



**Manyonge v Manyonge & another (Environment and Land Appeal E009 of 2022) [2024] KEELC 7546 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7546 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E009 OF 2022  
EC CHERONO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**ATHUMANI KHISA MANYONGE ..... APPELLANT**

**AND**

**ESTHER NASIMIYU MANYONGE ..... 1<sup>ST</sup> RESPONDENT**

**JAMII TOURS & TRAVEL LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the ruling and order of by Hon. C.A.S MUTAI (SPM) in Bungoma CMELC No. 395 of 2007 delivered on 04/02/2022)*

**JUDGMENT**

**Introduction**

1. Athumani Khisa Mayonge referred to as the Appellant herein filed this appeal on 1<sup>st</sup> March, 2022 against Esther Nasimiyu Mayonge and Jamii Tours and Travels Ltd referred to herein as the Respondents.
2. The appeal seeks to overturn the ruling of the trial magistrate Hon. C.A.S MUTAI (SPM) delivered by C.A.S Mutai (SPM) on 04/02/2022 in CM-ELC 395 OF 2007 and to have the orders dismissing the suit before the subordinate court set aside and the same be reinstated for further directions before a different magistrate.
3. In the impugned ruling, the trial magistrate had dismissed the appellant's application with costs where he had sought to set aside orders dismissing his suit for want of prosecution on 18/03/2021. Being aggrieved by the said ruling/order, the appellant preferred the current appeal on Grounds set out in the Memorandum of Appeal dated 1<sup>st</sup> March 2022.
4. In order to contextualise the basis of the present appeal, it is necessary to briefly set out the facts of the case before the subordinate Court.



5. One Achi Wephukulu Maikuma (now deceased) represented by Athumani Khisa Manyonge, the Appellant herein as her legal representative instituted the former suit against the Respondent/defendant before the subordinate court vide a plaint dated 22/08/2007 accusing her for breach of contract and sought orders for inter-alia eviction and costs. The Respondent filed a statement of defence and counterclaim dated 19/09/2007, denying the plaintiff/Appellant's claim and accused him of fraudulently representing himself as the owner of the property in issue and accepting Kshs.40,000/= which the Respondent asked in her counter-claim.
6. From the court record, the former suit first came up for hearing on 31/10/2007 and on numerous subsequent dates but was adjourned at the instance of the parties. Sometime in the year 2010, the trial court heard a preliminary objection raised by the Respondent and after considering the submissions by both sides, it rendered itself by dismissing the same on 18/02/2011. An application for Substitution dated 18/08/2014 was made after the demise of Achi Wphukulu Maikuma and the same was allowed on 23/01/2015. The matter was again set down for hearing but the same never took off and the issue that the court was not seized with jurisdiction to hear land matters was raised on 7/6/2016.
7. Thereafter the matter was fixed for hearing on 04/10/2018 and on numerous dates thereafter but was adjourned at the instance of both parties. On 18/5/2021, the matter came up again for hearing and the Appellant's Advocate sought for adjournment on grounds that the plaintiff was attending to a sick child which prayer was opposed by the Respondent. Upon considering the said application and the rival submissions, the trial court declined to grant the adjournment on grounds that the matter was old and no effort had been made to have the same heard and concluded. The Plaintiff/Appellant's suit was therefore dismissed for non-attendance and for want of prosecution. Being aggrieved by the said order, the Appellant filed an application dated 02/08/2021 seeking to review and setting aside the dismissal order of 18/05/2021 and for reinstating the suit for hearing on merit.
8. Upon considering the said application, the trial court dismissed the same with costs. The plaintiff/Appellant was again aggrieved with the said Ruling/order and preferred the present appeal vide a Memorandum of Appeal dated 1<sup>st</sup> March, 2022 raising the following five grounds;
  1. The learned trial Magistrate erred in law and fact when he failed to consider every aspect of the matter before him and in particular the Appellant's submissions.
  2. The learned trial Magistrate erred in law and fact when, by dismissing the Appellant's application for reinstatement of the suit, he effectively denied the Appellant his right to be heard in violation of the rules of natural justice and *the Constitution*.
  3. The learned trial Magistrate erred in law and fact when he failed to strike a balance in apportioning blame and allow fairness to prevail since the defendant had severally sought and allowed adjournment of the case.
  4. The learned trial Magistrate erred in law and fact when he exercised his discretion on wrong principles, hence the need to interfere with its exercise.
  5. The learned trial magistrate erred in law and fact by resorting to a measure too draconian in the circumstances of the case.
9. When this Appeal came up for directions, the parties agreed to canvass by way of written submissions. The appellant filed their submissions dated 20/08/2024.
10. In their submissions, the appellant placed reliance on the case of Iway Africa Limited vs. Infonet Africa Limited & Another (2019) eKLR and the provisions of section 80 of the *Civil Procedure Act* and Order



45 Rule 1 of the Civil Procedure Rules on review of court orders. The Appellant further relied in the following cases; Republic vs. Advocates Disciplinary Tribunal Ex-parte Apollo Mboya (2019) eKLR and *Mursal & Another vs. Manese (Suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E020 of 2021)* [2022] KEHC 282 (KLR). The Appellant argued that the subordinate court had the discretion to review and set aside its orders dismissing the plaintiff's case for want of prosecution.

11. The appellant further submitted that the reason for his non-attendance in court on the 18/05/2021 was because he was attending to his sick child who had been admitted at Nairobi West Hospital with Rheumatic Heart disease and severe pneumonia. That the medical documents had not been availed to his counsel on the hearing date in support of his application for adjournment and that the moment they became available, he made the application for review and reinstatement. He relied on the case of *Nasibwa Wakenya Moses vs. University of Nairobi & Another* (2019) eKLR and submitted that having obtained documents that were not initially available, the subordinate court ought to have allowed his application since he had met the threshold for the grant of review. The Appellant urged the court to allow the appeal and grant the orders sought.
12. At the time of writing this judgment, the respondents' submissions had not been filed through the court e-filing system.
13. This being the first appeal, it is the mandate of this court to re-appraise itself of the lower court file, pleadings and evidence and come up with her independent findings and conclusions. See *Selle -vs- Associated Motor Boat Company Ltd & Another* (1968) EA 123. Having looked at the pleadings, evidence, memorandum of appeal and written submissions, the sole issue for determination is If the trial court was right in dismissing the application for review and reinstatement.
14. The appellants suit before the subordinate court was dismissed for want of prosecution pursuant to Order 17 Rule 1 of the Civil Procedure Rules "Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment."
15. It is trite that the dismissal of a suit for want of prosecution is a discretionary power and has to be exercised judiciously. See *Ivita -vs- Kyumbua* (1984) KLR 441 and *Argan Wekesa Okumu -vs- Kima College Ltd & 2 Others* [2015] eKLR. In *CMC Holdings -vs- Nzioki* [2004] 1 KLR 173, the court held, on deciding whether or not to set aside an ex parte order, the court is looking into ensuring a party does not suffer injustice or hardship for excusable mistake or error, inadvertence, or accident.
16. At the hearing date, the appellant sought for an adjournment on grounds that his son was sick. The said application for adjournment was made by Mr. Kassim who was holding brief for Mr. Ocharo for the appellant who informed the court that the Appellant was attending to a sick child and that he was seeking for an adjournment. The court file was placed aside and later, the court reconvened and Mr. Anwar who was then holding brief for Mr. Ocharo informed the court that the Appellant's child was at Kitale District hospital. However, when the appellant filed the application for review and reinstatement, he attached a medical report from Nairobi West Hospital. The above discrepancies made it difficult for the trial court to believe that the appellant was being honest and truthful about the reasons for adjournment.
17. It is always presumed that an advocate who stands in court and informs the presiding judicial officer that he or she is holding brief for a colleague advocate has full instructions. It is therefore the responsibility of the principal advocate to fully brief his or her agent advocate. In the circumstances of this case, the principal advocate will be left to suffer for the mistakes of Mr Kassim and Mr Anwar advocates who held his brief. Mr. Ocharo was required to fully brief Mr. Kassim and Mr. Anwar in the matter.



18. This court agrees with the trial magistrates' sentiments that this suit having been filed in the year 2007 and having not taken off since it was filed demonstrated the appellant's lack of interest in prosecuting the matter. In the case of *Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and 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.”

19. It is trite that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. See Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution*. See *Gidion Sitelu Konchella -vs- Daima Bank Ltd* [2013] eKLR. Justice must also be balanced between the parties and therefore, the court has an obligation to weigh on the prejudice likely to be occasioned to the Respondent

20. In *Richard Ncharpi Leiyagu -vs- IEBC & 2 Others* [2013] eKLR, the Court of Appeal held that a hearing is a well-protected constitutional right which is the cornerstone of law and even if courts have inherent jurisdiction to dismiss a suit, this should be done in circumstances that would protect the integrity of the court process from abuse as that would amount to injustice and lastly that at the end of the day, there should be proportionality.

21. In order to exercise its discretion in favour of the Applicant, this court has to be satisfied that there is sufficient cause or reason to warrant the setting aside of the order of dismissal and the subsequent reinstatement of the suit. Sufficient Cause was defined by the Supreme Court of India in *Parimal vs Veena* which was cited with approval in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR. In that case, the Court stated that:-

In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

22. The reasoning behind the dismissal of a suit(s) for non-attendance and want of prosecution is founded on the principle of expeditious prosecution of cases by parties who come to court to seek justice. It is expected that once a party files a suit in court, he will efficiently and effectively fast track the hearing and determination of that same. That is not what the appellant did in this case.



23. The totality of my review and analysis of the entire record of appeal and the law is that this appeal lacks merit and the same is hereby dismissed with costs.

24. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of

1 M/S Namukuru H/B for Were for the Appellant.

2. Respondent/Advocate-absent Bett C/A.

