



**Kamau v Mwangi (Civil Appeal 673 of 2019)
[2024] KEHC 1704 (KLR) (Appeals) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

APPEALS

CIVIL APPEAL 673 OF 2019

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

PETER NJOROGI KAMAU APPELLANT

AND

JOHN KAMAU MWANGI RESPONDENT

(Being an appeal from the Ruling and Order of Hon. S. G. Gitonga, RM dated 18th October 2019 at the Magistrates Court at Milimani, Nairobi in Civil Case No.1082 of 2004)

JUDGMENT

Introduction and Background

1. On 18.10.2019, the Subordinate Court declined to reinstate the Appellant's suit that had been dismissed for want of prosecution ("the Ruling"). Aggrieved by the Ruling, the Appellant has appealed to the court through its memorandum of appeal dated 18.11.2019. He seeks to set aside the Ruling and have his application for reinstatement dated 10.08.2017 allowed thereby reinstating the suit.
2. From the record, the Appellant filed the suit on 06.01.2004 seeking general and special damages from the Respondent as a result of an accident that occurred on or about 10.02.2001 between the parties' motor vehicles. Between 16.06.2004 and 14.11.2015, the Subordinate Court heard and determined various interlocutory applications, the last one being the Appellant's for amendment of his plaint. There was a hiatus of the case between 14.11.2015 and 04.05.2017 which prompted the court to dismiss the suit for want of prosecution as no step had been taken by either party to prosecute the suit for a period over 1 year.
3. On 05.03.2018, the Appellant filed the application seeking to reinstate the suit on the grounds that under Article 159 of the *Constitution* and sections 1A and 2A of the *Civil Procedure Act* (Chapter



21 of the Laws of Kenya) it would be fair, expedient and in the best interest of justice to do so. The Appellant claimed that when the matter was coming up for mention for purposes of taking a hearing date and taking directions on 05.06.2017, it was taken out of that day's cause list as magistrates were attending the Magistrate's Colloquium. That he stood to suffer irreparably unless the dismissal order is discharged and the suit reinstated and that he has an arguable case with high chances of success. He urged that it will be in the best interest of justice that the suit be reinstated so that it can be heard and determined on merit.

4. Although the application was not opposed, the trial magistrate after taking written submissions rendered the Ruling dismissing the application. The Subordinate Court dismissed the Appellant's claim that the matter was taken out of the cause list on 05.06.2017 and had already been dismissed for want of prosecution. That before the matter was dismissed on 04.05.2017, it was last in court on 04.11.2015 which prompted the court to issue a Notice to Show Cause why the matter should not be dismissed especially bearing in mind that the suit was filed in 2004. It held that the Appellant failed to honour the Notice hence the matter was dismissed. The trial magistrate was not convinced that the Appellant had given sufficient grounds to warrant the reinstatement of the suit.

Analysis and Determination

5. The issue in this appeal is whether the Subordinate Court erred in declining to reinstate the suit that was dismissed for want of prosecution. In the Ruling and declining to reinstate the suit, the trial magistrate was entitled to exercise discretion to reinstate the suit. Before this court can interfere with the learned magistrate's discretion, it must be satisfied that she misdirected herself some material matter and as a result arrived at a wrong decision or, that she misapprehended the law or failed to take into account some relevant matter (see *Mbogo v Shah* [1968] EA 93).
6. Under Order 17 Rule 2(1) of the *Civil Procedure Rules* the court may be dismiss a suit if no cause is shown to the court's satisfaction as to why no steps had been taken for one year to prosecute the suit. The Court of Appeal in *Pkiech Chesimaya v Limakorwai Achipa* ELD CA Civil Appeal No. 16 of 2017 [2020]eKLR stated that this discretion under Order 17 is upon the trial court and not an appellate court. Thus, this court is to determine whether the trial court applied its discretion judiciously in finding that the Appellant had not given sufficient grounds to warrant the reinstatement of the suit.
7. Going through the record, I cannot fault the trial magistrate's conclusion as it is indeed true that as at 05.06.2017 this matter had already been dismissed for want of prosecution just over a month earlier and it was not possible that it was listed for mention when it had already been dismissed. There is also nothing on record to indicate that the matter was ever taken out of the causelist because magistrates were attending their colloquium. In declining to reinstate the suit, the learned magistrate also took note of the fact that this matter was filed way back in 2004, some 20 years ago. Ultimately, the case remained unprosecuted for over one year which was unexplained and it would be prejudicial to the Respondent to reinstate the matter in view of the inordinate delay in prosecuting it.

Disposition

8. I find that the ruling of the Subordinate Court dated 18.10.2019 is well founded. The appeal lacks merit and is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE



Mr Onindo instructed by Onindo and Onindo and Associates Advocates for the Appellant.

