



REPUBLIC OF KENYA



KENYA LAW
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**Kurji & 4 others v Kurji & 3 others (Civil Appeal E118 of 2021)
[2024] KECA 882 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 882 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E118 OF 2021
S OLE KANTAI, P NYAMWEYA & JM MATIVO, JJA
JULY 26, 2024**

BETWEEN

**MINAZ SHOKATALI KARIM KURJI 1ST APPELLANT
FIAZ SHOKATALI KARIM KURJI 2ND APPELLANT
NAWAZ SHOKATALI KARIM KURJI 3RD APPELLANT
KARIM SHAMSODIN KARIM KURJI 4TH APPELLANT
ARIF SHAMSODIN KARIM KURJI 5TH APPELLANT**

AND

**NUREZ ZAHERALI KURJI 1ST RESPONDENT
RAHIM SADRUDIN KURJI 2ND RESPONDENT
HUSSEIN ZAHERALI KURJI 3RD RESPONDENT
ABDULALI AKBERALI KURJI 4TH RESPONDENT**

(An appeal from the Ruling and Order of the High Court of Kenya (Kamau, J) dated 28th day of November 2019 in Milimani HCCC 597 of 2002)

JUDGMENT

1. Minaz Shokatali Karim Kurji, Fiaz Shokatali Karim Kurji, Nawaz Shokatali Karim Kurji, Karim Shamsodin Karim Kurji and Arif Shamsodin Karim Kurji (the appellants) are aggrieved by the High Court ruling delivered on 28th November 2019 in Milimani HCCC 597 of 2002 (Kamau, J) reinstating the respondents' aforesaid suit which was dismissed on 25th February 2015 for want of prosecution.
2. The respondents commenced the said suit against the appellants vide plaint dated 8th April 2002 seeking, inter-alia, that the appellants jointly and severally be condemned to pay them a sum of \$



- 10,000.00 and render true accounts of all the income and properties reserved for the third generation (grandchildren of the late Karim Kurji).
3. On 25th February 2015, the suit was dismissed for want of prosecution. According to the respondents, no Notice to Show Cause why the suit should not be dismissed for want of prosecution was served upon their counsel on record. Instead of physical service, the Notice to Show Cause was published on the Kenya Law website www.kenyalaw.org which escaped the attention of the respondents' counsel on record. Accordingly, their advocate did not attend to show cause as required and their counsel only learnt that the suit had been dismissed on 11th December 2015 after they sought a mention date for directions.
 4. In opposing the respondents' application for reinstatement of the suit, the appellants' maintained that the suit had been filed way back in the year 2002 and that it had been pending trial for more than 13 years. Therefore, it would be impossible to remedy the inordinate delay of nearly 13 years without any credible excuse being offered by the respondents. The appellants also maintained that after 20 years they would more likely be greatly impaired since not all their witnesses can recall material matters that occurred over 20 years ago and as a result, the suit could no longer be decided on merits.
 5. In the impugned ruling delivered on 28th November 2019, Kamau J. held that the respondents did not have prior notice that the suit had been listed for dismissal for want of prosecution and for that reason, the respondents' application dated 18th December 2015 seeking reinstatement was allowed and the orders issued on 25th February 2015 dismissing the suit for want of prosecution were set aside. The respondents were ordered to pay throw away costs of Kshs.100,000/= for having failed to prosecute the matter for over 13 years before its dismissal.
 6. Aggrieved by the said ruling, the appellants filed the instant appeal seeking to set it aside. Their memorandum of appeal dated 10th March 2021 prefers 6 grounds of appeal, namely, that the learned judge erred in law and in fact: in allowing the respondents application dated 18th December 2015 and reinstating the respondents' suit which had been dismissed for want of prosecution on 25th February 2015; by reinstating the respondents' suit notwithstanding their failure to prosecute the suit for more than 13 years since its institution; by exercising her discretion in favour of the respondents notwithstanding that the respondents had not offered any explanation for their inordinate and inexcusable delay for failing to prosecute the suit for more than 13 years; by finding that the respondent had no prior notice that the suit had been listed for dismissal for want of prosecution; by failing to consider that the prejudice to be occasioned to the appellants, one of whom had passed on while others were of advanced age with fading memories, far outweighed any prejudice to be suffered by the respondents who had exhibited inexcusable inertia by failing to prosecute their suit for more than 13 years; and by making a finding that the respondents would be penalized for errors of their advocates without giving any sufficient weight to the true and overriding cause of the dismissal which was the respondents' own failure for 13 years to take appropriate action or give instructions to their advocates to prosecute their case as required by law.
 7. The appeal was disposed of by way of written submissions and oral highlights. The appellants' submissions are dated 27th October 2021 while the respondents' submissions are dated 19th December 2021. The appellants were represented by the law firm of Anjarwalla & Khanna LLP while the respondents were represented by the law firm of Oraro & Company Advocates.
 8. According to the appellants, the crux of the appeal revolves around whether the learned Judge, considering the totality of circumstances presented before her, exercised her discretion judiciously in reinstating a suit that was 17 years old and in respect of which the respondents had not taken single step to prosecute for close to 13 years by the time it was being dismissed. The appellants argued their



appeal on the following distinct heads: (a) improper exercise of discretion in reinstating the suit, and (b) Prejudice occasioned to the appellants as a result of the reinstatement.

9. Regarding the issue of improper exercise of discretion in reinstating the suit, the appellant insisted that the mere filing of the application for reinstatement without undue delay was not evidence that the respondents were keen to prosecute their case and the same was contrary to the evidence of indolence for 13 years which subsists to date since there has never been an attempt to file witness statements to prepare the suit for trial.
10. The appellant further submitted that even the application seeking reinstatement was brought 10 months after the suit had been dismissed by Mbogoli, J. The appellants also submitted that the subject matter of the dispute is an agreement made in 1993 and as such the respondents will be greatly prejudiced because their elderly witnesses would suffer fading memory.
11. Regarding the issue of prior notice, the appellants urged this Court to find that the notice for dismissal of the suit was correctly issued when it was placed on the Kenya Law website www.kenyalaw.org. The appellants maintained that even if the appellants' explanation that they never saw the notice at Kenya Law website is to be accepted, it behooves the respondents to give cogent reasons why they failed to prosecute their suit for 13 years whether they received a notice or not. In support of this argument, they cited the finding in *Salkas Contractors Limited vs Kenya Petroleum Refineries Limited* [2004] eKLR where the test to be whether the delay is prolonged and excusable and whether justice can be done despite the delay.
12. Regarding the prejudice to be suffered if the reinstatement is upheld, the appellants maintained that some of their witnesses were elderly and had left the country and would suffer potential memory loss considering the claim related to events that took place over 20 years ago. They contended that the learned judge fell into error by holding that there would be greater prejudice if the respondents were denied an opportunity to ventilate their case on merit which was a contradiction having found that the respondents' delay in prosecuting their suit was inordinate, inexcusable and the appellants would be prejudiced.
13. The appellants also maintained that there was need for efficient disposal of legal disputes and in support of this position they relied on this Court's holding in *Tana & Athi River Development Authority vs Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR that there will be cases where justice will be better served by allowing the consequences of lawyers' negligence to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.
14. The appellants also submitted that it was the respondents who instituted the suit, not their advocates. Therefore, it was their primary duty to instruct their advocates to take active steps to progress the suit since they are the ones who dragged the appellants to court. Further, the respondents did not swear any affidavit to give evidence in support of the application for reinstatement. Therefore, there was no attempt to explain the inordinate delay of 13 years bearing in mind that according to the typed proceedings, the suit was last in court before Khamoni, J on 14th July 2010 and the same could not proceed for hearing.

Thereafter, the same was fixed for hearing on 15th November 2011, but the hearing did not proceed. Therefore, the respondents' failure to follow up on their case for five years should not be attributed to mistake by counsel but to the respondents and relied on *John Ongeri Mariaria & 2 Others vs Paul Matundura* [2004] 2 EA 163 in support of the holding that some clients must bear the brunt of their own careless approach.



15. The respondents' position was that only one issue falls for determination, that is, whether the trial court erred in law and in fact in exercising its discretion to reinstate the case. It was submitted that reinstatement is a discretionary remedy exercised in order to avoid injustice or hardship resulting from excusable errors, but not to assist a person who has deliberately sought to delay the cause of justice. The respondents argued that the appellants never applied for suit to be dismissed nor did they attend court when the matter came up for Notice to Show Cause. The respondents contended that the matter was dismissed without prior notice to the parties, therefore it cannot be argued that the appellants will suffer prejudice as a result of the reinstatement.
16. The respondents further urged that the appellants failed to specify any relevant considerations the trial judge failed to take into account or ought to have taken into consideration while allowing the reinstatement. They maintained that they provided sufficient reasons in support of the application dated 18th December 2015 in support of the plea for reinstatement. Furthermore, the learned judge was alive to the fact that no prejudice will be suffered by the appellants since the crucial witnesses were still alive even if they remain in their respective countries, technology advancement would facilitate taking their evidence through video conferencing. In support of their submissions, the respondents' cited *John Harun Mwau vs. Standard Limited & 2 Others* [2017]eKLR where this Court held that a defendant must demonstrate that justice will not be done in the case due to the prolonged delay on the part of the plaintiff, before the court can exercise its discretion in his favour and dismiss the action for want of prosecution.
17. In conclusion, the respondents maintained that there is no requirement in law that a litigant must swear an affidavit to shift blame to the advocates in order to obtain an order for reinstatement. Therefore, the appellants cannot invent their own procedure to govern the exercise of jurisdiction by the court.
18. We have considered this appeal, submissions and the impugned ruling. We have also considered the decisions relied on and perused the trial court's record. There is no doubt that a court has the power to grant an order reinstating a dismissed suit as was appreciated by this Court in *Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills* [1991] KLR 469, [1988-92] where it was held that there is inherent power to restore a case for hearing after it has been dismissed.
19. This being a first appeal, it is by way of a retrial and this Court, as the first appellate court, has a duty to re-evaluate the evidence afresh and draw its own conclusions. (See this Court's decision in *Kenya Anti-Corruption Commission vs Republic & 4 Others* [2013] eKLR). This Court's appellate jurisdiction to hear appeals is derived from Article 164(3) of the Constitution and section 3(1) of the Appellate Jurisdiction Act. Normally, when the trial court exercises its discretion in one way or the other after appreciation of entire evidence and materials on record, the appellate court should not interfere unless it is established that the discretion has been exercised perversely, arbitrarily or against judicial principles. We are reminded of the following authoritative statement of the law by Madan JA (as he then was) in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* [1985] E.A that:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”



20. We note that Order 17 Rule 2 of the Civil Procedure Rules 2010 vests a trial court the discretion to dismiss a suit where no step has been taken in the matter for a period of one year. The rule provides as follows:
- “In any suit I 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...”
21. While we are on the subject, a trial court has power under Order 12 Rule 7 to reinstate a suit that has been dismissed. The Rule provides that:
- “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.”
22. The above provisions confer wide discretion to a trial Court set aside an order dismissing a suit for want of prosecution. However, the discretion must be exercised judicially and justly. The rationale for this wide discretion was underscored by the East African Court of Appeal in *Shah vs. Mbogo and Another* [1967] E.A 116 as follows:
- “The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
23. The issue before us narrows to whether the trial court properly exercised its discretion in reinstating the respondents’ suit that had been dismissed for want of prosecution. The appellants are adamant that the trial judge abused her discretion while the respondents take the position that the discretion was exercised appropriately in the circumstances.
24. In addressing the above issue, we are required to consider circumstances under which the exercise of discretion by a trial court can be interfered with. As was held in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* (supra) [1985] E.A 898, at page 908, this Court will only interfere if the trial judge misdirected himself in law, or misapprehended the facts or he took into account considerations which should not have taken account or failed to take into account considerations which should have been taken into account, or the exercise of the discretion is plainly wrong.
25. In exercising her discretion to reinstate the suit, the learned judge noted that even though it had been 13 years since the suit had been filed, the appellants would not be prejudiced since the crucial witnesses are still alive and with the advancement in technology, the crucial witnesses could remain in the countries they immigrated to and their evidence could be taken through video conferencing. The learned judge went on to find that in weighing between dismissing the suit for inordinate delay and the right of the respondents to be heard, there would be greater prejudice if the respondents were denied an opportunity to ventilate their case on merit. We also note that the learned judge in holding that the respondents did not have notice that the suit had been listed for dismissal for want of prosecution cited *Nurez Zaherali Kurji & 3 Others vs Ameer Kassim Lakha & 9 Others* [2020] eKLR in which this Court set aside orders dismissing a suit for want of prosecution on the ground that the appellant did not have prior notice that the suit had been dismissed for want of prosecution and that appellant’s advocates only saw the matter day’s cause list. The circumstances in the said case are similar to the instant appeal. We have no reason to depart from the said decision.



26. We agree with the submission by the respondents that it is the Court that initiated on its own motion the dismissal for want of prosecution and that the appellant did not play any part yet it was at liberty during the said 13 years to approach the trial court and initiate the process of dismissal of the respondent’s suit for want of prosecution. It is also noteworthy that during the dismissal, both parties were absent. Essentially, it can be argued that both the parties were not heard before the respondents’ suit was dismissed for want of prosecution. We also find that even though the prior notice through the Kenya Law Website was adequate, in our considered view the same was not sufficient since the intended audience was not reached. We are persuaded by finding of the Supreme Court of India in Sangram Singh vs Election Tribunal, Kotah, AIR 1955 SC 664, at 711 cited in the case of Gerita Nasipondi Bukunya & 2 Others vs Attorney General [2019] eKLR that:

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

27. We are also not persuaded that the appellants have demonstrated that they have been prejudiced by the reinstatement of the suit and that the learned judge took into account considerations which she should not have taken account; or she failed to take account of considerations which she should have taken into account. We note that the learned judge weighed the prejudice to be served by the appellants against the prejudice to be suffered by respondents in the event she refused the reinstatement, and specifically weighed the two against right to be heard on merit and correctly concluded that greater prejudice would be suffered by the respondents if the suit was to be dismissed and not heard on merits. In our considered view and in the interest of justice, the court cannot be faulted in exercising its discretion in favour of the respondents, who even though had been indolent, deserved a last opportunity to have their claim heard and determined on merit. We reiterate the learned judge’s finding that with the advancement of technology, the appellant’s crucial witnesses are now able to testify from any part of the world without suffering any inconvenience. Therefore, it is only fair and just that the dispute between the parties to be determined on merits without any further delay. It is also important to reiterate that the dismissal was initiated by the Court, not the appellants, and that the suit was dismissed in the absence of both parties.

28. For the above reasons, we come to the inevitable conclusion that, this appeal must fail. Accordingly, we dismiss this appeal with costs to the respondents and direct that the suit in the High Court be heard and determined on priority basis.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

