



REPUBLIC OF KENYA



KENYA LAW
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**Olumbe v Obanyi (Civil Appeal E014 of 2024)
[2025] KEHC 5386 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E014 OF 2024
WM MUSYOKA, J
APRIL 30, 2025**

BETWEEN

JAPHETH OLUMBE APPELLANT

AND

HENRY OBANYI RESPONDENT

(An appeal arising from orders made in the ruling of Hon. T. Madowo, Senior Resident Magistrate, SRM, delivered on 12th March 2024, in Busia CMCCC No. 398 of 2021)

JUDGMENT

1. The primary court declined, by a ruling dated 12th March 2024, to reinstate the suit it had dismissed for want of prosecution. The appellants, who were the plaintiffs in the dismissed suit, were aggrieved and brought the instant appeal, through the memorandum of appeal, dated 25th March 2024, on grounds around the trial court failing to find that they had filed written submissions; visiting the mistakes and shortfalls of an Advocate on the litigant; the mere listing of matter in a cause list being treated as adequate notice; not considering that the Advocates for the appellant had difficulties at some stage hence unable to prosecute the matter; and finding a 3 month delay inordinate.
2. Directions, on the disposal of the appeal, were given on 17th February 2025, for canvassing of the appeal by way of written submissions. I have only seen written submissions by the appellants, which I have read and noted the arguments made.
3. The only issue for me to consider is whether the suit at the trial court should have been reinstated.
4. The said suit was dismissed for want or prosecution on 20th April 2023, and the appellants sought to have it reinstated by their application, dated 11th October 2023. They averred that they were unaware that the matter had been set down for dismissal for want of prosecution, on 20th April 2023, for they did not receive notice of the mention slated for that date for that purpose. They averred that the failure



- to set the matter down for hearing was actuated by matters beyond their control, as their Advocates had issues surrounding their offices or premises, which were inaccessible between 8th February 2023 and 30th June 2023. They submitted that the mistakes of their Advocates ought not be visited on them.
5. The law on reinstatement of suits dismissed is Order 12 Rule 7 of the Civil Procedure Rules, where the court may set aside the dismissal order, on such terms as may be just. The power to reinstate is discretionary.
 6. Dismissal of suits for want of prosecution turns largely on the delay in getting the suit prosecuted. The overriding principle is the mantra that there ought to be no delay in the dispensation of justice, based on the maxim that justice delayed is justice denied. The justification behind the remedy, of dismissal of suits for want of prosecution, is that litigation must be expedited and concluded by the parties. There can be no justice in filing a cause in court, and then leave it parked there, unprosecuted, hanging over the head of the other party like the famed sword of Damocles. Dismissals help in clearing backlogs in court, created by parties who lack appetite to prosecute their cases. Pendency of unmoving cases create a logjam, which generates a crisis of public mistrust and lack of confidence in the Judiciary. Dismissals reduce the ever-increasing caseloads, and the backlogs, caused by stale suits clogging the judicial system.
 7. The courts have set out the factors that are to be taken into account, in such cases. In *Ivita v Kyumbu* [1984] KLR 441 (Chesoni, J), the considerations were said to include whether the delay is prolonged and inexcusable; whether justice can be done despite the delay; justice is justice for both sides, and so the positions of both sides must be considered; whether the other side would be prejudiced, by justice not being done by the prolonged delay; and the reasons given for the delay.
 8. Whether to reinstate a dismissed suit would call for exercise of discretion in line with Articles 50 and 159 of *the Constitution*, and the oxygen principle in sections 1, 1A and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya. These were discussed in *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR [2015] KEHC 6789 (KLR) (Gikonyo, J), where it was stated that the fundamental principles of justice are enshrined in Article 159 of *the Constitution*, coupled with Article 50, with respect to the right to be heard, and to serve substantive justice to all. It was underscored that those principles ought to be factored when considering reinstatement of dismissed suits, bearing in mind that dismissal of suits is draconian.
 9. In this case, the suit had been filed on 1st September 2021. No action had been taken on the matter, until the trial court listed it for dismissal in 2023. The appellants did not attend court, on the date when the same was due for notice to show cause, and their suit was dismissed. In the application to have the suit reinstated, the appellants offered no explanation for the delay or inaction. What they explained was that the offices of their Advocates were inaccessible between 8th February 2023 and 30th June 2023. That amounted to no explanation at all, with respect to why no action had been taken, between when the suit was filed, in September 2021, and February 2023, when their Advocates began to have office challenges.
 10. The appellants appear to blame their Advocates, hence their plea that the sins of the Advocates ought not be visited on them, founded on *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR [1983] KECA 117 (KLR) (Potter, Kneller JJA & Chesoni Ag JA) and *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR (Waki, Warsame & Makhandia, JJA). However, there is also the other argument, stated in such cases as *Savings & Loan Limited v Susan Wanjiru Muritu Nairobi Milimani HCCC No. 397 of 2002* (Kimaru, J)(unreported) and *Duale Mary Anne Gurre v Amina Mohamed Mahamood & another* [2014] eKLR (JM Mutungi, J), that the suit belongs to the litigant, who has a duty to pursue prosecution of their case, and to constantly check with their Advocates on the progress of the matter.



11. The case was in limbo, between September 2021, when it was filed, and April 2023, when it was dismissed. The appellants have provided no proof of the efforts they made to ensure that their Advocates progressed the matter, after filing it, to pre-trial and eventually to full trial. They only became active after the dismissal. I do not think the appellants did much to aid their case. I am not persuaded, therefore, that the trial court improperly exercised discretion, in dismissing the suit, and in declining to have it reinstated.
12. Overall, I find no merit in the appeal. I, accordingly, dismiss it. There shall be no order on costs. The trial court records shall be returned to the relevant registry, while the appeal file herein shall be closed. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 30TH DAY OF APRIL 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Azenga Alenga, Legal Researcher.

ADVOCATES

Mr. Wangalwa, instructed by Wangalwa Oundo & Company, Advocates for the appellants.

Mr. Juma, instructed by the Attorney General, Advocates for the respondents.

