



**Mwapea v Ndung’u & 2 others (Civil Appeal E044 of 2021)  
[2024] KEHC 10290 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 10290 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E044 OF 2021  
F WANGARI, J  
APRIL 26, 2024**

**BETWEEN**

**NAHASHON MWAPEA ..... APPELLANT**

**AND**

**SIMON NJUGUNA NDUNG’U ..... 1<sup>ST</sup> RESPONDENT**

**MANGALE AKILI ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING INUKA POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant moved the Court through a Notice of Motion dated 8<sup>th</sup> December 2023. The application sought the following orders;
  - a. Spent
  - b. That pending the hearing and determination of this application there be a stay of execution of the Judgement, decree and any consequential orders arising from Mombasa CMCC No.1979 of 2016; Simon Njuguna Ndung’u & Anor v Nahashon Mwapea & 2 others.
  - c. That the order made by this honorable court on 29<sup>th</sup> March, 2023 dismissing this appeal for want of prosecution and all other consequential orders made thereto be set aside.
  - d. That this appeal be reinstated and/or re-opened and for hearing and determination on merit.
  - e. That costs of this application be in the cause.
2. The Respondents filed a replying affidavit opposing the application on grounds that the applicant had taken a period of over two years to prosecute the appeal they had filed and that their aim is to delay him from enjoying the fruits of his judgment. They also stated that the delay was inordinate, hence the application should be dismissed.



3. The basis of this application is the applicant's the Memorandum of Appeal against the Judgment and Decree of Hon. Kalo, Chief Magistrate in Mombasa CMCC.No. 1979 of 2021, delivered on 5<sup>th</sup> March, 2021. The appeal was dismissed for want of prosecution on 29<sup>th</sup> March, 2023 by Wangari J. The Appellant has now moved this court to have the appeal reinstated on grounds that on the 5<sup>th</sup> April, 2022 the court had issued stay of execution and set the matter for mention. That the court was not sitting on the date set and that the appellant later learnt that the appeal had been dismissed for want of prosecution on 29<sup>th</sup> March, 2023 after a notice to show cause had been issued on the 7<sup>th</sup> March, 2023. That the said notice was never served upon them and their appeal is meritorious with high chances of success.

### **Analysis and determination**

4. I have considered the application, and filed submissions together with the authorities relied upon by the parties, as well as the law and in my respectful view, there is only one issue for determination which is whether the Applicant has made out a case for grant of orders it seeks. Corollary to this finding is the issue of costs.

5. Order 17 Rule 2 (3) of the Civil Procedure Rules provides, inter alia: -

“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.”

6. The application was brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the Civil Procedure Rules. The provide as hereunder;

#### 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

#### 1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
  - (a) the just determination of the proceedings;
  - (b) the efficient disposal of the business of the Court;
  - (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology.”



### Section 3A

“Saving of inherent powers of court. 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.”

7. The essence of dismissal of suits for want of prosecution is the need for expeditious dispensation of suits. In *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR, it was held as follows;

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

8. This court has a duty to determine the application on merits. In *Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009*, the court on considering whether or not the suit should be dismissed for want of prosecution stated as follows: -

When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- 1) whether the delay has been intentional and contumelious;
- 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;
- 3) whether the delay is inordinate and inexcusable;
- 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

9. The appellant had filed a certificate of urgency seeking orders for stay of execution and when the same were granted on the 5<sup>th</sup> April, 2022 they went to slumber. A Notice to Show Cause as to why the suit should not be dismissed for want of prosecution was issued on the 7<sup>th</sup> March, 2023 and they had failed to appear in court to show cause. The appeal was thus dismissed on the 29<sup>th</sup> March, 2023.
10. Further, when the matter was dismissed for want of prosecution, it took the Plaintiff 9 months to file this application. There is no reason given as to why it took the Plaintiff that period before filing the



application for reinstatement of suit. Considering that the appeal was filed in 2021, and the parent suit at the lower court was filed in 2016, I find that the delay was inordinate and inexcusable, hence the application has got no merits.

11. Litigation must come to an end and the respondent cannot wait for over 8 years to enjoy the fruits of his judgment at the behest of an indolent appellant.
12. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. In this case, each party is to bear its own costs.
13. Following the foregone discourse, the upshot is that the following orders do hereby issue;
  - a. The application dated December 8, 2023 lacks merits and is hereby dismissed.
  - b. Costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 26TH DAY OF APRIL, 2024**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Mbonje Advocate h/b for Mwabonje Advocate for Applicant/ Appellant

N/A by the Respondent

Barile, Court Assistant

