



**Miguna v Standard Group Ltd & 3 others (Civil Suit 19 of 2018)
[2023] KEHC 26720 (KLR) (Civ) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26720 (KLR)

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

CIVIL

CIVIL SUIT 19 OF 2018

CW MEOLI, J

DECEMBER 20, 2023

BETWEEN

MIGUNA MIGUNA PLAINTIFF

AND

THE STANDARD GROUP LTD 1ST DEFENDANT

THE STANDARD LTD 2ND DEFENDANT

JOHN BUNDOTICH 3RD DEFENDANT

FAITH NGINA OR FAY NGINA 4TH DEFENDANT

RULING

1. The subject of this ruling is the Notice of Motion (the Motion) dated 16th January, 2023 brought by Miguna Miguna (hereafter the Applicant) seeking an order for reinstatement of the suit, following its dismissal on 4th November, 2021 for want of prosecution; upon the court’s review and/or setting aside of the dismissal order. The Motion is expressed to be brought under Articles 48, 50 and 159(2) of *the Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 17, Rule 6 and Order 51, Rule 1 of the Civil Procedure Rules (CPR).
2. The Motion is premised on the grounds on its face and amplified in the supporting affidavit sworn by the Applicant’s advocate, David Musyoka stating that following issuance of a notice to show cause, the suit was dismissed for want of prosecution. The advocate further stated that the delay in prosecuting the suit was occasioned by factors beyond the control of the Applicant, namely, that the Applicant was not only forcibly removed out of the country and this court’s jurisdiction on 6th February, 2018 by the Ministry of Interior and National Co-ordination, but that he was denied entry into the country



- severally thereafter, despite the existence of a valid court order declaring his removal unconstitutional and illegal.
3. Further that, the Applicant was only granted entry and access into the country following the August 2022 General Elections which saw a change in government, by which time the suit had already been dismissed. That the Applicant remains interested in the prosecution of the suit and hence it would be in the interest of justice for the dismissal order in place to be reviewed and/or set aside, and for the suit to be reinstated.
 4. The Standard Group Ltd, the Standard Ltd, John Bundotich and Faith Ngina or Fay Ngina (hereafter the 1st, 2nd, 3rd and 4th Respondents) resisted the Motion by way of the replying affidavit sworn by the 1st Respondent's Company Secretary, Millicent Ng'etich, on 2nd May, 2023 averring that there has been inordinate delay of over five (5) years on the part of the Applicant, in prosecuting the suit since its inception.
 5. The deponent further averred that the reasons given for the delay are untenable since court sessions are currently conducted virtually and hence it is of little consequence that the Applicant was out of this court's jurisdiction. It was averred that in the present instance, justice cannot be served due to the delay, coupled with the likely prejudice to be suffered by the Respondents if the suit is reinstated, given that they may experience difficulties in procuring the requisite documentation and attendance of witnesses in their defence. It was further averred that the Applicant has been indolent in the matter, and the court was urged not to exercise its discretion in his favour.
 6. The Motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the decisions rendered in *Rose Wanjiru Kamau v Tabitha N Kamau & 3 others* [2014] eKLR and *Lochab Bros Ltd v Peter Karuma T/A Lumumba, Lumumba Advocates* (2003) eKLR on the discretionary power of the court in setting aside a judgment and/or order, with the aim of doing justice to the parties. Counsel reiterated that the delay in prosecuting the suit was unintentional and excusable, as earlier set out. Counsel further submitted that the notice to show cause which preceded the dismissal order was not served upon the Applicant who at the time was acting in person, thereby encumbering his right to be heard and consequently, his right to a fair trial.
 7. Reference was made to the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR regarding the constitutional right to a fair hearing. Counsel therefore urged the court to exercise substantive justice by exercising its discretion in favour of the Applicant, adding that the Respondents have not tendered any credible evidence to support their assertions of likely prejudice if the dismissal order is set aside and the suit is reinstated.
 8. Counsel for the Respondents while citing the decisions in *Gideon Sitelu Konchella v Daima Bank Ltd* [2013] eKLR and *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR emphasised the need for expeditious disposal of disputes, asserting that in the present instance, the Applicant is guilty of inordinate delay. Counsel additionally argued that the guiding principles in determining whether a suit is deserving of reinstatement have not been met in the present instance, where there is prolonged and inexcusable delay. It was counsel's submission that the Applicant's inability to access the court's jurisdiction in no way hindered his ability to prosecute his suit virtually. It was also reiterated that the Respondents stand to suffer great inconvenience if the suit is reinstated, as earlier mentioned. Consequently, the court was urged to dismiss the Motion with costs, and to uphold the dismissal order.
 9. The court has considered the rival affidavit material and the contending submissions in respect of the Motion. As earlier mentioned, the Motion was brought under Articles 48, 50 and 159(2) of *the Constitution*, Sections 1A, 1B & 3A of the CPA and Order 17, Rule 6 and Order 51, Rule 1 of the CPR. While Sections 1A, 1B and 3A provide for the overriding objectives of the Act, Order 51, Rule 1 merely



makes provision where no specific provisions exist setting out such procedure. Articles 48, 50 and 159 of *the Constitution* on their part make provision inter alia for access to justice, the right to a fair hearing and the exercise of substantive justice without undue regard to procedural technicalities, respectively.

10. Section 3A of the *Civil Procedure Act* 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.” The Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

“Also cited was Section 3A of the *Civil Procedure Act* which enshrines 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. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

11. The power of the court to grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and Another* [1967] E.A 116:

“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.”

12. The events leading to the dismissal order issued of 16th March, 2022 (and not the date mentioned in the Motion) are as follows. The Applicant filed the suit on 29th January, 2018 seeking various reliefs arising based on the tort of defamation, against the Respondents. The record shows that the Respondents subsequently filed their joint statement of defence on 23rd February, 2018. However, it is apparent from the record that no further progressive action took place in the suit, resulting in issuance of the notice to show cause on 13th January, 2022 requiring the parties to attend court on 24th February, 2022 to show cause as to why the suit should not to be dismissed for want of prosecution. When the matter came up for hearing, none of the parties were in attendance, hence the dismissal order.

13. The Applicant’s explanation that the Applicant was hindered from prosecuting the suit due to his forceful removal from the country and the court’s jurisdiction, largely for political reasons, and the subsequent denial of his access to the country for a period of close to four (4) years thereafter, was a matter of public record. It is reasonable in the circumstances.

14. Regarding service of the notice to show cause, the record shows that the Applicant was at the material time acting in person/through his firm which appears to be a sole proprietorship. It is therefore plausible that the Applicant who it would appear was still out of the country at the time may not have had notice of the notice. The court finds the explanation given here to be equally reasonable in the circumstances.



15. Upon considering the sentiments made by the Respondents as to the likelihood of prejudice to be suffered by themselves in the event that the suit is reinstated, the court has notes that beyond mere averments no firm material was tendered by the Respondents in that respect.
16. The right to a fair hearing is constitutionally guaranteed.. In *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited (2020) eKLR* the Court of Appeal had this to say in that regard:
- “Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra)*; *Mbaki & Others vs. Macharia & Another [2005] 2EA 206*; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003*; for the holding inter alia that:
- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - (ii) the right to be heard is a valued right; and
 - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice...”
17. The Applicant is reasonably entitled to an opportunity to prosecute the suit to its conclusion. Consequently, and whilst considering the age of the suit and the prolonged delay in its prosecution since its inception, the court is satisfied to exercise its discretion in favour of the Applicant in this instance. In allowing the Notice of Motion dated 16th January, 2023 the court makes an order that the Applicant shall fully prosecute the reinstated suit by end of May, 2024, failing which the suit will stand automatically dismissed for want of prosecution, with costs to the Respondents. The costs of the Motion are awarded to the Respondents in any event.

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

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Aluoch h/b for Dr. O’Kubasu

For the Respondent: Mr. Ogutu**

