REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LC APPEAL NO.E085 OF 2024

WILLIAN ROMAN MCTOUGH ..... APPELLANT

VERSUS

BHABHUBHAI CONSTRUCTION CO. LIMITED ..... 1ST RESPONDENT

JULIUS ONYANGO AYIEKO ..... 2ND RESPONDENT

ALI NASUR MOHAMMED ..... 3RD RESPONDENT

(Being an appeal from the ruling of the Honourable Mr. K. Cheruiyot (SPM) delivered on the 18th March, 2022 in KSM CMCEL CASE NO. 44 OF 2019)

BETWEEN

WILLIAN ROMAN MCTOUGH ..... PLAINTIFF

VERSUS

BHABHUBHAI CONSTRUCTION CO. LIMITED ..... 1ST DEFENDANT

JULIUS ONYANGO AYIEKO ..... 2ND DEFENDANT

ALI NASUR MOHAMMED ..... 3RD DEFENDANT

J U D G E M E N T

Vide the Memorandum of Appeal dated 16th October, 2024, the Appellant challenged the ruling of the Senior Principal Magistrate's Court in Kisumu CMC EL CASE NO.44 OF 2019 (the suit) delivered on

18th March, 2022 (herein referred to as the ruling). The Memorandum of Appeal is indicated to have been filed pursuant to leave granted by the court on 9th October, 2024 in Kisumu ELC Misc. Application No. E013 of 2023.

The Appellant seeks that the ruling be set aside, the suit be reinstated and fixed before any Magistrate with jurisdiction for hearing and determination on merit, the costs of the lower court and the appeal be awarded to the Appellant.

A brief background of the appeal as can be gathered from the record of appeal filed herein and dated 21st January, 2025 and the Supplementary record of appeal dated 9th May, 2025, is that the Appellant was the Plaintiff in the suit wherein vide the amended plaint dated 10th May, 2012, he sued the Respondents over a parcel of land known as KISUMU/KOGONY/742 which he claimed to belong to him.

His complaint was that the Respondents had trespassed onto the suit land and started to construct a perimeter wall around it thereby denying him access to the land.

The suit which was at first filed in the High Court at Kisumu as KISUMU HCC NO.167 OF 2011 was later transferred to the

Magistrate's court as KSM CMC EL CASE NO.44 of 2019 for hearing and disposal.

The record shows that in response to the claim, the 1st Respondent filed a statement of defence dated 17th August, 2015 denying the Appellant's claim. The 1st Respondent averred that it was the bona fide proprietor of the suit land having lawfully acquired it by way of purchase from the 3rd Respondent and as such, its possession and use of the land was legal.

The 3rd Respondent also filed a statement of defence dated 23rd July, 2012 and denied the Appellant's claim. He claimed that he was the owner of the suit land having bought it from the 2nd Respondent and that he in turn sold the said land to the 1st Respondent on or about 11th February, 2011.

The record further shows that in the pendency of the suit, the 1st and 3rd Respondents filed a Notice of Motion application dated 19th July, 2021 seeking dismissal of the suit for want of prosecution and costs of the application. That the application was heard by the trial court which vide the ruling, found that the application had merit and allowed it. The court dismissed the suit for want of prosecution and awarded costs to the Applicants in the application.

<u>The appeal</u>

Aggrieved by the ruling, the Appellant preferred the appeal herein on the grounds: -

1) the learned trial Magistrate erred in law and in fact by dismissing the Appellant's suit for want of prosecution despite the Appellant demonstrating that the delay to prosecute the matter was excusable.
2) in dismissing, the Appellant's suit, the trial court failed to exercise its discretion judiciously which failure has occasioned an injustice to the Appellant.
3) in dismissing the Appellant's suit, the trial court misdirected itself in the same matter and as a result arrived at a decision that was erroneous and as a result there has been misjustice.
4) by the trial court's decision in dismissing the Appellant's suit, the Learned trial Magistrate failed to take into consideration the fact that prejudice will be occasion to the Plaintiff and exercise the judicial discretion so as to serve the substantive justice on behalf of the parties.

Vide directions given on 8th May, 2025, the appeal was heard by way of written submissions.

Appellant's submissions

Written submissions dated 5th June, 2025 were filed by the firm of Muma Nyagaka & Company Advocates for the Appellant. Counsel submitted that the four (4) grounds of appeal principally relate to one issue namely; whether the trial Magistrate's discretion in dismissing the Appellant's suit for want of prosecution was properly exercised.

Counsel submitted that the law donates a discretion to the trial court to allow or reject the application which discretion ought to have been exercised by considering the principles of law set out in relation to Order 17 Rules 2(1) and 3 of the Civil Procedure Rules. Counsel referred the court to the Case of *Nilesh Premchard Mulji Shah & Another t/a Kentan Emporium -vs- M.D. Popat and Others (2016)eKLR* where the court of Appeal held *inter alia* that;

> "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is whether justice can be done despite the delay. Thus, even if the

delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

That it is clear that the trial court failed to take into consideration the reasons for the delay in prosecuting the suit, that had the court done so it could have reached a conclusion that the delay was not inordinate and unreasonable. That from the proceedings, the Appellant had not lost interest in the matter. That the Appellant was always willing to proceed with this case and that he took the necessary steps to have his matter heard.

That the Appellant had informed the court that at one time, parties were in discussion to settle the matter out of court and that this averment was not controverted by the Respondent in any way. That the court ought to have made a factual finding based on the rules of evidence as the Appellant's averment was not controverted and give the averment a benefit of doubt. Counsel relied on the case of *Invesco Assurance Co. Ltd. -vs- Oyange*

Barak (2018)eKLR where the court held that article 159 of the Constitution and Order 17 Rule 2(3) give the court the discretion to dismiss the suit where no action has been taken for one year and on an application by a party. That the discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable and is likely to cause serious prejudice to the Defendant on account of that delay.

Counsel submitted that the trial court's holding that article 159 provides for expeditious disposal of the cases was an error and a misinterpretation of the article which provides for administration of justice without undue regard to technicalities.

Counsel also relied on the cases *Mwangi S. Kimenyi -vs- Attorney General & Another (2004) eKLR* and *Selle & Another -vs- Associated Motors Board Company Limited & Another (1968) EA 128* and urged the court to allow the appeal and remit the matter for trial before another court other than Hon. K. Cheruiyot.

Submissions for the 1st & 3rd Respondent

It was submitted on behalf of the 1st and 3rd Respondents that in his ruling, the learned trial Magistrate was fully aware that the power to dismiss a suit for want of prosecution under Order 17 Rule 2(1) and 3 of the Civil Procedure Rules was discretionary, the exercise of which must be judicious. That the trial Magistrate found that the application met the mandatory test in Order 17 rule 2 as more than a year had lapsed between the time the matter had last been in court to the date of filing the application.

That the trial court also found that the suit had been in court for 10 years without being tried and that the delay was so inordinate as to give rise to a substantial risk that there would be no fair trial and the likelihood of serious prejudice.

That it has not been shown that the trial court misapprehended the applicable law or that it failed to take into account a relevant factor or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong.

Counsel relied on the case of *Ocean Freight Shipping Company Ltd -vs- Oakdale Commodities Ltd, Civil Appeal NO.198 of 1995* for this submission.

Counsel submitted that the trial court was well guided by the decisions in *Ivita -vs- Kyumba [1984]KLR 444, Argan Wekesa Okumu -vs- Dima College Limited & 2 Others [2015]eKLR* which he cited in the ruling to the effect that the Applicant must show that the delay complained of is inordinate and inexcusable and that the Defendant was likely to be prejudiced by such delay.

Counsel submitted that a delay in prosecuting a case is prejudicial not just to the parties that want to see a fair resolution of the matter but also to the judicial process itself as witnesses die, memories fade and documents get misplaced over time, thereby severely compromising the chances of the court doing justice to the case.

That this was one of the reasons pointed out by the trial court for dismissal of the case.

That according to the pleadings in the amended plaint, the 2nd Defendant was the person who defrauded the Appellant of the suit land. That 2nd Defendant had died and the suit against him abated.

That the Appellant had no direct dealings with the 1st and 3rd Respondents. That without the 2nd Defendant, the Appellant's claim against the 1st and 3rd Respondents cannot stand and there is no use of court allowing such a suit to remain alive.

That the court is enjoined by the provisions of section 1A and 1B Civil Procedure Act to ensure that justice is administered without undue delay. Further that article 159 enjoins the court to ensure that matters were disposed of without delay.

Counsel relied on the case of *Fran Investment Limited -vs- GRS Security Services Limited [2015]eKLR* where it was held that;

> "This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such a draconian act comparable only to the proverbial "sworn of the Damocles." But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the Constitution that justice delayed is justice denied. Here, I am reminded that justice is to all the parties and not only the Plaintiff".

Counsel submitted that the judgement in respect of this appeal filed when the 2nd Respondent was deceased, will be nullity as the 2nd

Respondent is deceased yet was included as one of the Respondents.

That before the application for dismissal was filed, the matter was last in court on 25th February, 2020 when the Plaintiff (Appellant herein) asked for 2 months to finalize substitution of the 2nd defendant. That the application for dismissal for want of prosecution was filed after about a year and half later.

That the order of injunction issued on 9th May, 2012 had the effect of stopping the 1st Respondent from developing the property, that this was after the 1st Respondent had moved equipment and material to the site. That all that the 1st Respondent was allowed to do was to remain in possession.

That the Appellant was granted opportunity to prosecute his case.

Counsel urged the court to uphold the ruling dated 18th March, 2022, to dismiss the appeal and award costs to the 1st and 3rd Respondents.

Analysis and determination

This is a first appeal and hence the court has the obligation to re-examine and re-analyze the evidence placed before the trial court.

See cases of *Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123* and *Gitobu Imanyara & 2 others –vs- Attorney General [2016] e KLR.*

The appeal challenges the ruling of the trial court delivered on 18th March, 2022 dismissing the Appellant's suit for want of prosecution. The application that resulted in the ruling was dated 19th July, 2021.

The application was brought pursuant to the provisions of section 1A, 1B and 3A of the Civil Procedure Act and Order 17 Rule 2 (1) and 3 of the Civil Procedure Rules 2010.

The grounds upon which the application was brought were that the Plaintiff (Appellant herein) had failed to diligently proceed with the prosecution of his suit for 10 years to the date of filing of the application. That the Appellant had failed to comply with the directions of the court regarding trial of the suit. That more than one year had lapsed since the matter was last in court without the Applicant taking any steps towards prosecution of the suit. That the conduct of the Appellant was inimical to the overriding objective and to the constitutional fair trial safeguards thereby constituting a contravention of the rights of the 1st and the 3rd Respondents. That the pendency of the suit was prejudicial to the 1st and 3rd

Respondents and to the fair administration of justice. That it was evident that the Appellant was disinterested in having the matter heard and determined expeditiously, or at all. That it was only proper and in the interested of justice that the suit be dismissed with costs for want of prosecution.

The Supporting Affidavit sworn on 19th July, 2021 narrated the history and proceedings so far taken in the suit and concluded that since the matter was last in court on 25th January, 2020, the Appellant had taken no step to prosecute the matter or otherwise undertaken proceedings to conclude the matter.

The Replying Affidavit sworn by the Appellant on 8th September, 2024 also narrated the proceedings that had so far taken place on the case and explained that the delay in prosecuting the matter was not caused by lack of interest or indolence on the part of the Appellant.

The Appellant urged the court to exercise its discretion and sustain the suit rather than prematurely terminate it.

That there was delay in prosecuting the suit is not denied. It is clear from the record that the suit had been in court for about 10 years before the application to have it dismissed was filed.

The record shows that the suit was fist filed as KISUMU HCC NO.167 OF 2011 vide the plaint dated 4th October, 2011 in the year 2011.

The application resulting in the ruling was filed in 2011. The Appellant's explanation for the delay as contained in the Replying Affidavit was that at some time parties were trying to engage in negotiations to settle the matter out of court, that at other times when the suit came up for hearing the trial court was not sitting and that the 2nd Respondent passed on and the process of substitution was underway.

The trial court in its ruling found that the application met the test under Order 17 Rules 2 Civil Procedure Rules since no step had been taken for over a year since the matter was last in court before the impugned application was filed.

The trial court also considered the period of the delay which was 10 years and found that it was so inordinate as to give rise to a substantive risk to a fair trial and that there was a serious likelihood that prejudice will be caused to the Respondents.

The court further found that the delay was inexcusable. The court concluded that considering the need to give effect to the principle of justice in article 159 of the Constitution which provides for

expeditious disposal of cases, the application met the threshold for grant of the orders sought.

As submitted by both parties, the power donated by Order 17 Rule 2 to court to dismiss suits for want of prosecution is discretionary which must be exercised judiciously. It provides that

> "2(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."

Article 159 of the Constitution relied on by both parties in addition to directing the administration of justice without undue regard to procedural technicalities directs the courts and tribunals in exercising judicial authority to be guided by the principle among others that justice shall not be delayed.

To exercise discretionary power judiciously is to be guided by the sound principles of law, the unique facts of the case and good

reasoning or good sense and judgement on the part of the judicial officer. In *Hajar Services Limited vs Peter Nyangi Mwita [2020] eKLR* it was held inter alia that judicial discretion should be exercised on fixed legal principles and not on private opinions, sentiments and sympathy or benevolence but deservedly, and not arbitrarily, whimsically or capriciously

In the present case, it is clear that the trial court did not only consider the law and facts but also allowed itself to be guided by decided cases.

It is evident from the proceedings that the Appellant could not explain the delay. There was no evidence for example that parties had tried to engage in negotiation for out of court settlement. There is no explanation why no action was taken for the period of over one (1) year between the period when the matter was last in court and when the application for dismissal was filed. There is no plausible explanation why the substitution of the 2nd Defendant was taking more than 3 years.

As submitted on behalf of the 1st and 3rd Respondents justice is for all the parties in the suit. They had been waiting for the 10 years for the case to be prosecuted.

Section 1A, 1B and 3A of the Civil Procedure Act pursuant to which the application was brought before the trial court enjoin court and all parties to, *inter alia* ensure expeditious disposal of disputes brought to court under the Act.

In *Shah vs Mbogo and another (1976) EA 116*, it was held that

> "An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

I find no reason to interfere with the exercise of discretion by the trial court. I find that the appeal lacks merit and hereby dismiss it. Costs to the 1st and 3rd Respondents.

Orders accordingly.

Judgment dated and signed at Kisumu, read virtually this 20th day of November, 2025.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Muma for the Appellant

Otieno David for the 1st and 3rd Respondents