



**Sheikh v Estate of Amina Shee Yumbe & 3 others (Land Case
17 of 2022) [2024] KEELC 13485 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 17 OF 2022
LL NAIKUNI, J
NOVEMBER 20, 2024**

BETWEEN

HASSAN MOHAMED SHEIKH PLAINTIFF

AND

ESTATE OF AMINA SHEE YUMBE 1ST DEFENDANT

HABIB MOHAMED 2ND DEFENDANT

MUHUDHARI MOHAMED 3RD DEFENDANT

REISTRAR OF TITLES MOMBASA 4TH DEFENDANT

RULING

I. Introduction

1. This Honourable Court was tasked to make a determination of the Notice of Motion application by Hassan Mohamed Sheikh, the Applicant herein dated 28th June, 2024. It was brought under a certificate of urgency under the provisions of Sections 1, 1A, 3, 3A & 63(e) of the Civil Procedure Act, Cap. 21 and Order 51(1) of the Civil Procedure Rules, 2010 and all enabling provisions of the law.
2. Upon effecting service of the said application there were no responses elicited by the Respondents herein. Thus, although the application was unopposed, the Honourable Court will still proceed to make its determination on its own merit whatsoever.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-
 1. Spent.



2. That this Honourable Court be pleased to set aside the orders dismissing this suit for want of prosecution.
3. That this Honourable Court be pleased to reinstate this suit.
4. That costs of this Application be provided for.
5. The application was premised on the grounds, testimonial facts on the face of the application and the averments made out under the the 15 paragraphed annexed affidavit of PAUL W. MAGOLO an advocate of the High Court of Kenya and having the conduct of this matter on behalf of the Plaintiff / Applicant herein. The Applicant averred that:
 1. The Plaintiff closed his case.
 2. This matter was thereafter scheduled for hearing of application on the 24th June, 2024.
 3. On 24th June, 2024, he was present and he tried to log into teams to attend the virtual proceedings before the trial court.
 4. Unfortunately he stayed at the lobby waiting to be let in and only managed to be in after the matter had been called out.
 5. When the matter was called out in his absence virtually, the court went ahead to dismiss the case.
6. Failure by himself to attend court virtually was not intentional.
7. The Applicant had always been keen and/ or desirous to have this matter heard and determined.
8. The Applicant stood to suffer substantial loss and damage, unless this suit was reinstated.
9. The Respondents would not be prejudiced if the orders sought are granted as they will have the opportunity to present their defence.
10. The Application was brought timeously and without inordinate delay.
11. It was in the interest of justice and equity that the orders sought were granted.

III. Submissions

12. On 23rd July, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 28th June, 2024 be disposed of by way of written submissions. Pursuant to that on 25th September, 2024 a ruling date was reserved on 20th November, 2024 by Court accordingly. Unfortunately, by the time the Honourable Court was penning down the ruling, it could not access any submissions by any of the parties. A clear indication that none of them had complied.

IV. Analysis and Determination

13. I have carefully read and considered the pleadings herein and the cited authorities by the Learned Counsels and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. In order to arrive at an informed, just, fair and reasonable decision, the Honorable Court has crafted three (3) following salient issues for its determination.
 1. Whether the Honourable Court ought to set aside the order that dismissed with the suit for want of prosecution and subsequent reinstatement of the suit.



2. Whether the Applicant is entitled to the reliefs sought.
3. Who will bear the Costs of Notice of Motion application 28th June, 2024.

Issue No. a). Whether the Honourable Court ought to set aside the order that dismissed with the suit for want of prosecution and subsequent reinstatement of the suit.

14. Under this sub – heading, the main substratum in this matter is whereby the Honourable Court has been called upon to set aside its own orders and thus reinstate of a suit that had already been dismissed for want of prosecution. It is instructive to note that this Court not only of record, law but also justice. The Court is a temple whereby substantive Justice is dispensed with to all parties factoring the overriding interests. In determining the matters before it, it is guided by *the Constitution* of Kenya, the provisions of law and equity and the principles of natural justice in particular the provision of Articles 159 (1) & (2); 25 (c), 47, 48, 50 (1) & (2) of *the Constitution* of Kenya, 2010 on the Judicial authority, access to Justice and fair hearing. Given these legal parameters, the Court is enjoined to ‘give effect to the overriding objective both Sections 3(1) of the Environment and *Land Act*, No. 19 of 2011 and 1A (1) of the *Civil Procedure Act*, Cap. 21 that it to say, to facilitate “... the just, expeditious, proportionate and accessible resolution of disputes”. That has to be done without procedural technicalities, as contemplated in the provision of Article 159 (2) (d) of *the Constitution* of Kenya 2010.
15. It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A, IB, 3 & 3A of the *Civil Procedure Act*, Cap. 21, Laws of Kenya, being the inherent powers of the Court, are relevant, with regard to this and they state as follows:

“ 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;



- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

16. The provision of Section 3A of Act, Cap. 21 gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. Section 3A reads:

“3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the 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.”

17. When a party wishes to set aside an order of dismissal of suit for non-attendance or want of prosecution are guided by the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010. It provides that:-

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

18. The main Legal pith and substance substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assist in clearing backlogs in court and the ever-increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – “Justice delayed is justice denied” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice to one side or the other or both and in such circumstance, the Honorable Court may in its discretion dismiss the action straight away.

19. Additionally, the dismissal was pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, which provides, inter alia:-

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 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..



20. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In the case of:- “Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium – Versus - M.D. Popat and others & another [2016] eKLR”, the court stated as follows:

“ 11. Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita – Versus - Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

21. As to what constitutes notice under the provision of Order 17 Rule 2, the court in “*Kestem Company Ltd – Versus - Ndala Shop Limited & 2 others* [2018] eKLR” was of the view that it did not require service of notice:

“Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ‘give notice’. The court may give notice of dismissal through its official website or through the cause-list.

I do find that the notice of dismissal of the suit was given through the judiciary website and cause-list prepared which to the court, was adequate notice to the parties.”

22. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in “*Ivita – Versus - Kyumbu* [1984] KLR 441” (Chesoni J), 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 the 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.”



23. In the case of:- “Ivita – Versus - . Kyumbu [supra]” (Chesoni J) was followed in the case of:- “Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others [2018] eKLR” (Muchemi J), where the court said:

“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”

24. Further in the case of “James Mwangi Gathara & another -Versus - Officer Commanding Station Loitoktok & 2 others [2018] eKLR” (Nyakundi J), the court said:

“Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the adjudication processes. In my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point.”

25. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in “Bilha Ngonyo Isaac – Versus - Kembu Farm Ltd & another & another [2018] eKLR” ((JN. Mulwa J), which echoed the decision of the court in “Shah – Versus - Mbogo & Another (1967) EA 116” (Harris J), where the court stated on the matter of discretion:

“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.”

26. One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In the case of:- “Mobile Kitale Service Station – Versus - Mobil Oil Kenya Limited & another [2004] eKLR” (Warsame J) where it was held:

“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.”

Issue No. b). Whether the Applicant is entitled to the reliefs sought.

27. Under this sub – heading, the Honorable Court will endeavor to apply the above legal principles to this case. The Plaintiff/Applicant has contended that he had closed his case. The Plaintiff/Applicant held that the matter was thereafter scheduled for hearing of application on the 24th June, 2024. On the material day Counsel for the Plaintiff/Applicant was present and he tried to log into the Micro – soft



teams virtual means and participated where the matter was allocated a physical hearing in open Court at 12.00noon as per his request taking that none of the Defendants were present then. Unfortunately, he assumed that the matter would be proceeding virtually and thus stayed at the lobby waiting to be let in and only managed to be in after the matter had been called out. The failure to attend court was not intentional. According to the counsel on record the Applicant stood to suffer substantial loss and damage, unless this suit was reinstated

28. I am not entirely convinced by the arguments out forward by the Plaintiff/Applicant's advocate as the records for the Court are so clear. Although the allocated time for hearing of the matter physically in open Court was 12.00noon, it was 12.30pm when the matter was called out. The Learned Counsel for the Plaintiff/Applicant was absent yet Mr. Gakuo and M/s. Opiyo Advocates for the Defendants were present. The records indicate that it was at 1.00pm that the court at the instant of the Counsels present went ahead to dismiss the case for no attendance. and that from the record the matter had not been adjourned on account of the Plaintiff/Applicant. On several occasions, this Court has stressed on the need to adhere with timelines and being at the right place at the right time. Acting on the contrary, it inconveniences and prejudices caused not only to the Court but also the parities resultantly leading to accumulation of the back – log of cases. Further, this attitude contributes to the delaying in dispensing of justice an outright breach of the Legal Maxim – “Justice delayed is Justice denied”. But be that as it may, the Court is rather persuaded with the realization that the Plaintiff/Applicant's case had been closed at the time the matter was dismissed.
29. For that reason, although I will accord the Plaintiff/Applicant some benefit of doubt and grant it a second bite of the cherry by allowing the application, and reinstate its suit on conditions that I shall discuss further in conclusion and disposition but they will bear some penalties for their careless deeds. They will be condemned to pay some thrown away costs and the Court adjournment fees. Therefore, I find that the Application for reinstatement is meritorious upon fulfilment on the given conditions by the Honourable Court.

Issue No. c). Who will bear the Costs of Notice of motion application dated 28th June, 2024

30. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
31. In the present case, the Honourable Court elects to have the costs in the cause.

V. Conclusion & Disposition

32. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant have made out their case as per the Notice of Motion application dated 28th June, 2024.



33. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-

1. That the Notice of Motion application dated 28th June, 2024 be and is hereby found to have merit and hence allowed with the costs in the cause.
2. That the Honorable Court be and is hereby pleased to dismiss the order made on 24th June, 2024 dismissing the Plaintiff/Applicant's suit hereby reinstating the suit upon fulfilment of the Pre – Conditions set out herein.
3. That the Plaintiff/Applicant condemned to pay some thrown away costs of a sum of Kenya Shillings Five Thousand (Kshs. 5, 000/=) to each Learned Counsel for Defendants present on the material day for the prejudices and inconveniences caused and a sum of Kenya Shillings two thousand (Kshs. 2, 000/=) the Court adjournment fees before the next hearing date.
4. That failure to fulfil any the conditions set out under Order (3) above the application dated will automatically stand dismissed.
5. That for expediency sake, the matter be re – fixed for hearing on priority basis on 26th March, 2025. Notice to issue
6. That the cost of this application will be in the cause.

It is so ordered accordingly.

RULING DELIEVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF NOVEMBER 2024.

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

M/s. Firdaus Mbula, Court Assistant.

Mr. Paul Magolo Advocate for the Plaintiff/Applicant.

No appearance for the 1st, 2nd, 3rd & 4th Defendants/Respondents.

