



**Coast Raha Company Limited & 2 others v Ali (Civil Appeal
E004 of 2022) [2025] KEHC 11516 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CIVIL APPEAL E004 OF 2022**

**JN NJAGI, J
JULY 30, 2025**

BETWEEN

COAST RAHA COMPANY LIMITED 1ST APPELLANT

MOMBASA RAHA COMPANY LIMITED 2ND APPELLANT

NASOR ALI MOHAMED 3RD APPELLANT

AND

ALI SALMIN ALI RESPONDENT

RULING

1. The Applicant herein has filed a Notice of Motion application dated 11th June 2025 seeking for orders that the suit herein be dismissed for want of prosecution on the ground that the Appellants/ Respondents have failed to take positive steps to prosecute the matter since the filing of the appeal. That the matter has been mentioned severally before this court with no appearance from the Appellants/ Respondents. That it is apparent that the Appellants are no longer interested in pursuing their claim and therefore it is in the interests of justice that the suit be dismissed for want of prosecution. That the pendency of the suit is prejudicial to the Applicant and to fair administration of justice.
2. The application was supported by the affidavit of counsel for the Applicant Mr. Geoffrey Kilonzo.
3. The appeal was opposed by the Appellants/Respondents vide the replying affidavit of Mr. Ndolo, counsel for the Appellants/Respondents in which he avers that the Appellants are still interested in pursuing the appeal. That the advocate who was handling the matter under the firm of Kimondo Gachoka & Co. Advocates left the law firm without a proper handover. That the appeal is now being handled by the firm of Kairu & McCourt & Co. Advocates who are seeking to be given 30 days to file and serve the Record of Appeal. That the conduct of the advocate who left the firm of Kimondo Gachoka without a proper handover should not be visited on the Respondents.



4. Both the counsels for the Applicant and the Respondents relied on their affidavits and made no submissions.
5. I have considered the record of the court and the contents of the affidavits of the counsels appearing for the parties. The court record indicates that the appeal was filed on the 3rd June 2022 together with an application seeking for stay of execution of the judgment of the lower court. The court granted stay orders on the 6th June 2022. The Appellants did not take any action towards the hearing of the appeal. After lapse of time, the Applicant filed the instant application seeking to have the appeal dismissed for want of prosecution.
6. The Appellants/Respondents attribute the failure to take action on the matter on the former advocate who left the firm of Kimondo Gachoka & Co. Advocates without giving out a brief on the matter. It is the submission of the current advocates for the Appellants/Respondents that the conduct of the said advocate should not be visited on the Respondents.
7. Order 17 Rule 2 (1) of the Civil Procedure Rules which governs dismissal of suits for want of prosecution provides as follows:

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 should not be dismissed and if cause is not shown to its satisfaction, may dismiss the suit.

8. Whether or not to dismiss a suit for want of prosecution lies at the discretion of the court. In Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR, the court stated as follows:

“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 vs 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.”

9. The court record in this matter shows that the last court appearance on behalf of the Appellants/Respondents was on 3/11/2022 when a Mr. Nyabero was present for them. No appearance was made for them after that date until when Mr. Ndolo made appearance for the Appellants/Respondents on the 19/6/2025 after the instant application was filed. The appellants had thereby not made appearance in court for a period of over 2 years before the instant application was filed. I find that delay to be inordinate.



10. The explanation given for the delay that the advocate who was handling the matter from the firm of Kimondo Gachoka & Co. Advocates left the firm without making a handover has not been substantiated as no affidavit was filed by an advocate from the said firm confirming the allegation. The delay therefore has not been explained to the satisfaction of the court.
11. The question is whether justice can still be done despite the delay. The Applicant has not laid down any evidence showing that the hearing of the appeal will be prejudiced by the delay. In my view he can be compensated for the delay by being paid the costs of the application as he is not to blame for the delay. He acted within the law in filing the application for dismissal of the suit for want of prosecution.
12. I have considered that the Appellants/Respondents have appointed new advocates in the matter. This is an indication that they are interested in pursuing the appeal. It is only fair and just for the new advocates to be given an opportunity to prosecute the appeal. To order otherwise will amount to condemn the Respondents unheard against the rules of natural justice.
13. In view of the foregoing, I consider it to be in the interests of justice to dismiss the application but order the Applicants to have the costs of their application. Consequently, it is hereby ordered that:
 - (1) The application dated 11th June 2025 is dismissed.
 - (2) The Appellants/Respondents to pay the Applicant throw away costs of Ksh.20,000/= within 30 days of the date hereof.
 - (3) The Appellants/Respondents to file and serve the Record of Appeal within 30 days from the date hereof.
 - (4) Failure to comply with any of the conditions as set in orders 2 and 3 herein, the application dated 11th June 2025 to stand allowed as prayed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 30TH JULY 2025.

J.N. NJAGI

JUDGE

In the presence of

No appearance for Appellants/Respondents

No appearance for Respondent/ Applicant

Court Assistant: Kambi

