

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. E014 OF 2025**

**JOHN ODHIAMBO NYAMBALO ..... APPELLANT**

**- VERSUS -**

**AGA KHAN HOSPITAL ..... RESPONDENT**

(Being an appeal from the Ruling/Order of the Honourable E.A. Obina (SPM) at  
Kisumu in Kisumu CMCC No. 631 of 2015 delivered on 17/1/2025

**J U D G M E N T**

1. The appellant sued the respondent via a plaint dated **1/12/2015** seeking general damages for negligence by the respondent which negligence led to the death of her daughter.
2. The respondent entered appearance and filed a statement of defence dated **15/12/2015** in which it denied the particulars of negligence and put the appellant to strict proof of his allegations.
3. Vide an application dated **12/5/2016**, the appellant sought orders to compel the respondent to grant him documents that were vital to his case which application was granted on the **7/6/2016**.
4. On the **10/5/2017**, the lower court fixed the suit for notice to show cause as to why it should not be dismissed for want of prosecution under **Order 17 Rule 2** of the Civil Procedure Rules and on the **14/6/2017** the appellant's suit was dismissed.

5. Seven years later, the appellant moved the trial court vide a Motion dated **9/7/2024** seeking to reinstate his dismissed suit averring that he was never served with any Notice for Dismissal. The appellant further relied on a further affidavit sworn by his advocate on the **5/9/2024** in which it was reiterated that they were never served with the Notice to Show Cause.
6. The application was opposed vide a replying affidavit sworn by **Mitchell J.B. Menezes** on the **22/7/2024** on behalf of the respondent in which it was deposed that it was served with the Notice to Show Cause dated **10/5/2017** and when the matter was set down for hearing, the appellant or his advocate never attended court. That the appellant had not disputed the address for service on the Notice to Show Cause thus demonstrating that he had been served.
7. In its ruling, the trial court found that the appellant had not offered a reasonable explanation for the delay in moving court to reinstate the suit and that this delay prejudiced the respondent. In the premises, the court proceeded to dismiss the appellant's application.
8. Aggrieved by the said decision, the appellant appealed to this Court vide a Memorandum of Appeal dated **17/1/2025** setting out two (2) grounds of appeal which can be summarized into one broad ground; ***'that the trial court erred in law and fact in dismissing his suit without noting that the applicant was not served with the notice to show cause.'***
9. This being a first appellate Court, its duty is to re-evaluate and analyse the evidence tendered before the trial court with a view to arriving at its own independent findings and conclusions at all times having in mind that it did not see the witnesses testify. (See **Selle & Another –vs- Associated Motors Boat Company Ltd & Others**).

10. The Court has perused the entire record and considered the material canvassed before the trial court leading up to the impugned ruling of **17/1/2025**. The events leading to the present appeal have in part been captured above. The appellant's suit was dismissed for want of prosecution in a ruling delivered on **17/1/2025** pursuant to a Notice to Show Cause (NTSC) issued under **Order 17 Rule 2 of the Civil Procedure Rules**.

11. Order 17 Rule 2 of the Civil Procedure Rules provides that: -

***“(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) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.***

***(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.***

***(4) The court may dismiss the suit for non-compliance with any direction given under this Order.***

***(5) A suit stands dismissed after two years where no step has been undertaken.***

***(6) A party may apply to court after dismissal of a suit under this Order.”***

12. It would be important to note that pursuant to the NTSC dated **10/5/2016**, the appellant was expected to place before the court detailed and cogent reasons

explaining the delay or failure to prosecute the suit and why the court should sustain it.

13. **Order 17 Rule 2(6) of the Civil Procedure Rules** grants the court jurisdiction to entertain an application of this type. While the discretion of the court to set aside a dismissal order is unfettered, an applicant is obligated to adduce material upon which the Court is to exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in one's favor. In **Shah v Mbogo and Another [1967] E.A 116**, the rationale for the exercise of discretion was spelt out as follows: -

*“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”*

14. The principles enunciated in ***Shah v Mbogo (supra)*** were further amplified further by Platt JA in **Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193**. Although the courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal force in this matter. Indeed, the dismissal order issued herein is equivalent to a judgment as it determined the suit by way of dismissal.

15. The appellant's affidavit attributes delay in prosecuting the suit and dismissal of the suit, to non-service of the NTSC. These averments were vehemently disputed by the respondent.

16. The record reveals that the NTSC which was for hearing on **14.6.2017** was duly served via the postal mail to the respective counsels. The appellant has not disputed the correctness of the postal address used to effect service of the NTSC. Thus, the argument that there was no notice of the NTSC is unconvincing.
17. Further, the appellant did not offer an explanation as to why he took over 7 years to bring the application for reinstatement of the suit. Clearly, that was evidence of unwillingness to pursue the suit.
18. In an era where courts are overwhelmed with substantial caseloads, it is insufficient for any party involved in the dismissal of their case to attribute blame solely to external factors without recognizing their own contributions to the case's dismissal. Both parties and their legal representatives are obligated to collaborate with the court to advance the primary goal of ensuring a fair, swift, proportionate and cost-effective resolution of disputes, as outlined in **sections 1A and 1B of the Civil Procedure Act**. Extended delays in pursuing claims undermine this primary goal and can lead to unfair results for the party that is innocent. The case in question has now been pending for over ten years.
19. This is a clear case where the appellant abandoned his case. He cannot turn back and seek equity from court in reinstatement of the suit. Equity aids the vigilant and not the indolent.
20. The upshot of the above is that this appeal lacks merit and is hereby dismissed. I make no order as to costs.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 31<sup>st</sup> day of **October, 2025**.

**A. MABEYA, FCI Arb**  
**JUDGE**