

REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. E053 OF 2024

DAVID ONYANGO OBONYO

APPELLANT

VERSUS

SOUTH NYANZA SUGAR CO. LTD

RESPONDENT

JUDGMENT

1. This appeal arises from the ruling and order given on 28.08.2024 by Hon. A.C. Munyuny (RM) in Migori Chief Magistrate's Court Case Number 520 of 2016 - David Onyango Obonyo Versus South Nyanza Sugar Company Limited.
2. The appellant filed suit on 26.05.2016, claiming loss for two ratoons in a contract entered into on 14.08.2013 in plot number 460C field 223 vide account 512089. The appellant went to sleep until 4.5.2022, when the court invoked Order 17, Rule 2(5) of the Civil Procedure Rules. The suit was dismissed for want of prosecution.

3. After dismissal of the suit, the appellant filed a notice of motion dated 12.3.2024. The court dismissed the application for want of merit. The order was to apply to 1556 of 2016, 1557 of 2016, 520 of 2016, and 122 of 2018.
4. The application was heard on 7.08.2024 and court reserved the ruling for 28.08.2024. The proceedings were taken in the CM case number. On 28.08.2024, the court delivered a ruling. CMCC 1556 of 2016, 1557, 520 of 2016, and 122 of 2018 were marked as standing dismissed. The court found that the application was filed more than 1 year after the dismissal order. The court observed that equity aids the vigilant and not the indolent.
5. The appellant was aggrieved and set forth the following grounds of appeal:
 - a) That the learned magistrate erred in both law and in fact when she failed to consider and evaluate the applicant/appellant's application and determined that the application lacked merit.
 - b) That the learned magistrate erred in both law and fact when she punished the applicant for the fault of her advocate on record and dismissed the applicant's application.
 - c) That the learned magistrate erred in law and fact when she wrongly exercised her discretion and determined that

- the applicant/appellant was not deserving to have her day in court and his case heard and determined on merit.
- d) That the learned magistrate erred in law and fact when she dismissed the appellant's application which in any event was unopposed.
 - e) That the learned magistrate was biased against the appellant.

Submissions

6. The appellant submitted that the court erred in dismissing the application dated 15.03.2024 for lack of merit. This is said to have locked the appellant out of the seat of justice. Reliance was placed on the case of **Shah V. Mbogo** [1967]E.A. 116. The court was invited to exercise discretion to avoid hardship. The failure to prosecute the suit was said not to be deliberate but due to a mistake of counsel as the appellant took all steps to follow up the case with his advocates. The appellant was said to have been punished for a mistake of counsel contrary to Article 50 of the Constitution. Refuge was sought in the case of *Gaciani & 11 others v Kimanga & another* (Application E004 of 2023) [2023] KESC 23 (KLR), where the Supreme Court [Mwilu; DCJ &VP, Ibrahim, Njoki, Lenaola & Ouko SCJJ] held as follows:

Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence, the applicants have not demonstrated any efforts or due diligence, through evidence or correspondence of the follow

up with the Advocates or to pursue their rights as we found in *George Kang'ethe Waruhiu v Esther Nyamweru Munene & another* Civil Application No.18 of 2020 [2021] eKLR. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.

7. The Appellant submitted that he had not merely blamed his former advocate for bungling his case, but had placed before the court correspondence demonstrating the alleged mishandling. He contended that the trial court ought to have considered that correspondence on its merits instead of casting aspersions upon it without proper evaluation. In support of his position, reliance was placed on the decision in **Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR)**, though the authority was cited rather out of context and did not squarely address the issues arising in the present appeal. This was a case for the extension of time. He blamed his former advocate for gross negligence that prevented him from pursuing and presenting his case.
8. The respondent filed submissions dated 2.1.2026. They stated that the application dealt with is dated 15.03.2025, not 15.03.2024. The said application was dismissed on 07.08.2024.

The said application was dismissed, and there is no variation of the latter order. They argued that the appellant was bound by the pleadings.

Analysis

9. There is only one issue disclosed in the appeal, that is, whether the court erred in dismissing the application to set aside the orders dismissing the suit.
10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. However, The treatment of findings of fact by the lower court was addressed in the case of **Peters vs Sunday Post Limited [1958] EA 424**, where the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

11. The matter proceeded by way of affidavit evidence. Consequently, it falls within the ambit of the principles enunciated in **Sugut v Jemutai & 3 others** (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR). The Court noted that where the trial court did not take evidence, it is in as good a position as the trial court to evaluate and re-assess the evidence, since no issues of demeanor arise. In that case, Kiage JA stated as doth:

“I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle Vs Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of

fact were therefore from a reading of what was recorded by the previous judge.”

12. The appellant had materials before him showing that the appeal ought to be dismissed, yet he proceeded with the appeal.

13. When the court invoked Order 17, Rule 2(5) of the Civil Procedure Rules, the suit was dismissed for want of prosecution. The said rule provides as follows:

(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.

14. It is instructive that there were no proceedings conducted between 15.11.2016 and 9.5.2022, a period of approximately

six years. Equally, there were no proceedings from 9.5.2022 until March 2024. The explanation proffered consisted of three letters purportedly sent to counsel between April 2022 and 2024. However, those letters do not account for, nor do they satisfactorily explain, the inordinate delay between 2016 and 9.5.2022. Indeed, there was absolutely no explanation whatsoever for that prolonged period of inactivity. The court must differentiate between procedural technicalities and negligence. In the case of **Malika v Registrar of Lands [2024] KEHC 374 (KLR)**, the court stated as follows:

In the case of James Mangeli Musoo v Ezeetec Limited [2014] eKLR it was held that:

“A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue Regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”

15. However in this case, the appellant disregarded every tenet of expeditious disposal of cases. No steps were taken in a period of 6 years. This is not a technicality. The appellant was

negligent in setting the matter down for hearing. Negligence was defined in the case of **Njeru (Suing as the personal representative of the Estate of Kennedy Mukundi Njiru) v Machikine Holdings Limited [2023] KEHC 585 (KLR)**

as:

Negligence was defined in the case of Blyth v Birmingham Waterworks Company (1856) 11 Ex Ch 781 (Baron Alderson) as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done" (See Salmond and Heuston on the Law of Torts 9th Edition). The elements of the tort of negligence which must be proved for an action in negligence to succeed are:

- (a) There was a duty of care owed to him or her,
- (b) The duty has been breached, and
- (c) As a result of that breach, he or she has suffered loss and damage.

16. The question whether the court can deal with indolence as a mere technicality was addressed in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**, stating as follows:

I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

17. The appellant filed a case and parked it in court. By not proceeding with the same, they offended constitutional imperatives of expeditious disposal of cases. In the case of **Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others**

[2015] KECA 284 (KLR), the Court of Appeal [Makhandia, Ouko & M’Inoti, JJ.A.] stated as follows;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a license to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the appellant’s advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

18. As a fact, this court, CM Kariuki J, has addressed the question of dismissal for want of prosecution in the case of **Duale Maryan Gurre v Ainal Mohamed Mahamood & another [2014] KEHC 7646 (KLR)** as follows:

I have considered the material placed before the court and the reason offered by the plaintiff for the delay in prosecuting the suit and I am not persuaded I should exercise my discretion in favour of the plaintiff. Any person who initiates a litigation against another has a duty and is under an obligation to ensure that the suit he has brought is expeditiously processed and prosecuted in the court by ensuring the necessary preparation and follow up is done to ensure there are no unnecessary delays. The overriding objective of rendering justice expeditiously, as envisaged under sections 1A and 1B Civil Procedure Act is anchored on the parties and their legal advisors playing their supportive roles in the chain of justice delivery and as the saying goes justice cuts both ways in every matter.

19. The matter herein was filed way back in 2016 and left until 9.5.2022 when it was dismissed, err, deemed to stand dismissed. The appellant continued in his slumber until the very next one year and 10 months later. The right to be heard is sacrosanct. The right is a two-edged sword. The claimant was given an opportunity to be heard but did not take it. To blame the advocates for his misadventure is otiose and old school. The appellant has a duty and responsibility to ensure that his case progresses. In **Harakam Enterprises Ltd & another v Ochieng & another** (Suing as the Legal Representatives of the Estate of the Late Sarah Awuor Odhiambo) (Civil Appeal 12 of 2021) [2023] KEHC 18917

(KLR) (13 June 2023) (Ruling), SM Mohochi, J, posited as follows:

In this case, the Applicant's case is that he was heard on the notice to show cause and seeks to regurgitate "showing cause" as a basis of the Application. The Decision by the Learned Judge Kizito is not faulted and no material has been placed to show case if the decision was not judicious or was informed by mistake.

20. However, in *Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji* Civil Application No. Nairobi 179 of 1998 the Court of Appeal held that:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly, the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilize it."

20. The appellant was given notice of dismissal, which was even unnecessary since 2 years had lapsed. The appellant did not want to be heard or did not show any interest in being heard. The excuse given is a red herring meant to hoodwink the court into believing lies that have no place in the current time and age. The matter was heard together with two other matters, which strangely have the same letters, in the appellant's advocate's font. Such lies bring the profession to disrepute and reminds the court of the decision in the case of **Kioko Peter v Kisakwa Ndolo Kingóku [2019] eKLR**, where Odunga J, as he then was, lamented as follows:

Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 when he expressed himself in the following terms:

"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence

is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted.”

21. The appellant had a chance to be heard but just sat and waited out. This is not an edifying behaviour that the court can condone. The appellant must remember it is a right to a fair trial that cannot be limited. The right to a fair hearing requires parties to help the court in the delivery of justice and not to be indolent. In the case of **Simon Ndungu & another v Kangathia Kiuna & another** [2021] eKLR, L. Gacheru, J posited as follows:

Justice is a double-edged sword; the Applicant had an opportunity to defend his suit but thwarted it. He has been an indolent party and the equity aids a vigilant party not an indolent one.

22. Therefore, parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in the case of **Gideon Sitelu Konchella vs Daima Bank Limited** (2013) eKLR where the court, while citing the case of *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR, held that:-

I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that

litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.

23. The appellant had a duty to follow up on the advocate in the case. The only conclusion the court could make is that the appellant did not follow up on his matter and cannot blame an advocate as he had a duty to follow up. The court correctly dismissed both the suit on 09.05.2022 and the application dated 12/15 March 2024. The court finds that the court below properly exercised discretion.

24. The net effect is that I do not see where the court erred in dismissing the suit. This was proper exercise of discretion. In the case of *Mbogo and Another vs. Shah [1968] EA 93*, the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters

which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

25. In the circumstances, the appeal lacks merit. It is accordingly dismissed. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

26. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

27. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others** [2014] KESC 31 (KLR), as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the

judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

28. Costs follow the event. The event is the dismissal of the appeal. The same is thereof dismissed with costs of Ksh. 55,000/= to the Respondent.

Determination

In the circumstances, I make the following orders:-

- a) The appeal herein lacks merit and is accordingly dismissed with costs of Ksh. 55,000/= to the Respondent.
- b) 30 days stay of execution.
- c) The file is closed.

DELIVERED, DATED and SIGNED at **NYERI** on this **11th** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Michael

ORIGINAL