

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO.46 OF 2015**

**ZACHARIAH OTACHI ONDIEKI.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup>**  
**RESPONDENT**

**LEAH AYITSO.....2<sup>ND</sup> RESPONDENT**

**[An appeal from the ruling of the Resident Magistrate at Kisii - Hon. S.N. Makila in CMCC No.565 of 2009 delivered on 1<sup>st</sup> April, 2015]**

**JUDGMENT**

1. This is an appeal from the ruling of the Resident Magistrate’s court at Kisii (the Hon. Makila in CMCC No. 565 of 2009 dated 1.04.2015. The appellant herein being dissatisfied with the same filed the instant appeal on the grounds that:

1. The Learned Trial Magistrate’s ruling blocked the fair hearing of the Defence case as laid in the constitution of Kenya.
2. The Learned Trial Magistrate erred in law by taking into consideration that justice shall be administered without undue regard to procedural technicalities and ended up a case not heard on merit.
3. The Trial Magistrate erred in law by not taking note that a party should be given an opportunity of being heard.
4. In the circumstances, the trial magistrates ruling was oppressive and in contravention of Article 159 (2) of the Constitution of Kenya.

2. The appellant thus sought for the following orders:

- a) The appeal be allowed.
- b) The Magistrate’s ruling be set aside and the court be directed to proceed with his case on merit from where it stopped.
- C) Costs be in the cause.

3. The appellant in his submissions stated that on 9.8.12 one Pius from the firm of Ochillo & Company advocates for the 2<sup>nd</sup> respondent took the date of 26.9.12 *ex parte* and come that day the Attorney general (1<sup>st</sup> respondent) had not been served and the matter was fixed for hearing on 14.11.2012 and was dismissed for want of prosecution by Hon. R. Maloba. The appellant filed the application dated 19/5/2014 (at page 37 of the records of appeal) seeking reinstatement of the suit on the grounds that; the case ought to be heard on merit as the defendants had not testified in the matter. Also, that both advocates for the parties never attended the hearing of the case and that the non-attendance of counsel for the parties was not intentional but caused by an innocent mistake which ought not be visited upon the clients. Further that Article 159 of the Constitution provides that Justice shall be administered without undue regard to procedural technicalities. He also submitted Parties were not given an opportunity of being heard fairly as required by law. He said he stands to suffer loss and injustice of the order sought to be set aside is left to stand. Vide a ruling dated 1.4.15 Hon. Makila dated 1/4/2015 dismissed the application on the grounds that it was not merited as it was filed almost 2, years after the dismissal order and that it was brought under the omnibus Section 3A of the Civil Procedure Act yet there is order 12 rule 7 of the civil procedure rules which provides for reinstatement of suit but it was not cited in the application.

4. The 1<sup>st</sup> respondent submitted that Section 3A of the civil procedure Act cap 21 of law of Kenya provides that “nothing in the civil procedure act shall limit or otherwise affect inherent power of the court to make. Such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

Also, that Order 12 Rule 3 of the Civil Procedure Rules, 2010 provides that:

“If on the day fixed for hearing the suit has been called on for hearing outside the court, only the Defendant attends and admits no part of the

claim, the suit shall be dismissed except for good cause to be recorded by the court”

1<sup>st</sup> respondent to this court that the dismissal of the trial court case and subsequent application for reinstatement was proper because the court had no option but to dismiss it in the absence of the plaintiff. Also, the Appellant Application in the trial court was an afterthought having been filed on 19<sup>th</sup> May, 2014 whereas the suit was dismissed on 14<sup>th</sup> November, 2012. The Appellant failed to explain the reason for such delay in filing the Application and why he deliberately failed to attend court.

1<sup>st</sup> respondent cited the case of Shah vs Mbogo quoted with approval in the case of John Mukuha Mburu vs Charles Mwenga Mburu (2019) eKLR the court held thus:

"... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

5. Also, that for the court to exercise its discretion in favour of the Appellant, he must satisfy that

In the case of Bilha Ngonyo Isaac vs Kembu farm & Another (2018) eKLR where it was held that:

"...as a whole I am not satisfied that the trial court misdirected itself in exercise of its discretion. To the contrary, I find that the decision to disallow the application for reinstatement of the suit was well thought out and reasons for the decision stated therein, those that were placed before the court on the material date. There would be no injustice to a party who for three consecutive times would fail to attend court for hearing of his case, and no satisfactory reasons are given when the court fails to hear him out, then states that he is prejudiced by an order of dismissal. In the circumstances, it is the Respondents who were prejudiced by the Appellant's failures to prosecute the case without unreasonable delay"

It was further submitted was the duty of the Appellant to ensure that the case proceeds for hearing without wasting the precious court time. Justice cuts both ways and the Respondents should also have right to speedy resolution of the dispute pending before the court and there should be an end to litigation.

They concluded that appeal herein is incurably, defective, incompetent and lacks merits and should be dismissed with costs.

### ***Analysis and determination***

6. I have carefully considered the appeal and the submissions by the appellant and 1<sup>st</sup> respondent. The second respondent did not file any submissions. The appeal revolves around order 12 Rule 3 and 7 of the Civil Procedure Rules.

Order 12 Rule 3 of the Civil Procedure Rules, 2010 empowers the court to dismiss a suit for non-attendance. It provides that:

“If on the day fixed for hearing the suit has been called on for hearing outside the court, only the Defendant attends and admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court”

Rule 7 provides that CPR which provides for reinstatement of suits.

“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

7. The appellant appears to blame his Advocates for the non-attendance which led to the dismissal, hence the plea that the mistake of the Advocates ought not be visited upon them, founded on *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR [1983] KECA 117 (KLR) (Potter, Kneller JJA & Chesoni Ag JA) and *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR (Waki, Warsame & Makhandia, JJA). However, there is also a school of thought which argues that a litigant also has a duty to follow up on his case to its logical conclusion as was held in the case of *Savings & Loan Limited v Susan Wanjiru Muritu Nairobi Milimani HCCC No. 397 of 2002* (Kimaru, J) (unreported) and

Duale Mary Anne Gurre v Amina Mohamed Mahamood & another [2014] eKLR (JM Mutungi, J

9. In the case of in the case of Shah vs Mbogo quoted with approval in the case of John Mukuha Mburu vs Charles Mwenga Mburu (2019) eKLR the court held thus:

“... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

In the case of Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J (as he Then was,) stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant”.

### **Issues for determination**

10. The issues arising for determination;

- a. Whether the learned Trial Magistrate properly exercised her discretion in dismissing the application dated 19.5.14.

In the case of In the case of Shah vs Mbogo quoted with approval in the case of John Mukuha Mburu vs Charles Mwenga Mburu (2019) eKLR the court held thus:

“...this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

In the case of Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J (as he Then was,) stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant”.

11. The lower court case was filed in the year 2009 and it dragged in court till the year 2014 when it was dismissed for non-attendance. By then the plaintiff had testified and his case had been closed but he was recalled for cross examination at the instance of the 1<sup>st</sup> respondent. On 14.11.12 none of the parties was in court and so the court dismissed the case for non-attendance. The appellant was to attend court for cross examination by the 1<sup>st</sup> respondent but they were absent. The appellant did not give any reason why he and his advocate did not attend court on the hearing date. He says that the respondents were not heard on the case yet he was also absent on the material date. It is trite law that litigation must come to an end and expeditious disposal of cases is now enshrined under Article 159 of the Constitution of Kenya. This appellant took the court in circles from the year 2009 till 2014 when the court put a stop to it. Though all parties were absent on 14.11.12, the appellant moved the court about 1 ½ years from the date of the dismissal this is obviously inordinate delay and a pointer to the fact that he is not keen to prosecute the case. I find that from the record herein there was no good cause to warrant reinstatement of the suit. The learned trial magistrate properly exercised her discretion by refusing to reinstate the suit as the appellant is majorly to blame for the delay in prosecution of case since 2009, no reason was given for failure to attend court on 14.11.12 and he filed

the application for reinstatement about 1 1/2 months after dismissal. He was thus guilty of laches.

12. I find no merit in the appeal and I proceed to dismiss it.

13. Each party to bear his costs of the appeal. Costs of the lower court suit to the respondents.

**T.A ODERA**

**JUDGE**

**14.1.26**

**Delivered Virtually via Teams Platform in the Presence of: -**

Mr Ndiritu for the 1<sup>st</sup> Respondent

Court Assistant - Kipchirchir