

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. 372 OF 2023

**JOHN MAHUNYU KUNGU.....
APPELLANT**

VERSUS

**SASINI LIMITED.....
RESPONDENT**

**(Being an Appeal from the Ruling of Hon. J. A. Agonda
(PM) delivered on 2nd November 2023 in Ruiru SPMCC
No. E508 of 2021)**

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Ruiru Principal Magistrate in SPMCC No. E508 of 2021 dated 2nd November 2023 whereby the trial court dismissed the application dated 8th August 2023 seeking for orders of reinstatement of the appellant's suit.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
 - a) The learned trial magistrate erred in law and in fact in dismissing the appellant's case yet the summons to enter appearance were still active.

- b) The learned trial magistrate erred in law and in fact by dismissing the appellant's case yet no pre trial date had been set and communicated to the parties herein.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the trial court erred in dismissing his application seeking reinstatement of the suit that was dismissed for want of prosecution. The appellant argues that he duly served summons upon the respondent and filed an affidavit of service stating the procedure in which the same was effected. Parties then filed their pre-trial documents within the stipulated timelines. The appellant then sought for a pre-trial date within the stipulated timelines which was never acted upon for almost a year despite several reminders being sent and the court administrator giving an undertaking of the same.
5. The appellant further argues that no notice to show cause was ever served prior to the dismissal of the suit. The summons were still active and the suit was dismissed prematurely. To support his contentions, the appellant relies on **Order 17 Rule 2 of the Civil Procedure Rules**

and the cases of **Annunciata Waithera Kibue & 2 Others vs Gibson Kamau Kuria t/a Kamau Kuria & Kiraitu Advocates [2016] KEHC 8527 (KLR)** and **INPHA Pharmaceuticals Limited vs Waweru & Another (Civil Appeal E104 of 2021) [2023] KEHC 25933 (KLR)**.

The Respondent's Submissions

6. The respondent submits that the trial court in dismissing the application considered the materials placed before it and arrived at the correct finding. The appellant has not demonstrated that the trial court erred in law and in fact by disallowing the application to reinstate the suit. The trial court found that the appellant through his advocate was aware that the matter was in court on 11th May 2022 and 2nd June 2022. Further a link was shared on the plaintiff's advocates email but there was no attendance.
7. The respondent submits that the suit was filed on 12th November 2021 and there were several mentions which the appellant had notice sent through his advocates email address, which has not been denied. The appellant did not give an explanation why he did not attend court on 2nd June 2022. The respondent argues that there was inordinate delay from the date of dismissal of the suit to the date of filing the application as the suit was dismissed on 2nd June 2022 and the application was filed on 15th August 2023. The delay was inordinate and was further not explained.

8. The main issue for determination is whether the appeal has merit.

The Law

9. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

10. In **Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR** the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the

witnesses and should make due allowance in this respect.

11. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the

fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the appeal has merit.

12. The appellant instituted the suit in the lower court vide plaint filed on 12th November 2021. From the court record, the lower court on 5th April 2022 sent the link to the appellant's advocates and scheduled the matter for mention on 11th May 2022. On 11th May 2022, there was no appearance by any of the parties and the court sent

the link once more and scheduled the matter for mention on 2nd June 2022. On the said date, the matter came up for mention but both parties were absent and the court proceeded to dismiss the suit for want of prosecution.

13. The appellant through his affidavit of service stated that they served the respondent with the summons to enter appearance and plaint on 8th June 2022 and the respondent entered appearance and filed its statement of defence on 23rd June 2022. The appellant then filed his reply to defence and he followed up with the court for a mention date to which the lower court responded that they would notify them when the date was issued by the court. The appellant later came to learn through the e-filing portal that the suit had been dismissed on 2nd June 2022 under Order 17 Rule 2(1) of the Civil

Procedure Rules. The appellant then filed an application dated 8th August 2023 under Order 12 Rule 7 of the Civil Procedure Rules seeking to reinstate the suit.

14. **Order 12 Rule 7 of the Civil Procedure Rules** provides:-

Where under this order judgment has been entered or the suit has been dismissed, the court on application may set aside or vary judgment or order upon such terms as may be just.

15. The factors taken into account or consideration for the purpose of reinstatement of suits were addressed in **Ivita vs Kyumbu [1984] KLR 441** where the court stated:

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 the 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 it 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 prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour 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.

16. Reinstating a suit is the discretion of a court which ought to be exercised judiciously as was held in the case of **Shah vs Mbogo & Another (1967) EA 116** where the court stated:

The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

17. The law on dismissal of suits for want of prosecution is governed by **Order 17 Rule 2(1) of the Civil Procedure Rules** and it provides;-

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.

18. Order 17 Rule 2 is clear that a suit may be dismissed for want of prosecution there being no application made by any of the parties within one (1) year in one year and after giving notice to the parties to show cause why the suit should not be dismissed.

19. In this case, the suit was filed on 12/11/2021 and dismissed on 22/06/2022. It is on record that only the court links were sent to the appellant's advocate on 5/4/2022 and 11/05/2022. The matter was not listed for dismissal or notice to show cause why it should be dismissed for want of prosecution. From the date of

sending the links on 11/05/2022, only two (2) weeks had lapsed before the

dismissal date. Order 17 of the Civil Procedure Rules provides for a notice to be sent to the parties to show cause why the suit should not be dismissed for want of prosecution. Although the word used is "may", the court ought to have considered the facts of the case before dismissing it without notice. The purpose of the notice under Order 17 Rule 2 is in accordance with the principles of fair hearing and being accorded a chance to be heard under Article 50 (2) of the Constitution. The reason given for dismissal on 02/06/2022 was that the appellant's advocate failed to attend court.

20. I have perused the affidavit in support of the application dated 8th August 2023 which was dismissed and the subject of this appeal. It is noted that the advocate of the appellant one Patrick Waiganjo Wachira swore the supporting affidavit. He states that the link sent to their office by the court on 5/07/22 was to the effect that a hearing date would be given by the court on notice. This was after the appellant had complied with Order 11 and had sent a request for a date for pre-trial directions. The date for pre-trial was not given by the court for over one year. The counsel deposes that he came to learn from the Court Case Tracking System that the case had been dismissed on 02/06/2022. The relevant documents are annexed to the supporting affidavit.

21. It is not in doubt that the counsel for the appellant followed up on his case with court for a pre-trial date to be given but communication from the court was not forthcoming. It was after that that the case was dismissed without notice to the appellant or his counsel.
22. In my considered view, the appellant's counsel did his part but breakdown of communication from the court and delay in giving a date for pre-trial led to the unfortunate outcome. In the ruling of the court delivered on 2nd November 2023, the court below dealt with the relevant law but failed to take into consideration the facts relating to communication between the counsel for the appellant and the court. It is evident that this omission led to the wrong conclusion that the appellant failed to prosecute his case.
23. It is further noted that the right of the appellant to be heard in his case under Article 50(2) was denied due to the erroneous conclusion. Consequently, I find that the learned magistrate erred in dismissing the appellant's case.
24. I proceed to set aside the ruling of the trial court delivered on 2nd November 2022 and direct that the original file be returned to the court below for hearing and determination.
25. The appeal is successful.
26. Each party to meet its own costs in that there was no fault on their part.

27. It is hereby so ordered.

***JUDGMENT DELIVERED VIRTUALLY, DATED AND
SIGNED AT THIKA THIS 19TH DAY OF FEBRUARY
2026.***

**F. MUCHEMI
JUDGE**