



REPUBLIC OF KENYA



**Muite & another v National Bank of Kenya (Civil Appeal E247 of 2021)
[2025] KEHC 16883 (KLR) (Civ) (19 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16883 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E247 OF 2021**

AC MRIMA, J

NOVEMBER 19, 2025

BETWEEN

PAUL KIBUGI MUIITE 1ST APPELLANT

EDITH NDETI MUIITE 2ND APPELLANT

AND

NATIONAL BANK OF KENYA RESPONDENT

(Being an appeal from the Ruling and Order of Hon. A. Abura in Chief Magistrates Court Civil Case No. 572 of 2003 delivered on 10th May 2021)

JUDGMENT

The Background:

1. Through an application by way of a Notice of Motion dated 7th November 2021, Paul K. Muite and Edith N. Muite, the Appellants herein, sought to strike out Milimani Chief Magistrates Court Civil Case No. 572 of 2021, (hereinafter referred to as ‘the suit’) which had been instituted against them by the National Bank of Kenya, the Respondent herein. The application was precipitated by the failure to set down the suit for hearing within 120 days, pursuant to the order of the High Court remitting the said suit for retrial.
2. The Respondent opposed the application. It was its case that it encountered various challenges in complying with the timelines set by the High Court including inability to trace the file, a set back outside their control and the fact that the Appellants had contributed to the delay as a result of various adjournments given at their request. The Respondent asserted that they were desirous of prosecuting their case and the delay was not deliberate.



3. In its Ruling of 10th May 2021 [hereinafter referred to as ‘the impugned ruling’], the trial Court, upon considering the principles for striking out of a suit for want of prosecution as provided for under Order 17 Rule 2(1) and (2) of the Civil Procedure Rules, made the finding that the Respondent had satisfactorily explained the reasons for the delay and that it was not inordinate. Accordingly, it exercised discretion in favour of the Respondent by dismissing the application. The Appellant was aggrieved, hence, the instant appeal.
4. The appeal was heard by way of written submissions, hence, this judgment.

The Appeal:

5. Through a Memorandum of Appeal dated 11th May 2021, the Appellants sought to set aside the impugned ruling on the following grounds: -
 1. The learned Magistrate of the Subordinate Court erred in law and exercised her discretion wrongly when she dismissed the Appellant's Notice of Motion dated 7th November 2019 without considering any or all of the Appellants' bases for the said Motion lodged solely to give effect to the Order of the High Court made on May 2nd 2019 by the Hon. Mr. Justice Serگون in Nairobi High Court Civil Appeal No. 154 of 2015 between the parties.
 2. The learned trial Magistrate erred and misdirected himself in law and in fact when she failed to consider that the Motion dated 7th November 2019 by the Appellants was merely to formalize the effect of the Order of the High Court made on May 2nd 2019 by the Hon. Mr. Justice Serگون in Nairobi High Court Civil Appeal No. 154 of 2015, since the time-cap of 120 days to prosecute the suit as imposed by the High Court had already lapsed.
 3. The Learned Magistrate failed to consider that by operation of the Order of the High Court made on May 2nd 2019 by the Hon. Mr. Justice Serگون in Nairobi High Court Civil Appeal No. 154 of 2015, she was divested of jurisdiction to list the suit before her for Hearing on July 19th 2021 as it had automatically been dismissed, the 120 days to prosecute the suit having since long lapsed
 4. The learned Magistrate erred and misdirected herself in law when she failed to consider that such a course as she took on May 10th 2019 to set down the suit for trial on July 19th 2021 when the Order of the High Court made on May 2nd 2019 by the Hon. Mr. Justice Serگون in Nairobi High Court Civil Appeal No. 154 of 2015 had neither been stayed nor extended was effectively to trample upon and denigrate the authority of the High Court conferred on the High Court under Article 165(6) of *the Constitution* of Kenya.
 5. The learned Magistrate erred and misdirected herself in law and acted in violation of the Appellants' right to fairness and a fair trial under Article 25(c) of *the Constitution*, and therefore a breach of Article 10(2) of *the Constitution* since the Order of the High Court made on May 2nd 2019 by the Hon. Mr. Justice Serگون in Nairobi High Court Civil Appeal No. 154 of 2015 had taken effect already and the suit before her stood automatically dismissed, thus subjecting the Appellants to a patently unfair and unlawful trial.
 6. The learned Magistrate erred in law and in fact and exercised her discretion wrongly when she dismissed the Appellants' Motion dated 7th November 2019 and proceeded to set down an already dismissed suit for hearing without an Order from the High Court vacating, varying or discharging the said Order of the High Court made on May 2nd 2019 by the Hon. Mr.



Justice Sergon in Nairobi High Court Civil Appeal No. 154 of 2015, or hearing the Appellants' objections to such a course of action.

7. The learned Magistrate erred in law when she read mischief into the application dated 7 November 2019 by the Appellants without considering the merits of the adjournment sought by the Appellants' counsel and the bases of the application.
8. The learned Magistrate ought to have given deference to the Order of the High Court made on May 2nd 2019 by the Hon. Mr. Justice Sergon in Nairobi High Court Civil Appeal No. 154 of 2015 giving the Respondent 120 days effective May 2nd 2019 to prosecute its suit in the Subordinate Court, in default of which the suit stood automatically dismissed, as indeed it is.
9. The learned magistrate erred in law and seriously misdirected herself when she disregarded the Appellants' submissions of the Appellants in asserting their application dated 7th November 2019 to affirm the Order of the High Court made on May 2nd 2019 by the Hon. Mr. Justice Sergon in Nairobi High Court Civil Appeal No. 154 of 2015, and altogether disregarded the authorities cited to her by the Appellants, (and which were binding on her, pursuant to the doctrine of stare decisis) thus demonstrating her bias against the Appellants.
10. The learned Magistrate failed to take into cognizance of, and abrogated the Appellants' right to access Justice as enshrined in Article 48 of *the Constitution*, as the High Court's Order of May 2nd 2019 had already taken effect and the suit stood dismissed as at May 10th 2021 when she proceeded to set it for hearing.
11. The learned Magistrate failed to exercise her discretion properly in considering the Appellants' application dated 7th November 2019, and ignored all applicable principles of law and precedent in similar cases.
12. The learned magistrate erred in law and seriously misdirected herself when in law and fact when she failed to look into the proper merits of the of the said application dated 7th November 2019 hence arrived at a wrong decision.

The Submissions:

6. The Appellants presented written submissions dated 24th May 2024. They reiterated the contention that the suit stood automatically dismissed by operation of a peremptory "guillotine" time-cap order imposed by the High Court. They submitted that the 120-day period expired on or about 31st August 2019, and the suit was not set down for hearing by that date. They argued that the suit, therefore, stood automatically dismissed by operation of the superior Court Order and that their Notice of Motion before the Magistrate was merely "to formalize the effect" of this dismissal.
7. It was their case that the Learned Magistrate lacked jurisdiction since the suit was automatically dismissed. They also argued that defying a superior Court Order was tantamount to usurping the High Court's power to review or extend its own decision, effectively trampling upon the authority of the High Court under Article 165(6) of *the Constitution*. The Appellants, therefore, asserted that the trial Court wrongfully exercised discretion by failing to give deference to the binding High Court Order and instead wrongfully attempted to exercise discretion, ignoring the finality of the guillotine order. In addition, the Appellants submitted that the Respondent never sought for any extension of the fixed 120-day period from the High Court under Section 95 of the *Civil Procedure Act*, meaning the High Court became functus officio upon the expiry of the time.



8. As regards the lost file, the Appellants submitted that the Respondent failed to follow the elaborate and mandatory procedure for file reconstruction, including obtaining a Certificate of Loss as required by the High Court Registry Operation Manual and supporting case law. To fortify their case, the Appellants relied on various authorities among them the one in Julius Kipkeny Kolil & another -vs- Kenya Commercial Bank Limited & 2 others [2021] eKLR and Janet Wamuyu Mbao v Aga Khan Health Services Limited T/A Aga Khan Hospital, Nairobi [2015] eKLR to affirm the mandatory, self-executing nature of such dismissal orders.
9. In the end, the Appellants sought orders setting aside the impugned ruling and substituting it with an order allowing their Notice of Motion with costs.

The Respondent's case:

10. National Bank of Kenya Limited opposed the appeal through written submissions dated 15th May 2024. From the outset, it asserted that the appeal is another disingenuous tactic devised by the Appellants aimed at ensuring that the Respondent's claim is never heard and determined on merit. The Respondent highlighted the Appellants' deliberate and endless litigious conduct throughout the proceedings since the suit was filed in 2003 which included failing to file a defence after setting aside an initial default judgment, requesting multiple adjournments, and failing to appear for hearing on June 5, 2012, which led to a second ex parte judgment.
11. The Respondent submitted that the Magistrate's decision to save the suit was correct and that the suit should not be dismissed for want of prosecution. To lend credence to the foregoing, it was its case that the High Court's Order imposing the 120-day time-cap was issued per incuriam because of lack of merits analysis. It submitted that the High Court's judgment concerned an appeal to set aside an ex-parte judgment and was granted under Order 12 Rule 7 but did not determine whether the Respondent had failed to prosecute the suit or apply the relevant legal framework and jurisprudential principles for dismissal for want of prosecution.
12. In challenging delay, it was its case that it was excusable delay. The Respondent maintained that the trial Court correctly applied the principles of Order 17 Rule 2 by demonstrating sufficient cause as to why the suit was not heard within 120 days. It was its case that it showed that the trial Court's file was missing from the registries, a circumstance that was beyond its control despite its consistent interventions and formal notifications to the relevant Court officers. The Respondent emphasized that the injustice of dismissing their suit when the High Court, in the very judgment imposing the time-cap, had previously excused the Appellants' two-year delay in seeking to set aside the ex parte judgment because the file was missing ought not be allowed. It submitted that it would be unjust to excuse the Appellants' two-year delay while punishing the Respondent's four-month delay for the same cause.
13. It was further argued that the Appellants had not stated any particulars of prejudice they would suffer if the appeal is dismissed. Conversely, it fronted the position that it would suffer grave prejudice by being locked out of recovering Kshs. 1,440,858.30 plus 23% interest, after obtaining judgment twice. It urged that the test for dismissal requires the delay to be prolonged and inexcusable, and for justice not to be done despite the delay. It asserted that a dismissal would be a draconian act contrary to Article 159(2)(d) of *the Constitution* and the overriding objective.
14. On a procedural issue, the Respondent submitted that an appeal against the dismissal order by the trial Court, based on Order 17, Rule 2 of the Civil Procedure Rules, did not lie as of right, but with the leave of the Court under Order 43 of the Civil Procedure Rules, which leave was neither sought nor granted. It was further its case that the Appellants neglected to comply with the High Court order to pay the Respondent's throw away costs of KES. 30,000/- within 21 days, a condition for setting aside



the ex parte judgment and as such had approached the Court for a discretionary relief while disobeying Court orders.

15. In conclusion, the Respondent prayed that the appeal be dismissed with costs and the matter be returned to the trial Court for hearing on a priority basis.

Analysis:

16. The core issue for consideration in this appeal is whether the trial Magistrate, in dismissing the Appellants' Notice of Motion seeking to strike out the suit, erred by effectively overriding the High Court's automatic dismissal order. This Court has carefully perused the impugned ruling against the judgment in Nairobi High Court Civil Appeal No. 154 of 2015 [hereinafter referred to as 'the No. 154 judgment'] delivered on 2nd May 2019 by His Lordship Hon. Justice Serгон.
17. In paragraph 14 of the No. 154 judgment, this Court stated as follows: -
 14. The suit be heard on priority basis and in any case within the next 120 days failure to which the same shall stand automatically dismissed for want of prosecution.
18. According to the above rendition, the suit was to be heard by 30th August 2019. Since that did not come to pass, the Appellants filed the Notice of Motion dated 7th November 2019 seeking to strike out the suit in line with the above order. The above scenario brings to the fore two key issues. The first issue is jurisdictional. The order in the paragraph 14 of the No. 154 judgment was self-executing without more. In other words, once the period stated therein lapsed without the suit was being heard, then that was it. The trial Court was no longer seized of any further jurisdiction over the matter since the suit automatically stood dismissed. In fact, there was even no need of filing the Notice of Motion in the suit save for neatness and effecting the High Court order. The only other way the trial Court could exercise any further jurisdiction in the suit thereafter was upon further orders of the High Court either extending the timelines set in the paragraph 14 of the No. 154 judgment or directing otherwise. The trial Court, therefore, and with utmost respect, could not arrogate itself the jurisdiction to otherwise deal with the suit further which it did not have. As such, any proceedings and orders, if any, post the 120 days timeline can only be nullity and void ab initio.
19. The second issue relates to the manner in which the Learned Magistrate dealt with the Notice of Motion. Respectfully, from the reading of the impugned ruling, the Court did not lay any meaningful premium on the paragraph 14 of the No. 154 judgment. The Court said nothing about the binding nature of the order by the High Court. That approach was not proper since the Court was obligated to express itself and determine all the issues raised by parties in the application. In this case, the Court was to state the manner in which it understood the said paragraph 14 of the No. 154 judgment. Glossing over such a cardinal issue without any reason thereto cannot be sustained in law.
20. Having said so, this Court wishes to clarify and affirm that even if there were plausible reason[s] explaining the failure to hear the suit as ordered by the High Court, the trial Court's hands were tied until such a time when the High Court orders were varied, so to say. The upshot, therefore, is that the application was wrongly disallowed.

Disposition:

21. In the end, this Court finds the appeal merited and hereby makes the following final orders: -
 - (a) The appeal is hereby allowed and the Ruling delivered on 10th May 2021 in Milimani Chief Magistrates Court Civil Case No. 572 of 2021 is hereby set aside and vacated forthwith.



(b) The Appellants' Notice of Motion dated 7th November 2019 is hereby allowed as prayed.

(c) The Respondent shall bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2025.

A.C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for, Learned Counsel for the Appellants.

Mr. Oruenyo, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

