to be answered in this Ruling. The first question is whether the delay is inordinate. The second question is whether the delay is inexcusable. The third question is whether justice can still be achieved if this suit were to be sustained.**

#### **Analysis and Determination -**

9. This being a first appeal the duty of the court is to analyze, re-evaluate the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify -see **Sielle v Associated Motor Boat Company Limited** (1968)EA 123.

10. The issues for determination in the appeal are –

1. Whether the suit was ripe for dismissal for want of prosecution;

2. Whether there was delay.

11. In his ruling the learned trial magistrate agreed that the notice was served on the wrong address. He however held that no sufficient reason had been given to show why the suit had not been prosecuted before it was dismissed. That there was indolence and delay in prosecuting the suit. That the applicant had not shown attempts made at an out of court settlement.

12. Order 17 Rule 2 of the Civil Procedure Rules 2010 gives the court the discretion to dismiss a suit where no step has been taken in the matter for a period of one year. The rule provides as follows:

**“In any suit I 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....”**

13. At the same time the court has power under Order 12 Rule 7 to reinstate a suit that has been dismissed. The Rule provides that:

**Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.**

14. The trial magistrate in his ruling agreed that the matter was last in court on the 25<sup>th</sup> June 2019. He however made no finding on whether the suit was ripe for dismissal for want of prosecution despite the clear provisions of Order 17 Rule 2 that a suit can only be dismissed for that reason where no step has been taken in the matter for a period of one year. It was barely 5 months since the last time when the matter was in court before the notice to show cause was issued. It is then plainly clear that a period of one year had not lapsed before the matter was called for dismissal. The suit was then not ripe for dismissal for want of prosecution.

15. The test that is applicable in determining whether to reinstate a suit that has been dismissed for want of prosecution has been well articulated in the submissions of the advocate for the appellant and the authorities that she has cited. The test is that it has to be shown that there is inordinate delay in prosecuting the suit and secondly that if there is delay, whether it is excusable. In this case there was no delay at all as the suit was not ripe for dismissal for want of prosecution. The rules of delay therefore do not apply in this case as there was none. It was wrong for the court to decline to reinstate the suit when it was apparent that the court had made a mistake in dismissing the suit when it was not ripe for dismissal and even when the court found that the notice to show cause was sent to the wrong address. The dismissal of the application for reinstatement of the suit was in the premises arbitrary, unjustifiable and in complete contempt of the clear provisions of the law.

16. The upshot is that the appeal is upheld. I accordingly order that the suit be and is hereby reinstated for hearing to be heard before a magistrate of competent jurisdiction other than Hon. Mbayaki Wafula.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 14<sup>TH</sup> DAY OF OCTOBER 2021**

**JESSE N. NJAGI**

**JUDGE**

In the presence of:

Miss Moraa H/B Miss Muindi - for Appellant

Appellant - Absent

Court Assistant – Mr. Kashane

30 days Right of Appeal.