



REPUBLIC OF KENYA



KENYA LAW
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**Nairobi Hospital v Kigen & another (Civil Appeal 585 of 2018)
[2024] KEHC 6278 (KLR) (Civ) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6278 (KLR)

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

CIVIL

CIVIL APPEAL 585 OF 2018

JN NJAGI, J

MAY 29, 2024

BETWEEN

THE NAIROBI HOSPITAL APPELLANT

AND

GEOFFREY KIGEN 1ST RESPONDENT

HON. SAM KOECH 2ND RESPONDENT

*(Being an appeal from the ruling of Hon. E. A Nyachoti, Chief Magistrate
in Nairobi CMCC No. 7649 of 2006 delivered on 11th December 2018)*

JUDGMENT

1. The appellant's matter came up for hearing of an application on 11th December 2018 wherein the advocates for the appellant/plaintiff and the 2nd respondent were present in court. The trial magistrate proceeded to dismiss the case for the appellant/plaintiff for want of prosecution on the ground that they had not complied with the order of the court made on 13/2/2017 to amend their plaint within 7 days. The appellant was dissatisfied with the decision of the learned magistrate and filed this appeal.
2. The grounds of appeal are that:
 - a. The Learned magistrate erred and misdirected herself by dismissing the Appellant's entire case, without hearing Counsel for the Appellant;
 - b. The learned magistrate erred in law and in fact by failing to consider the facts of the case as enumerated in the appellant's application and supporting affidavit;



- c. The learned magistrate erred in law and fact in holding that the grounds on which the appellant's application were premised were not convincing and failed to allow submissions on the same;
 - d. The learned magistrate erred and misdirected herself by failing to appreciate the rules of natural justice;
 - e. That the learned magistrate erred in law and fact by proceeding to decide on an issue not before the court and thereby not exercising her discretion judicially;
 - f. The learned magistrate misdirected herself by dismissing the appellant's suit yet the respondents had not applied for dismissal of the same;
 - g. The learned magistrate erred in law and fact in failing to consider the principles governing the exercise of the discretion to dismiss a case for want of prosecution and;
 - h. The learned magistrate erred and misdirected herself by condemning an innocent litigant for the mistake of counsel.
3. The appellant prayed that this Court sets aside the ruling of the trial court and reinstate the suit.
 4. The appeal was disposed of by way of written submissions of the advocate for the appellant. The advocate for respondent did not make submissions in the matter.

Submissions

5. The appellant submitted through counsel that the dismissal of the appellant's suit was a draconian act that denied the appellant the opportunity to ventilate his case in court. The appellant relied on the case of *Philip Kaimutai Langat P/A Kiplangat Maina v Job Kibet Maina* (2007) eKLR to urge that it was imperative that the appellant be allowed to ventilate his case.
6. The appellant submitted that mistake of counsel who was in conduct of the case should not be visited on the appellant. Reliance was placed in *CFC Stanbic Ltd v John Maina Githaiga & another* (2013) eKLR.
7. It was submitted that the respondents will suffer little or no prejudice if the appeal is allowed.

Analysis and Determination

8. This court's role as a first appellate court is to re-assess and reconsider the evidence and arrive at its own conclusions taking into account that it has not had the benefit of hearing the witnesses and observing their demeanour like the trial court – *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123.
9. I have considered the grounds of appeal and the submissions by counsel for the appellant. The issues for determination are
 - (1) Whether it was proper to dismiss the appellant's case for want of prosecution for the reasons given by the trial court.
 - (2) Whether the suit ought to be reinstated.
10. The trial court dismissed the suit for want of prosecution on the ground that the appellant had not complied with orders earlier given by the court. Being an exercise of discretionary power, dismissal of a matter for want of prosecution must be done judiciously. In the case of *Alex Wainana t/a John*



Commercial Agencies - vs - Janson Mwangi Wanjibia (2015) eKLR, the Court of Appeal set out the principles governing the exercise of discretion in the following terms: -

“The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of *Gathiaka vs Nduriri* (2004) 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it.”

11. The principles to be considered in an application for dismissal of the suit for want of prosecution were espoused in the case of *Ivita V Kyumbu* [1984] KLR 441 thus:

“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.”

12. In this case the advocates for the parties were present in court when the matter was dismissed. A matter cannot be dismissed for want of prosecution when the advocates for the parties are before the court. The act of dismissal of the suit was a wrong exercise of discretion on the part of the trial magistrate. There was no allegation of delay nor was there evidence that justice could not be done in the case if the appellant had not complied with the directions of the court. The court had the option of proceeding with the matter with the plaintiff that was before the court if the appellant had failed to amend its plaint. There was no justification in dismissing the suit.

13. It is trite law that mistake of counsel should not be visited on his/her client. In this case, the advocate was not given an opportunity to explain why he had not amended the plaint. There was no evidence that the appellant was the one to blame for failure to amend the plaint. The respondents in the case had not applied for dismissal of the case. The trial court did not exercise its discretion judiciously in dismissing the suit.

14. The appellant faulted the trial court for denying it the right to be heard by dismissing the suit when its advocate was before the court. The right to be heard is one of the cardinal principles of our Constitution. The court in the case of *Richard Nchapai Leiyanguvs IEBC & 2 others* ... state as follows on the right to be heard:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

15. In my view the dismissal of the suit in the presence of advocates for the parties without giving them a chance to address the court was a draconian act that has no room in our judicial dispensation. It can only lead to needless escalation of costs.
16. In view of the foregoing, I find the appeal to be merited. Consequently, the order of the trial court dismissing the suit is set aside and the suit is reinstated for hearing. Considering that this is an old matter, hearing to proceed on priority basis.



16. I make no order as to costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY 2024

J. N. NJAGI

JUDGE

In the presence of;

Miss Waweru holding brief for Kalwa for Appellant

Kemboi for Respondent

Court Assistant – Amina

30 days Right of Appeal.

