Mwangi aias Lydia Njeri Ndichu v Kibui & another (Environment and Land Appeal E102 of 2022) [2025] KEELC 4907 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4907 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E102 OF 2022

JA MOGENI, J

JUNE 26, 2025

BETWEEN

LYDIA NJERI MWANGI AIAS LYDIA NJERI NDICHU ..... APPELLANT

AND

CECILIA WANJIRU KIBUI ..... 1ST RESPONDENT

FLORENCE NYAMBURA MWANGI ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant`s suit at the lower Court was dismissed for want of prosecution on the 8/06/2021. She thereupon filed an application dated 14/06/2021 seeking for the reinstatement of the suit but the same was similarly dismissed *vide* a Ruling delivered on the 9th November 2021. The Appellant was aggrieved by the dismissal and filed the instant Appeal.

2. The Grounds of Appeal as per the Memorandum of Appeal dated 13/07/2023 are that:

    1. The Court erred in law as the procedure mode manner of service of the application for dismissal and the hearing notice that lead to the dismissal was noncompliant, unprocedural as to time and person served, illegal and requires setting aside of the orders for dismissal.

    2. The learned Magistrate erred in law and fact by dismissing the suit without legal basis, merit and contrary to the law and rules of natural justice. The due process of the law was not followed by the Magistrates Court in the two line Ruling with no factual basis, and legal- reasoning for the dismissal of a sensitive land case that Appellant had been robbed of her' title by the Respondents through deceit and fraud.

    3. The learned Magistrate erred in failing to exercise caution, and dismissing the suit at online hearing during Covid pandemic in absence of the Appellant Advocate who had not even informed the Appellant of the case coming up for dismissal for want of prosecution.

4. The learned Magistrate failed to exercise her discretion to fix the matter for hearing rather than dismissal of the same

5. That at the material time of dismissal the Applicant was indisposed, sick and hospitalized and did not receive any communication from the Appellant Advocate.

6. The learned Magistrate erred by visiting Appellant Advocates errors, mistakes and collision on the Appellant who ought not to suffer injustice hardship, and right of access to justice to ventilate her case on merits.

7. That the dismissal was land case herein was done by collusion and fraud involving the Appellant Advocate to deny her right to property land .by collusion involving the parties and Advocates.

Background Facts

3. A brief background of the case is that the Appellant had sued the 1st Defendant/Respondent claiming to be declared as the legal property owner of the suit property and seeking cancellation of title issued to the 2nd Defendant and that the records to be rectified to reflect the Plaintiff/Appellant to be the owner.

4. The matter came up for directions on the 25th 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 hearing on 11/04/2017 but the Counsel for the Plaintiff Mr. Odongo who was holding brief for Mr. Kirubi told the Court that Mr. Kirubi was not able to proceed since the Plaintiff was unwell and he prayed for an adjournment, which the Court granted after the 2nd Defendant Mr. Mwaura notified the Court that the Plaintiff did not invite them to fix a hearing date but that he was ready to proceed since the 2nd Defendant was in Court.

5. The Court referred the parties to Pre-trial Conference and condemned the Plaintiff to pay Court adjournment fees and the costs for the 2nd Defendant and her Advocate's cost. The next appearance in Court was on 6/04/2021 for hearing of the application of the 2nd Defendant dated 10/12/2020 and the Court directed that it was to be heard on 8/06/2021. Since the Plaintiff did not attend Court and the Court was satisfied that she was appropriately served and she neither filed a response nor appear in Court, the application was allowed as prayed leading to the dismissal of the Plaintiff's case.

6. This dismissal led to the Plaintiff filing the application dated 14/6/2021 seeking to have the Court set aside the orders for dismissal of her suit issued on 8/06/2021 but it was dismissed through the Court's order of 9/11/2021.

7. Another application was made dated 23/12/2021 the Appellant/Applicant made an application seeking to have the orders of the Court dated 8/06/2021 set aside and or reviewed plus reinstatement but again the Court dismissed the application by its finding that the matter was res judicata vide its order issued on 25/10/2022.

The Application for Reinstatement

8. The Appellant`s application for reinstatement of the suit was based on the grounds that the learned Magistrate did not consider due process of the law and rules of natural justice and condemned the Plaintiff unheard.

9. It is the Appellant's contest that the learned Magistrate did not exercise caution and dismissed the suit at online hearing during Covid Pandemic in absence of the Appellant Advocate and that the Appellant had not been informed about the case coming up for dismissal for want of prosecution.

10. Thus that the learned Magistrate failed to exercise her discretion to fix the matter for hearing rather than dismissal of the same.

11. The appeal was canvassed by way of written submissions.

12. The Advocates for the Appellant, Nyende & 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 2 months before the dismissal for want of prosecution. 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 and out of Court settlement.

13. It was submitted that the Appellant had demonstrated in the application dated 25th 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.

14. 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.

Analysis and Determination

15. 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.

16. The issues for determination in the appeal are –

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

    2. Who pays the cost for the appeal?

17. 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 ...."

18. 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."

19. The trial Magistrate in her Ruling observed that the Plaintiff had abandoned her suit in Court since 2017 to 2020 and the non-attendance of the hearing of the application dated 10/12/2020. He however made no finding on whether the suit was ripe for dismissal for want of prosecution.

20. 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.

21. 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 several cases in our Courts and there would be no need of reinventing the well. I will rely on the plethora of cases from our higher Courts and others. The test one has to adhere to dismiss a case for want of prosecution 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 but it was a delay that was explained by the Appellant/Applicant. I do therefore find that the dismissal of the application for reinstatement of the suit was in the premises arbitrary, unjustifiable and it violated clear provisions of the law.

22. It is also not lost to the Court that dismissal of a suit is a draconian act that drives a litigant away from the seat of justice and as such, discretion ought to be exercised judiciously. This position was amplified in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows: -

> " 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 acts are comparable only to the proverbial 'Sword of the Damocles' which should only draw blood where it is absolutely necessary."

23. As held in the case of *Belinda Murai & Others v Amos Wainaina* [1978] LLR 2782, quoted with approval by the Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* [2013] eKLR:-

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the 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 a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of appeal sometimes overrule..."

24. A similar observation was famously made by Appaloo JA (as he then was) in *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103:

> " 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. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

25. The Respondents' assertions concerning likely prejudice do not seem to address the core consideration whether justice could still be done in this matter despite the delay here, which is slightly over two years now. For instance, it was not demonstrated that the delay will render the procurement of witnesses or documentation difficult for the Respondents. The words of Chesoni J (as he then was) in the case

of *Ivita v Kyumbu* (1984) KLR 441 albeit made in respect of an application for dismissal of a suit for want of prosecution are pertinent here:-

> " 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 disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the Court that he 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 favour 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."

26. The above decision must be read through the prism of the overriding objective introduced more recently in Sections 1A and 1B of the *Civil Procedure Act*. Parties can proceed to perfect the instant matter for hearing in reasonable time. Further, trial dates can be scheduled without undue delay if the Appellant is so minded, so as to give effect to the parties' undoubted right to a fair trial. See *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR.

27. Any likely prejudice to the Respondents arising from any further delay can be mitigated through appropriate directions as to the expeditious prosecution of the case, as well as an award of costs. The Court here sounding the caveat that at present, Courts are deluged with heavy caseloads and hence cannot allow any party to litigate at their leisure. This means that the Courts must firmly discharge their duty under the overriding objective. In that regard, the Court of Appeal stated in *Karuturi Networks Ltd & Anor. v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 that: -

> " The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the Court". See *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR.

28. In the end result, the Court is persuaded that the justice of the matter lies in exercising its discretion in favour of the Appellant by allowing the Appeal dated 13/07/2023. Consequently, the dismissal order of 8/06/2021 is hereby set aside and the suit is reinstated. These orders are granted upon the conditions that the suit shall be set down for hearing within two (2) months of the original lower Court's file being taken back to and received in the Thika Registry.

29. The costs of the Appeal are awarded to the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF JUNE 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

Mr. Nyende for the Appellant

1st Respondent – Not represented

Mr. Mwaura for the 2nd Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE