Kamau v Kamau & 3 others (Civil Suit 314 of 2011)
[2023] KEHC 27082 (KLR) (Civ) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27082 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 314 OF 2011

CW MEOLI, J

DECEMBER 20, 2023

BETWEEN

STEPHEN KIMANI KAMAU ..... PLAINTIFF

AND

AUTHUR KANAI KAMAU ..... 1ST DEFENDANT

BEATRICE NGONYO KAMAU ..... 2ND DEFENDANT

AUTHUR KANAI KAMAU & MARIAH NDUKU KAMAU (SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE) RICHARD S. KAMAU ..... 3RD DEFENDANT

REHEMA W KAMAU ..... 4TH DEFENDANT

RULING

1. For determination is the motion dated 08.12.2022 by Stephen Kimani Kamau (hereafter the Plaintiff/ Applicant) seeking inter alia that the court be pleased to set aside the orders made on 24.03.2017 dismissing the Plaintiff's suit and all consequential orders thereto and that the court be pleased to reinstate the Plaintiff's suit. The motion is expressed to be brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Article 50 of *the Constitution*, and premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by the Plaintiff.

2. The gist of his depositions is that he was surprised when served with a Bill of Costs dated 20.06.2022 via WhatsApp relating to the instant suit and upon inquiry from his counsel on record at the time, counsel informed him he had ceased from acting on his behalf in the matter; that he consequently instructed new counsel who upon perusal of the court file discovered that the suit was dismissed on 24.03.2017; and that prior to the said dismissal, he was neither notified by erstwhile counsel nor served with an application by the said counsel to cease from acting and that no such motion had been filed. Further

that, despite erstwhile counsel having been served with the notice to show cause (NTSC) under Order 17 Rule 2 of the Civil Procedure Rules (CPR), he failed to communicate with him in good time to enable him take appropriate steps towards prosecution of his case.

3. He further deposes that during the pendency of the suit there were two (2) other related pending suits on the question of liability involving the parties herein, and which have been diligently prosecuted and are the subject of two (2) subsequent appeals. Therefore, the dismissal of this case which concerns special damages before a conclusive determination as to the question of liability in the pending appeals is prejudicial, as it would lock him out of an opportunity to pursue damages. That the court ought to pardon the error of erstwhile counsel that has resulted in the present state of affairs as the dismissal has occasioned him great hardship.

4. He asserts that justice will only be served by allowing parties to canvass the case on merits whereas no prejudice will be visited on Arthur Kanai Kamau, Beatrice Ngonyo Kamau, Arthur Kanai Kamau & Mariah Nduku Kamau (Administrators of the Estate of the late Richard S. Kamau) and Rehema W. Kamau (hereafter the 1st, 2nd, 3rd & 4th Defendant/Respondent(s)) should the motion be allowed. Asserting that he was interested in pursuing the suit to its ultimate conclusion , he stated that it is in the interest of justice that the suit be reinstated for hearing on merit.

5. The 1st Defendant opposes the motion through grounds of opposition dated 23.01.2023 and a replying affidavit of even date on his own behalf and on behalf of the 2nd, 3rd and 4th Defendants. He takes issue with the Plaintiff's motion on grounds that the same is unmeritorious and an abuse of the court process; that the Plaintiff has not demonstrated grounds upon which the court's discretion should be exercised in his favour; and that the Plaintiff is guilty of laches and there has been inordinate delay in bringing the motion.

6. In his replying affidavit, he states that since the filing of the suit in 2011 and the requisite pleadings by the respective parties, no action has ever been taken by the Plaintiff after the close of pleadings in the year 2012. That while the 3rd Defendant died on 01.05.2012, no substitution had been made and therefore the suit against the said Defendant has since abated. He asserts that the last action by the Plaintiff to prosecute the matter was in July 2013 and no steps have ever been taken to progress the matter which prompted an application dated 12.10.2015 seeking the dismissal of this suit for want of prosecution.

7. He contends further that Messrs. Githinji Kimamo Advocates as referred to by the Plaintiff in his affidavit are strangers to the instant proceedings and that there has been no application on cessation of representation on record. Further to the foregoing, the deponent asserts that the Plaintiff has not demonstrated his own actions or steps taken to prosecute or follow up on the matter since its filing, pointing out that the dismissal order was made more than seven (7) years ago exemplifying indolence on the part of the Plaintiff. Moreover, asserting the Defendants' entitlement to the expeditious disposal of the suit in order to reduce costs of litigation and ensure availability of witnesses and evidence, he said the reinstatement of the suit would be greatly prejudicial.

8. In conclusion, he deposes that despite the existence of other related active litigation, the onus was on the Plaintiff to actively pursue the instant claim and that no sufficient explanation has been given in that regard. Hence the Plaintiff is not deserving of the court's discretion.

9. In rejoinder by way of a supplementary affidavit, the Plaintiff asserts that he was diligent in the prosecution of this suit and as a consequence instructed present counsel to take up the matter while also reiterating other depositions in the supporting affidavit.

10. The motion was canvassed by way of written submissions. Counsel for the Plaintiff argued that if the dismissal orders are allowed to stand, the Plaintiff will be greatly prejudiced having suffered substantial financial loss upon collapse of his building which is the subject of the instant suit. Reiterating the gist of the Plaintiff's affidavit material, counsel submitted that whereas it is trite that a suit belongs to a litigant, officers of the court play an important role in informing their respective clients on the progress of their cases of which was not done in the instant matter.

11. It was further submitted that the Plaintiff only became aware of the dismissal upon being served with a Bill of Costs as such he ought not to be made to suffer the consequences of mistake made by his erstwhile counsel. The decision in Belinda Murai & 9 Others v Amos Wainaina [1979] eKLR was called to aid in the latter regard. Further citing the decision in Gold Lida Limited v NIC Bank Limited & 2 Others [2018] eKLR, counsel argued that the Defendants will not suffer prejudice that cannot be remedied by an award on costs upon reinstatement of the suit.

12. On behalf of the 1st Defendant, counsel while revisiting the pertinent events anchored his submissions on the provisions of Article 159(2) of *the Constitution*, Section 1A and 1B of the *Civil Procedure Act* and the decisions in Nilani v Patel (1969) E.A 341 and Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi [2014] eKLR. He reiterated that the 1st Defendant had never been served with any notice of change of advocates from the inception of the matter up until Messrs. P.M Kithuka & Co. Advocates came on record for the Plaintiff in December 2022. As such, the Plaintiff has failed to prove delay or purported mistake leading to dismissal of the suit attributed to Messrs. Githinji Kimamo & Co. Advocates. Moreover, it is the duty of the court and litigants to ensure that civil disputes are determined efficiently and in a timely manner, here pointing out that the Plaintiff's last action in the matter was in May 2013, almost an entire decade before the instant motion prompted by the 1st Defendant's Bill of Costs.

13. While calling to aid the dicta in Patel v East Africa Handling Service Limited (1974) E.A, Ivita v Kyumbu (1984) KLR 441 and Wachira v Karani v Bildad Wachira [2016] eKLR as concerns the applicable considerations, counsel reiterated that no explanation was tendered for the Plaintiff's inaction and nor has he demonstrated the action he took towards progressing the matter and or following up on the position of suit prior to its dismissal. That the reasons advanced do not meet the requisite test to warrant this court's exercise of its discretion.

14. As to the question whether the motion has met the conditions for grant of an order of setting aside, counsel relied on the decisions in Stephen Ndichu v Monty's Wines and Spirits [2005] eKLR and the Ugandan decision in Phillip Ongom, Capt. v Catherine Nyero Owota Civil Appeal No. 14 of 2001 [2003] UGSC 16 and asserted that the Defendant will suffer prejudice if the motion is allowed, especially the 1st Defendant who is aged and lacking the energy to litigate. That the balance of convenience on the tilts in favour of the Defendants and that the motion ought to be dismissed with costs.

15. While the 2nd, 3rd and 4th Defendant did not file submissions, from the 1st Defendant's material canvassed before this court and the proceedings of 27.06.2023, it appears that the said Defendants align themselves and or support the 1st Defendant's position in the matter.

16. The gist of events leading to dismissal have in part been captured by the parties in their respective affidavit material outlined above. Undoubtedly, the Plaintiff's suit was dismissed for want of prosecution vide the order of 24.03.2017 by Njuguna, J. on the NTSC dated 14.02.2017, issued pursuant to Order 17 Rule 2 of the CPR. The Plaintiff's motion invokes inter alia the provisions of Section 3A of the *Civil Procedure Act*, the latter which reserves the inherent power of the court "to

make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". Nevertheless, Order 17 Rule 2 of the Civil Procedure Rules, which was not invoked by the Plaintiff provides that :-

> "(1) 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.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> (5) A suit stands dismissed after two years where no step has been undertaken.
>
> (6) A party may apply to court after dismissal of a suit under this Order."

17. Rule 2(6) of the foregoing Order grants the court jurisdiction to entertain an application of this nature. While the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in their favor. In the case of Shah –vs- Mbogo and Another [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

18. The principles enunciated in Shah –vs- Mbogo (supra) were further amplified further by Platt JA in Bouchard International (Services) Ltd vs. M'Mwereria [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal measure in this matter. Indeed, the dismissal order issued herein can be construed to be an equivalent a judgment, as it determined the suit conclusively by way of dismissal.

19. The Plaintiff's explanation contained in his affidavit material is two-pronged. First, that his erstwhile counsel neither notified nor served his application to cease from acting and, secondly, that despite erstwhile counsel being served with the NTSC, he failed to communicate the same in goodtime to enable the Plaintiff take appropriate steps towards prosecution of the matter. The 1st Defendant challenges this position with verve by pointing out that erstwhile counsel as referred to by the Plaintiff is a stranger to the instant proceedings and that delay in prosecuting the matter has been inordinate and insufficiently explained by the Applicant.

1. To contextualize the rival positions, it would be apposite for this court to revisit the entirety of the record and restate the record of events therein for the benefit of the parties. The suit herein was filed on 05.08.2011 and the plaint subsequently amended on 12.10.2011. The 1st Defendant filed his statement of defence on 20.09.2011 followed by the 2nd, 3rd & 4th Defendant who filed their respective statements of defence on 10.11.2011. At the time, the Plaintiff was represented by the Messrs. S.N. Gikera & Associates Advocates.

2. On 17.05.2013, the latter firm of advocates filed a motion seeking among others injunctive reliefs, which motion was withdrawn on 04.06.2013. Thereafter, on 02.07.2015 a Notice of Change of Advocates was filed by Messrs. Githinji Kimamo & Co. Advocates who consequently came on record for the Plaintiff. Parties subsequently appeared before the Deputy Registrar on 17.09.2015 in respect of the Messrs. S.N. Gikera & Associates Advocates Bill of Costs as filed against the Plaintiff.

3. There was no further activity in the matter up until the Deputy Registrar of the High Court issued the NTSC dated 14.02.2017, and scheduled for hearing on 24.03.2017, leading the dismissal of the suit on the latter date. It was not until the 1st Defendant filed his Bill on Costs dated 20.06.2022 which subsequently came up for directions on 06.10.2022 and 15.11.2022 that the Plaintiff moved this court by the instant motion, this time through another firm of advocates, Messrs. PM Kithuka & Co. Advocates who filed a Notice of Change dated 08.12.2022.

4. The 1st Defendant has argued that Messrs. Githinji Kimamo & Co. Advocates is a stranger to the instant proceedings as no Notice of Change of Advocates in respect of Messrs. S.N. Gikeria & Associates Advocates has been evinced. As earlier noted Messrs. Githinji Kimamo & Co. Advocates came on record on behalf of the Plaintiff vide a Notice of Change of Advocates on 02.07.2015. It appears that the said notice may not have been served upon the 1st Defendant's advocate hence her contestation. From the record, there is no application for cessation of acting by either Messrs. S.N. Gikera & Associates Advocates or Messrs. Githinji Kimamo & Co. Advocates, whereas the NTSC was duly served upon the latter firm on 14.03.2017, as evidenced by the receiving stamp on the face of the NTSC and affidavit of service on record.

5. The Plaintiff's application hinges partly on mistake of counsel. Apaloo, J.A. (as he then was) famously stated in Phillip Kiptoo Chemwolo & Another v Augustine Kubede (1986) eKLR:-

> " I think a distinguished equity judge has said:
>
> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

25. Recently, however the Court of Appeal in Daqare Transporters Limited v Chevron Kenya Limited [2020] eKLR though considering a slightly different issue restated the principls spelt out by its predecessor Shah v Mbogo (supra), which principles are equally applicable to the instant matter to the effect that;-

> " .....The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. "

26. For starters, as stated in Daqare (supra) that oft-cited ground of mistake of counsel has no blanket application. The Plaintiff was required to demonstrate his own steps to avert the situation to which

mistake of counsel has been pleaded. This suit was dismissed on 24.03.2017, the Plaintiff's contending that Messrs. Githinji Kimamo & Co. Advocates failed to inform him of their cessation and or advice on the NTSC. Cases belong to the litigants who file them, and not counsel. The mistake alleged here of counsel is a professional obligation on the part of counsel towards his client. But for the Plaintiff to succeed he must demonstrate on his part the steps he personally took either by way of correspondence with Messrs. Githinji Kimamo & Co. Advocates in following up on the status of his matter. It is not enough for the Plaintiff to lay all the blame at the doorstep of the erstwhile counsel without demonstrating his own efforts towards progressing or keeping abreast of his matter and or putting erstwhile counsel to task.

27. As for the question of delay, no explanation has been offered by the Plaintiff. The suit herein was filed in 2011 and no substantive action was taken by the Plaintiff to progress the matter save for the motion that was filed and withdrawn by erstwhile counsel Messrs. S.N. Gikera & Associates Advocates some two (2) years after institution of the suit. The next substantive action by the Plaintiff was in December 2022 when he moved the court vide the instant motion which appears to be a reaction to the 1st Defendant's Bill of Costs. The Plaintiff appears to have been woken up from his slumber upon being served with the 1st Defendant Bill of Costs.

28. The delay in the prosecution of the suit was inordinate and compounded by delay in bring in the instant motion. The period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the court's discretion only. The Court of Appeal in Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR succinctly addressed the argument of delay as follows; -

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....."

29. There is no evidence that between 2011 to 2013 or 2013 to 2022, the Plaintiff made any significant attempts to progress his matter. Cases belong to the litigants who lodge them in court, and in this instance, it is not available to the Plaintiff to blame the erstwhile counsel. At a time when courts are deluged with heavy caseloads, it is not enough for any party caught up with dismissal of his case to plead for reinstatement without acknowledging the role he or she played in the dismissal of the suit.

30. While the Plaintiff was entitled to be heard on the merits of his case the right cannot be stretched to the detriment of the parties he dragged to court. It is now 14 years since the cause of action arose, 12 years since the suit was filed and well over 6 years since dismissal of the suit. The explanations offered by the Plaintiff are not satisfactory. One Defendant is already deceased. Given the nature of the claim, the Court agrees with the 1st Defendant that re-opening the matter will be prejudicial as it is doubtful whether a fair trial can still be held after such a long hiatus.

31. In Ivita v Kyumbu (1984) KLR 441 Chesoni J (as he then was) stated that: -

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of

the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

32. As observed in Ivita's case, extended delay impacts adversely on the possibility of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. The delay in this matter militates against re-opening it. Further, in the court's opinion, allowing the reinstatement of the Plaintiff's suit in the present circumstances would run afoul of the overriding objective in Section 1A and 1B of the CPA. The Court of Appeal stated in Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09 that: -

> " The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court".

33. Consequently, the court is of the considered opinion that the Plaintiff's motion is devoid of merit. Finally, as to the question of costs of the suit, on 24.03.2017 Njuguna, J dismissed this suit for want of prosecution vide a short order which stated as follows;- "Notice having been given to show cause why this suit should not be dismissed, and there being no satisfactory response, the suit is hereby dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules" .

34. The taxing officer, by her ruling delivered on 28.03.2023 in respect of the 1st Defendant's Bill of Costs correctly observed that the foregoing order did not award costs, and consequently, she lacked jurisdiction to tax the Bill. The order of Njuguna J made in the absence of both parties did not address the matter of costs. Costs follow the event; the Defendants, having participated in earlier proceedings in the matter, were entitled to costs. This court, while dismissing the Plaintiff's motion dated 8.12.2022 will grant costs thereon as well as costs in respect of the dismissed suit to the Defendants. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Makau

For the Respondent: Ms. Ogonda h/b for Mrs. Onyango

C/A: Carol