**Jemaiyo v SO (Minor Suing through Samuel Omwenga Ondora) (Civil Appeal E186 of 2022) [2025] KEHC 13531 (KLR) (29 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13531 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CIVIL APPEAL E186 OF 2022**

**RN NYAKUNDI, J**

**SEPTEMBER 29, 2025**

**BETWEEN**

**BEATRICE JEMAIYO ..... APPELLANT**

**AND**

**SO ..... RESPONDENT**

**MINOR SUING THROUGH SAMUEL OMWENGA ONDORA**

**RULING**

1. The Appellant filed a memorandum of appeal on 5th December 2022 seeking for the following orders;
    a. The appeal be allowed with costs to the Appellant.
    b. The ruling delivered on 24th February 2022 be set aside and orders subsequently made in the favor of the Appellant.
    c. The orders of the trial court as to costs be set aside.
    d. The Appellant be awarded costs of this appeal and in the trial Court.
    e. Any other orders this Court may deem just and expedient to grant.

**Decision**

2. This Court delivered an interlocutory ruling on 17th July 2023 pronouncing itself as follows;
    i. There shall be a stay of execution of the judgment delivered on 13th May, 2022 in Eldoret CMCC No. 1164 of 2016 on the condition that the Appellant/Applicant herein deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within (30) days from today, failing which the order for stay shall automatically lapse.

ii. Costs of the application to abide by the result of the appeal.

3. The intended Appellant has not complied with the orders of this Court dated 17th July 2023. I have seen no order on enlargement of time in favor of the intended Appellant. In matters of appeals Order 42 Rule 35 provide as follows;

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

   b. If, within one year after the 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.

4. This Court during the pendency of these proceedings came across an application dated 22nd September 2025 kind of intercepting the publication of the dismissal order due to inordinate and inexcusable non-prosecution of the appeal dating back 17th July 2023 when substantive directions were issued the entire record shows an Appellant not interested in taking positive steps in complying with the Court orders including the latest directions on 17th June 2025. Fortunately, on this very day when this Court issued final directions on the disposal of the appeal both Counsels were in attendance. The highlighting of submissions so expected from the legal Counsels on behalf of the Appellant and the Respondent never took place for reasons of non-compliance. The Appellant in the latest application has expended resources in the form of twenty paragraphs which could have been utilized in filing submissions touching on her appeal.

5. It is the primary duty of the Appellant to take steps to progress her case since she is the one who brought respondent to Court. It is now two years which have lapsed without the Appellant taking any step to progress her case, however strong or weak it may be for this court to make a determination once and for all. The Appellant inter alia is not even excusable under *the Constitution* for it provides under Article 50 on fair trial rights that disputes be resolved within a reasonable time and the same constitution goes further to state in Article 159 (2) (B) that justice shall not be delayed. I dare say in so far as that this appeal is concerned that the inordinate delay by the Appellant is a threat and a violation of the over-riding objective of the Court stipulated in Section 1A, 1B, and 3A of the *Civil Procedure Act*. The delay in prosecuting this appeal is simplicity on the emphasized test which the Court should apply as laid down in the cases of Ivita v Kyumbu KLR 441 and Communications Courier & Another v Telcom (K) Ltd (1999) eKLR in which the Court observed;

> " 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 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 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 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."

6. Incidentally, the Court proceedings were typed, made ready for the parties to inform themselves, any gaps of law or facts which were not properly conceived, digested, construed, evaluated or interpreted judiciously by the learned trial Magistrate resulting in subjecting the impugned judgement to an appeal process therefore the issued of proceedings usually a common of grievances by the intended Appellant does not apply to this case. As at the time the dismissal order was issued by this Court on 18th September 2025 there was no iota of evidence to meet the test of sufficient cause why the prolonged delay of not complying with the orders of the Court issued on 17th July 2023. The law frowns on this conduct of the Appellant in prosecuting the appeal. It is trite that public policy demands that the business of the courts should be conducted with expedition and it is of the greatest importance in the interest of justice that these actions be brought to trial with reasonable expedition. The court does not see how a fair trial can be ascertained after a great delay of 2 years after the cause of action arose. See Fitzpatrick v Batger and Co Ltd [1967]2 All ER 657; Reggentin v Beecholme Bakeries Ltd [1967]111 SOL. JO 216. See also Odunga's Digest on Civil Case Law and Procedure 3rd Edition Vol 4 Page 2977.

7. The Applicant can plead in many words but should acknowledge that at the root of this litigation is just the period of delay which is inordinate from the time the interlocutory ruling on 23rd July 2023 which was meant to trigger the appeal process. Why did the framers of *the Constitution* envisaged a situation where a trial or an appeal should begin and concluded within a reasonable time where there are no procedural barriers like non-availability of typed record is that in such circumstances justice delayed is justice denied?

8. Given the background on the pace of historical litigation by the parties in this matter the question I ask myself so what is the best method which shall apply in favor of the parties seeking to achieve a generally accepted standard of fairness? This is where the tyranny of judicial discretion comes in including the residual powers of the court classified as inherent jurisdiction. Within the rubric cluster of the law discretion necessarily involves a latitude of individual choice according to the particular circumstances and differs from a case where the decision follows ex debito justitiae once the facts are ascertained and in matters of discretion authorities are not of much value since no two cases are exactly alike and even if they were, the Court cannot be bound by a previous decision to exercise its discretion in a particular way because that would be in effect putting an end to the discretion. See Evans v Bartlam [1937]AC 473; Jenking v Bushby [1891] 1 Ch 484.

9. For a Court to consider whether or not to excuse a mistake on the part of Counsel, it must first be shown that what he did or failed to do was mistaken as a deliberate or careless act or omission cannot properly be the subject of the exercise of discretion in an Applicant's favor and that is so whether the mistake is by the Applicant personally or his Advocate, as the Court cannot assist a party who is deliberately indolent or at fault.

10. The saving grace of applications of this nature are the provisions of *the Constitution* in Article 10 on national values and principles and governance, Article 27 on quality and freedom from discrimination, Article 48 on access to justice and 50 on fair trial rights. By these provisions *the Constitution* has an overarching novel constitutional intervention over all manners of administration of justice in the adjudication of cases in our legal system. *The Constitution* in Article 10 which binds all State Officers including Judges, Magistrates and Chairpersons of Tribunals introduces the principles of governance which include human dignity, equity, social justice, inclusiveness, equality, non-discrimination etc. and the principle of fairness the carrier concept in Article 50 of *the Constitution*. Fairness is synonymous with justice. Fairness however is more practical than justice which is an ideal purposed by every legal system. Practically under Article 50 (1) of *the Constitution* fairness comports that a judgment or a decision by Courts must be made by consideration of all circumstances of the prevailing situation

and individualized circumstances. Therefore, the output of the Court is that ruling or judgment which determines and vindicates rights and obligations of the disputants hence it must be such that to ordinary reasonable men and women in the rural and urban Sub-Counties and Wards must find it to be fair, reasonable and logical. That kind of ruling or judgment is only possible from a constitutional organ properly and competently constituted if all facts of the cause of action are considered and accounted for without laying emphasis to the minor fact made to undermine the major facts of the case.

This contours of the power of the Court was the seminal question being articulated by a different comparative jurisdiction but from whom we borrowed sometimes in absolute terms the foundation of our legislative schemes of statutes which started us off after independence as a continuum to domesticate our very own legal system. This is what the Court said in Siddiq (dead) Through Legal Representatives (Ram Janmabhumi Temple Case) v Mahant Suresh Das & Others (2020) 1 SCC 1, *the Constitution* Bench of this Court has summarized the contours of the power as:

> " 1023. ...The phrase 'is necessary for doing complete justice' is of a wide amplitude and encompasses a power of equity which is employed when the strict application of the law is inadequate to produce a just outcome. The demands of justice require a close attention not just to positive law but also to the silences of positive law to find within its interstices, a solution that is equitable and just. The legal enterprise is premised on the application of generally worded laws to the specifics of a case before courts. The complexities of human history and activity inevitably lead to unique contests "such as in this case, involving religion, history and the law — which the law, by its general nature, is inadequate to deal with. Even where positive law is clear, the deliberately wide amplitude of the power under Article 142 empowers a Court to pass an order which accords with justice. For justice is the foundation which brings home the purpose of any legal enterprise and on which the legitimacy of the rule of law rests. The equitable power under Article 142 of *the Constitution* brings to fore the intersection between the general and specific. Courts may find themselves in situations where the silences of the law need to be infused with meaning or the rigors of its rough edges need to be softened for law to retain its humane and compassionate face..."

11. In an Article by Rashmi Goyal referenced https://cdnbbsr.s3waas. govin>uploads>2025/03 titled Judicial Discretion stated as follows;

> " Discretion is the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives. Judicial discretion is a very broad concept because of the different kind of decisions made by Judges within the same given circumstances. The exercise of discretionary power conferred on a Judge is omnipotent in judicial proceedings. Some degree of discretion is unavoidable because legislature cannot foresee every eventuality which may come in judicial proceedings. The term judicial discretion has nowhere been defined in the statues though it is exercised regularly by courts of law. It is exercised when a Judge is conferred a power under a statute that requires the Judge to choose between several different, but equally valid, courses of action. Discretion is inevitable both in civil and criminal proceedings. It is impossible to foresee the eventualities in the judicial proceedings and for this purpose the power of discretion is conferred upon the Judge to decide justly according to the facts and circumstances. It is for this reason that in every piece of legislation generally we find words like, "as Courts deems proper", "as the court thinks reasonable", "as the court otherwise directs" and other similar expressions which confers discretionary power on the Court. These expressions show that a court has unbridled freedom to decide a case according to his/her subjective satisfaction. Judges are being perceived as wielding wide range of power because of the discretion conferred on

them. Now the question which arises "Is the judge free to exercise discretion according to his subjective satisfaction"?

12. I have anxiously reviewed the entire record of this litigation and the breach of procedural law and court orders duly issued for purposes of case management and enforcement of the fair trial right under the doctrine of equality of arms. The blunders, mistakes all acts of omission on the part of the Appellant are crystal clear from the substratum of the proceedings but as Philip Stanhope remarked judgement is not upon all occasions required, but discretion always is. I am persuaded to exercise judicial discretion to set aside the dismissal order, to enlarge time for the ends of justice to be met on the following condition precedents;

    a. That the Appellant complies with the declarations made in the ruling of this Court dated 17th day of July 2023 within 21 days from today's date

    b. That upon compliance with Clause (a) the Appellant will have the liberty to approach this Court with clean hands to file written submissions as earlier ordered to canvass the appeal within seven days immediately after complying with Clause (a) of this ruling.

    c. That the appeal as it stands had already been admitted for hearing with a presumption that the orders of 17th July 2023 were not breached.

    d. That thereafter the Respondent on being served with the written submissions by the Appellant shall file rejoinder submissions touching on the issues raised by the Appellant within seven days without any leave or permission on enlargement.

    e. That both submissions deemed to have been filed shall be highlighted on 6th November 2025.

    f. That avoidance of doubt the application dated 22nd September 2025 is moot.

    g. That the costs of this application shall be met by the Appellant including the throw-away costs to the Respondent and his legal Counsel as provided for under the Advocates Remuneration Order before the highlighting of the submissions of the appeal. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 29TH SEPTEMBER 2025**

.....

**R. NYAKUNDI**

**JUDGE**