



Onsongo v Timothy Otieno Awuor t/a Connection Services Auctioneers (Miscellaneous Civil Application 613 of 2019) [2023] KEHC 21337 (KLR) (Civ) (10 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 613 OF 2019
CW MEOLI, J
AUGUST 10, 2023**

BETWEEN

JARED ONSONGO APPELLANT

AND

**TIMOTHY OTIENO AWUOR T/A CONNECTION SERVICES
AUCTIONEERS RESPONDENT**

RULING

1. Jared Onsongo (hereafter the applicant) brought the Notice of Motion dated October 18, 2022 (hereafter the Motion) supported by the grounds laid out on its face and the facts stated in his affidavit. The applicant is seeking an order to review and/or vary and set aside the order dismissing the application dated September 13, 2019 (hereafter the application) for want of prosecution and reinstatement of the application.
2. In his supporting affidavit which largely echoed the grounds, the Applicant stated that the dismissed application sought leave to appeal the order of the lower court in Milimani CMCC No. 3577 of 2015 dismissing the case for non-attendance on the part of his advocate. Further that when the parties attended court on March 9, 2020 they were directed by this court to avail typed proceedings handling the matter to enable the court appreciate the nature of the matter and give appropriate directions regarding the appeal. That one (1) week later, the country went into lockdown following the outbreak of the Covid-19 pandemic, making it difficult if not impossible for the applicant's advocate to obtain the typed proceedings for the lower court ; that it was not until February 22, 2022 and July 19, 2022 that the advocate was able to secure the said proceedings and a copy of the decree respectively; and it was then discovered that the matter had been dismissed by the High Court for want of prosecution.



3. It was further averred by the applicant that the delay in prosecuting the application was unintentional and unavoidable and that it is in the interest of justice for the court to grant the orders sought in the Motion; adding that no prejudice will be visited upon any of the parties herein in the circumstances.
4. Timothy Otieno Awuor T/A Connection Services Auctioneers (hereafter the respondent) opposed the Motion by lodging Grounds of Opposition dated March 8, 2023 as follows:
 - a. That the applicant is grossly guilty of laches and has historically exhibited immense indolence in the management of the case right from the lower court;
 - b. That the circumstances of the case do not fall within the purview of Order 45 of cap. 21;
 - c. That The application fails for the reason that the applicant has knowingly failed to explain why he did not attend court on 13/10/2022 before Hon. Justice Sergon to show cause why the matter should not be dismissed yet the court record shows that the notice of dismissal was served physically on 24/08/2022;
 - d. That the application is highly prejudicial to the Respondent as it is designed to merely harass him by subjecting him to an unending judicial process at massive costs; and
 - e. That the application is frivolous, misconceived and an abuse of the court process as it offends the overriding objective in civil litigation for just expeditious and inexpensive resolution of matters.
5. The Respondent also swore a replying affidavit echoing the above grounds and averring that the application was rightly dismissed and that notwithstanding the lockdown in the year 2020, the courts continued to entertain matters and to issue dates. Hence the reasons given by the applicant in explaining the delay in prosecuting the application are unsatisfactory. The respondent further averred that the applicant has little if any interest in pursuing the appeal and therefore urged that the Motion be dismissed with costs
6. The Motion was canvassed by way of written submissions. Counsel for the applicant anchored his submissions on the provisions of Order 45, Rule 1 of the *Civil Procedure Rules* (CPR) and the decision offered in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR on the question of ‘sufficient reason’ as a condition for the grant of an order for review. The Applicant’s counsel by and large submitted that the delay in prosecuting the application was occasioned by the lower court registry and consequently pleaded with the court to allow the Motion.
7. The respondent through his counsel submitted that the delay in prosecution of the application was solely due to the applicant’s laxity and negligence and further submitted that the delay is inordinate. Citing the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR where the court stated that what constitutes inordinate delay varies from one situation to another and is dependent on the unique circumstances of the case at hand. It was also submitted by counsel that the applicant is guilty of material non-disclosure owing to his failure to disclose to the court that his advocate was served with a notice to show cause prior to the dismissal order but that he did not attend court for the hearing thereof, thus justifying the dismissal order.



8. It was the contention by counsel for the Respondent that generally, the Applicant has not satisfied the conditions set out under Order 45 of the *CPR* to entitle him to a review of the dismissal order. On that basis, the Respondent’s counsel concluded that the Motion ought to be dismissed with costs.
9. The court has considered the rival affidavit material; the Grounds of Opposition and the contending submissions in respect of the Motion plus the authorities cited therein. It is clear that the orders sought in the instant Motion are for the review and/or setting aside of the dismissal order made on October 13, 2022 and for the reinstatement of the application.
10. The principles that guide a court in deciding whether to review its order are found in Order 45 of the CPR and reaffirmed under section 80 of the *Civil Procedure Act* the former which states:

“ Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

11. The following are the instances in which a court can review a decision already in place:
 - a. the discovery of new and important matter or evidence, or
 - b. some mistake or error apparent on the face of the record, or
 - c. any other sufficient reason.
12. In *Wachira Karani v Bildad Wachira* [2016] eKLR, Mativo J (as he then was) grappled with the essence of the term “sufficient cause/ reason” as follows :

“ Also relevant is the case of *Ongom vs Owota* [8] where the court held inter alia that the court must be satisfied about one of the two things namely:-

- (a) either that the defendant was not properly served with summons;
- (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

It’s important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-

.....

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean? The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others* [9] discussing what constitutes sufficient cause had this to say:-



“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant”

In *Daphene Parry v Murray Alexander Carson*[10] the court had the following to say:-

‘Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,.....’ (sic)

13. The court (Mativo J, as he then was)concluded by stating that:

“.....I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of *Parimal v Veena* observed that:-

"Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a curious man. In this context, "sufficient cause" means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." ...(sic)

14. I fully associate myself with the above reasoning, which in my view also has application here, where it appears that the instant motion is brought under the limb of ‘sufficient reason’ above. The record shows that the dismissed application was seeking leave to file an appeal out of time against the decision delivered by the trial court on October 17, 2018 and March 27, 2018 in Milimani CMCC No. 3577 of 2015. The record also shows that this matter was last in court on March 9, 2020 on which date the applicant through his advocate on record sought leave of the court to file a further affidavit annexing the lower court typed proceedings and which leave was granted.
15. However, there was no compliance, and no further action took place in the matter, leading to issuance of the notice to show cause on August 8, 2022 which was duly served and acknowledged by the official stamp of the applicant’s advocate. The record shows that the applicant’s advocate attended court on October 13, 2022 for the hearing of the notice to show cause, where he explained that the delay in prosecuting the application was occasioned by the time taken in obtaining the typed proceedings. In the end, the court determined that the explanation given by the applicant were not plausible and therefore proceeded to dismiss the application for want of prosecution, with no order as to costs.
16. It is clear from the foregoing that the explanation given in the present instance had previously been presented before the court, considered, and found inadequate, hence the dismissal order. Indeed, the court agrees with the respondent that in the circumstances disclosed, the applicant has been lax and negligent in the conduct of his case. It is to no avail for the applicant to cite the COVID-19 pandemic; it is a matter of record that the court business migrated to online platforms as early as June 2020 and normal operations were substantially restored by July 2020. The respondent is awarded the costs of the motion in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10TH DAY OF AUGUST 2023.



C.MEOLI

JUDGE

In the presence of

For the Applicant: Ms. Kemunto

For the Respondent: Ms. Githaiga h/b for Mr. Okulo

C/A: Emily

