**Karani v Cheburer (Civil Appeal E002 of 2024)**
**[2025] KEHC 406 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 406 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ITEN**

**CIVIL APPEAL E002 OF 2024**

**JRA WANANDA, J**

**JANUARY 24, 2025**

**BETWEEN**

**SARAH JEPCHUMBA KARANI ..... APPELLANT**

**AND**

**YATICH CHEBURER ..... RESPONDENT**

## JUDGMENT

1. This Appeal is against dismissal of a suit, namely, Eldoret Chief Magistrate's Court Civil Case No.263 of 2014 for want of prosecution. The suit was a personal injury claim arising from an alleged road traffic accident. The order of dismissal was made on 5/02/2024 when the matter came up for hearing but could not take off because the Appellant had still not attended a medical re-examination session agreed upon by the parties and which was meant to ascertain the injuries alleged to have been suffered by the Appellant.

2. It is the above order dismissing the suit that aggrieved the Appellant and which she is now challenging by this Appeal. She lodged this Appeal vide the Memorandum of Appeal filed on 15/02/2014 and raised the following 9 grounds quoted verbatim:

    i. That the trial Magistrate erred in law and fact in failure to observe that this matter had proceeded ex parte and Judgment delivered against the Respondent on 30th September 2019.

    ii. That the trial Magistrate erred in law and fact in dismissing the suit for want of prosecution contrary to the provisions of Order 12 Rule 1 of the Civil Procedure Rules 2010.

    iii. That the trial Magistrate erred in law and fact in dismissing the suit for want of prosecution contrary to the provisions of Order 17 of the Civil Procedure Rules 2010.

    iv. That the trial Magistrate erred in law and in fact in failing to observe that it is the Respondent who issues dates for second medical examination and it is not a walk in hospital.

v. That the trial Magistrate erred in law and in fact in failing to observe that there were security issues of banditry that made travelling impossible for the Appellant.

vi. That the trial Magistrate erred in law and fact by sacrificing substantive hearing on the altar of procedural technicality contrary to the provisions of Article 159(3)(d) of *the Constitution* of Kenya 2010.

vii. That the learned Magistrate erred irrational sacrificing the right to be heard under Article 50 of *the Constitution* of Kenya 2010.

viii. That the trial Magistrate erred in law and fact by negating the provisions of Section 1A and 1B of the *Civil Procedure Act* Cap. 21.

ix. That the trial Magistrate erred in law generally arriving at an erroneous conclusion.

**Hearing of the Appeal**

3. Pursuant to directions given, the Appeal was canvassed by way of written Submissions. The Appellant filed her Submissions on 25/09/2024 whereas the Respondent filed on 1/10/2024.

4. This Appeal is in one series with two others, namely Iten High Court Civil Appeal No. E003 of 2024 and Iten High Court Civil Appeal No. E004 of 2024 both which also arise from the same alleged traffic accident stated to have occurred on 3/01/2019 and which are all against the same Respondent, Yatich Cheburer. The 3 Appeals and the lower suits they arise from are as follows.

| Appeal | Lower Court suit | Appellant/Plaintiff |
|---|---|---|
| Iten HCAA No. E002 of 2024 | Iten PMCC No. 8 of 2024 | Sarah Jepchumba Karani |
| Iten HCCA No. E003 of 2024 | Iten PMCC No. 9 of 2024 | Owen Pundon Karani |
| Iten HCCA No. E004 of 2024 | Iten PMCC No. 7 of 2024 | Gloria Chelagat |

5. From the records of the lower Courts, the order of dismissal of the suit made on 5/02/2024 in Iten PMCC No. 8 of 2019 was ordered to also apply to the other 2 matters, namely, Iten PMCC No. 7 of 2024 and Iten PMCC No. 9 of 2024. This therefore explains why there are 3 respective but related Appeals.

**Appellant's Submissions**

6. In his submissions, Counsel for the Appellant cited Order 17 of the Civil Procedure, 2010 and submitted that Rule 2 thereof requires a mandatory notice to be served on why a suit should not be dismissed. According to him therefore, the Court proceeded to dismiss the suit for want of prosecution without issuing such notice. He submitted further that, also, such dismissal can only be done if no step has been taken in the suit for a period of 1 year. He then cited several cases. He further submitted that the 2nd medical examination was requested by the Respondent which has specific doctors and whom they refer parties to, that it is not a walking-in and walk-out where one just presents himself for examination but is a case where one has to wait until a date is given by the doctors and dates are communicated, that in most cases, and that notices are too short to enable a client to prepare to travel for the re-examination.

7. He submitted further that the Appellant comes from Elgeyo Marakwet area which, as is in the public domain, has been experiencing banditry attacks which rendered movement impossible. He submitted further that although the Appellant was booked for the re-examination for 29/01/2024, on that date, while he was on his way to Nakuru for the re-examination, there was a banditry attack and as a result, they were forced to abort the journey and that this information was conveyed to the Court on the date that the suit was dismissed, 5/02/2024. According to Counsel, the delay for not attending the re-examination was not intentional as it was caused by the banditry issue and late notices from the Respondent's Advocates, and that the said reason is excusable and does not amount to abuse of the Court process since the Plaintiff's Advocates always appeared before Court and explained the reasons. He then referred to Article 25 of *the Constitution* on the requirement for fair trial, Article 50 on the right to be heard, and Article 159 and Section 1A and 1B of the Civil Procedure Rules on the need to breathe life to actions, rather than dismissing them on technicalities.

**Respondent's Submissions**

8. On his part, the Respondent's Counsel, in opposing the Appeal, and after giving a history of the litigation, including the fact that the suit had earlier been dismissed for want of prosecution but later reinstated, submitted that the Appellant failed to avail himself for the second medical examination which forced the Appellant to file the Application dated 20/04/2021 seeking to compel the Appellant to attend the examination and which Application was allowed by consent. He submitted further that the Appellant was booked on several dates, the latest being 7/12/2023 and 29/01/2024 and which was after the suit had come up for Mention in respect to the same issue. He then cited Order 12 and Rule 7 of the Civil Procedure Rules and submitted that the legal substratum for dismissal of suits for want of prosecution is founded on the principle that litigation must be expedited. He also cited several authorities.

9. He then narrated a chronology of the proceedings and/or Court attendances and submitted that it can be clearly seen that that the delay was inordinate thus the Court was justified in dismissing the suit. Counsel also pointed out that contrary to the Appellant's submissions, the Appellant was referred for the re-examination on 28/09/2019 and advised to book an appointment for the same and that indeed, the Appellant's Counsel on different dates even told the Court that he had booked the Appellant for such re-examination. On the allegations that the notice was too short and also that there was a banditry attack on the date that the Appellant was travelling, Counsel observed that nothing has been produced to prove the allegations.

**Determination**

10. This being a first Appeal, this Court has the duty to analyze and re-examine the arguments or submissions made before the lower Court and reach its own conclusions. In regard thereto, the Court of Appeal in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, stated as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

11. The background of the matter is that by the Plaint filed on 12/04/2019 through Messrs Mathai Maina & Co. Advocates, the Appellant pleaded that the Respondent was the owner of the motor vehicle registration number KBS 160A Toyota Matatu and whom the Appellant sued for being vicarious liable

for the actions and/or omission of his driver, servant and/or agent. The Appellant pleaded further that on 3/01/2019, she was travelling as a fare-paying passenger in board the said motor vehicle along Iten-Kabarnet Road when the Respondent's driver drove the same so negligently, recklessly and carelessly that he caused it to lose control and by reason whereof, it overturned and caused an accident. She claimed that, as a consequence thereof, she sustained severe personal bodily injuries and has suffered loss and damage. The Appellant therefore prayed for general damages, special damages, costs of the suit and interest.

12. Initially, default Judgment was entered on 18/06/2019 when the Respondent failed to enter appearance or file a Statement of Defence. The suit then proceeded to formal proof and thereafter, a full Judgment was entered on 30/09/2019 in favour of the Appellant and damages awarded. However, the parties subsequently, by consent, successfully moved the Court to set aside the Judgment, and which consent was adopted on 16/10/2019. Consequently, the Statement of Defence filed by Messrs Kairu & McCourt Advocates was admitted into the record.

13. The record reveals that thereafter, the Court, upon the basis that the suit had remained dormant for a considerable time, suo motu fixed the matter for Notice to Show Cause (NTSC) why the same should not be dismissed for want of prosecution. The Notice was fixed for hearing for 19/02/2020. On the said date however, no party appeared and the Court duly dismissed the suit for want of prosecution.

14. Pursuant to this dismissal, the Appellant, on 3/03/2020, filed an Application seeking the setting aside of the dismissal and/or reinstatement of the suit. The grounds cited were that the matter was erroneously listed for dismissal for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules since 1 year had not lapsed without any action being taken in the matter, and also that on the date of the hearing of the NTSC, Counsel for the Appellant arrived late in Court due to transport logistics and found the suit already dismissed. The record does not clearly reveal what transpired thereafter in respect to the Application and it is therefore not clear whether the Application was heard and if so, the outcome thereof. By this time, the Respondent's Advocates had changed to Messrs Kimondo Gachoka & Co.

15. What is however apparent is that on 21/04/2021, the Respondent filed an Application seeking orders that the Court do compel the Plaintiff to attend medical re-examination by the Respondent's doctor. This therefore suggests that the suit was re-instated. The ground cited for the Application was that the Respondent had failed to turn up for a medical appointment fixed for 28/09/2019. According to the Respondent, the missing of the medical appointment was a tactic by the Appellant to put pressure on the Respondent's doctor's diary in a bid to force the doctor to conduct the re-examination within a limited time-frame and thus create delay which would then portray the Respondent in bad light as the one causing adjournment. Further, according to the Respondent, the re-examination was crucial as it would enable the Respondent to fully comply with Order 11 of the Civil Procedure Rules. The Application was not objected to and was then, on 10/05/2021, allowed, again, by consent of the parties.

16. The record then shows that on several occasions thereafter, in fact on about 13 different occasions, the matter came up in Court for more than 3 years, between June 2021 and September 2024, for either Mention for the purpose of the Court being updated on the progress of the medical re-examination or for hearing. Not much progress was made over all this period for the reason that either the parties failed to attend Court or because the Appellant had not yet availed himself for the medical re-examination. Frustrated with the lack of progress, and coupled with the non-attendance of the Plaintiff or his

Counsel on that date, Hon. V. Karanja, Principal Magistrate, on 11/12/2024, observed and ordered as follows:

> " The issue of 2nd medical assessment was pending for the last one year. The delay is inordinate and this matter is fixed for hearing on 5/02/2024 ....."

17. When the suit came up for hearing on 5/02/2024 as scheduled, Counsel for the parties were this time both present in Court. Counsel for the Appellant was Miss Kinyanjui while Counsel for the Respondent was Miss Kirigo. They are then reported to have submitted as follows:

> " Miss Kirigo
>
> The matter is for hearing. The Plaintiff is yet to undergo 2nd assessment. The Plaintiff was booked for 29.01.2024. He did not show up. The matter has been pending the 2nd medical assessment since 2019 and it has been mentioned severally in Court. Section 3(a) of the *Insurance Act* is clear. The 2nd medical examination. We pray that the matter be dismissed in the alternative we can take action on our application 6.04.2021"
>
> Miss Kinyanjui
>
> The plaintiff was booked for 2nd medical assessment on 29.1.2024. they reached Nakuru and informed us that there were bandits and we pray for the venue be changed and the application be allowed.
>
> Miss Kirigo
>
> This position to apply to CC 7 of 2019 and CC 9 of 2019."

18. Upon hearing Counsel as quoted above, Hon. V. Karanja (PM), ruled as follows:

> " I have considered the application made by counsels for both the plaintiff and the defendants. The issue of 2nd medical examination has been pending from 26.4.2021. it is 4 years down line and the orders of this court of 11.12/2023 were clear that today the matter has to proceed and the plaintiff is not ready. I will allow the application by the defendant and proceed to dismiss his suit for want of prosecution. Order 17 rule 2 CPR."

19. The question now is whether the trial Magistrate was justified in dismissing the suit. In answering the said question, I may mention that the principles to be applied in determining the issue of dismissal of an action for want of prosecution were well set out in the case of Allen Vs Sir Alfred Mc Alphine & Sons Limited (1968) where Salmon L. J guided as follows:

> " A defendant may apply to have an action dismissed for want of prosecution either (a) because of the plaintiff's failure to comply with the Rules of the superior court or (b) under the court's inherent jurisdiction. In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognise inordinate delay when it occurs.

(ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.

(iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

20. Echoing the above, R.Z. Chesoni (as he then was), in the case of Ivita vs. Kyumba (1984) K.L.R 441, stated that:

> " 3. The test applied by the courts in an 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 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 in the discretion of the court."

21. The above principles were restated by the Court of Appeal in the case of Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd (2004) e KLR, where it held as follows:

> " ..... The principle that pervades these decisions is that the court has to be satisfied that the ordinate delay is excusable and if so satisfied, then the court has to consider whether justice can be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done then it will be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution."

22. Borrowing from some of the above authorities, Gikonyo J, in the case of Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR broke down the above principles and extrapolated the same in an even more elaborate manner as follows:

> " [10] No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay 1) is inordinate and inexcusable; and 2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. The Court will be interested in the nature and importance of the case, the right of the Plaintiff to be heard and the fact that summary dismissal of a suit drives away the Plaintiff from the seat of judgment; an arbitrary and draconian act comparable only to the proverbial ''sword of the Damocles''. And, for the Defendant, in order to complete the balancing, the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is

substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of *the Constitution* are the relevant guide here. Ultimately, as Chesoni J (as he then was) stated in the case of Ivita Vs Kyumbu, the Court should ask itself, whether, despite the delay, it is still possible to do justice for all the parties."

23. Applying the above principles to the facts of this case, I again point out that from the chronology of events set out above, the suit had previously been dismissed on 19/02/2022 for want of prosecution, upon which the Appellant applied for reinstatement thereof. As aforesaid, the record is not clear on the fate of the Application but all indication is that the Application was indeed allowed and the suit reinstated. On the basis of this history alone, one would have expected the Appellant to henceforth exercise strict vigilance so as to avoid a repeat of similar dismissal of her suit, and to take steps to expedite the hearing thereof. From the record, she does not seem to have met this expectation.

24. Regarding the issue of the second medical examination, as aforesaid, the Respondent first brought the same to the attention of the Court when she filed the Application an on 21/04/2021 seeking that the Appellant be compelled to present himself for examination. According to the Respondent, the Appellant's failure to avail himself for the examination was delaying the hearing of the suit since, inter alia, without the 2nd medical Report, the pre-trial requirement under Order 11 of the Civil Procedure Rules could not be concluded. As aforesaid, that Application was subsequently allowed by consent. I note that in the Affidavit filed in support of the Application, the Respondent exhibited a copy of her Advocates' letter dated 28/09/2019 by which the Appellant, through her Advocates, had been referred for the medical re-examination. The letter was premised as follows:

> "Kindly contact our client's medical department on Telephone number 07XXXXXXXX and book the Plaintiff for medical re-examination ....."

25. By the time that the Respondent was therefore bringing the matter to the Court's attention and seeking its intervention vide the said Application, the said referral letter had already been with the Appellant for about 1 ½ years but still she had not complied with it. It took the filing of the Appellant's said Application for the Appellant, through his Advocates, to finally undertake to go for the examination. With the Application allowed, the requirement for the Appellant to avail herself for the medical re-examination thus became an order of the Court. However, from the time that the Application was so allowed by consent on 10/05/2021, up to the date of the dismissal on 5/02/2024, almost 3 years later, and despite the matter having been mentioned in Court on several different dates for the sole purpose of gauging the progress of the re-examination, the Appellant had still not availed himself for the re-examination. The record also reveals that on several of these mention dates, the Plaintiff or her Advocates did not even attend Court.

26. In light of the above chronology of events, can the Appellant really be heard to fault the trial Magistrate for dismissing the suit for the failure to comply with the directions? Can the Appellant justifiably seek to invoke the provisions of Article 25 of *the Constitution* on the requirement of a fair trial, Article 50 on the right to be heard, and Article 159 and Section 1A and 1B of the Civil Procedure Rules on the need to breathe life to actions, rather than dismissing them on technicalities? Methinks not. The cited provisions cannot come to the rescue of the Appellant in the circumstances of this case. I say so because the Appellant was never denied a hearing or an opportunity to present her case. On the contrary, she was given ample opportunity to do so but by her actions or inaction, displayed shocking lethargy and clear refusal to co-operate with the Court. As aforesaid, the record shows that, before it was dismissed, the suit had been mentioned repeatedly up to 13-14 times over a period of 3 years simply for the purpose

of giving the Appellant time to conclude the issue of her re-examination. In aggregate therefore, from the time that the Respondent sent to the Appellant the letter in September 2019 referring him for the re-examination, up to the date of the dismissal in February 2024, almost 4 ½ years had lapsed.

27. The grounds submitted by the Appellant in attempting to give some feeble excuses for her failure to comply with the directions are all flimsy. She only talks of the alleged banditry attacks that purportedly occurred on 29/01/2024 which she claims frustrated her efforts to travel for the examination. Even if the said allegation is genuine, still the Appellant does not give any explanations for her 4 ½ years inaction insofar as booking and/or presenting herself for the re-examination is concerned. She also does not explain why even after booking appointments, she continuously missed them without any prior notice.

28. One limb of the arguments made by the Appellant is that since, in dismissing the suit, the trial Magistrate cited Order 17 Rule 2(1) of the Civil Procedure, the Appellant ought to have been served with a Notice to Show Cause (NTSC) before the suit was dismissed, and also that 1 year should have lapsed without any step having been taken in the suit before it could be set down for dismissal. I notice that in presenting the said argument, the Appellant has conveniently omitted also mentioning Rule 2(4) which provides as follows:

> " The court may dismiss the suit for non-compliance with any direction given under this Order."

29. As already recounted, the suit had earlier been dismissed under the provisions of the said Order 17 Rule 2(1) after service of the NTSC. The same was later, upon application of the Appellant, reinstated by consent. Later, the Respondent applied for the Appellant to be compelled to avail himself for the second medical examination. Again, the Application was allowed by consent and the Appellant undertook to comply. This undertaking thus became an order of the Court. All these events were related and intertwined having taken place in the same suit and cannot therefore be isolated or severed. The Appellant having failed to comply with the directions agreed upon, the Court was fully within its discretion in dismissing the suit.

30. In any event, the Court was, in my view, still entitled to dismiss the suit under its inherent powers donated under Section 3A of the *Civil Procedure Act* and which provides as follows:

> " 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."

31. In finding as above, I cite the Court of Appeal decision in the case of Munyi v Mwangi & Another (Civil Appeal 26 of 2017) [2022] KECA 29 (KLR) (4 February 2022) (Judgment), in which the following was held:

> " 20. In the case of Stephen Boro Gitiha vs Family Finance Building Society & 3 others [2009] eKLR this Court emphasised that;
>
> "... both the *Civil Procedure Act* and the *Appellate Jurisdiction Act* were amended to incorporate sections 1A and 1B in the *Civil Procedure Act* and sections 3A and 3B in the case of the *Appellate Jurisdiction Act*. These provisions incorporate into the civil process an overriding objective which has also been defined ... the courts are now on the driving seat of justice and ... have a new call to use the overriding objective to remove all the cobwebs hitherto

experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner".

21. And in the case of Safaricom Limited vs Ocean View Beach Hotel Limited & 2 Others [2009] eKLR expressed itself thus:"

    The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow."

22. In effect, with the appellant having stalled the appellate process by blatantly disregarding the orders of the court, and thereafter refusing to take any prudent steps to restart it, we find that the lower court was well within its powers to rely on the inherent powers provided under section 3A to strike out the appellant's appeal, and we so find."

**Final Orders**

32. The upshot of my findings above is that this Appeal lacks merit. The same fails and is dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Ms. Angweny h/b for Mr. Mathai for the Appellant

N/A for the Respondent

Court Assistant: Kuto