



**Kamweti v Kitungu & 2 others (Civil Case 134 of 2011)
[2022] KEHC 10407 (KLR) (Civ) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 10407 (KLR)

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

CIVIL

CIVIL CASE 134 OF 2011

SJ CHITEMBWE, J

MARCH 31, 2022

BETWEEN

LEONARD GETHOI KAMWETI PLAINTIFF

AND

SOLOMON KITUNGU 1ST DEFENDANT

JAINDI KISERO 2ND DEFENDANT

NATION MEDIA GROUP LIMITED 3RD DEFENDANT

RULING

1. This ruling is in respect of two applications. Firstly, the 1st defendant filed a preliminary objection dated June 8, 2021 raising the following grounds;
 1. This suit stands dismissed pursuant to the order of Njuguna J made on December 5, 2019
 2. The suit was not prosecuted within 6 months from December 5, 2019 as directed by the court
 3. The suit stood dismissed on June 5, 2020 and anything done thereafter is a nullity and is void in the law.
 4. The defendants are entitled to the costs of the suit following the dismissal of the suit.
2. The 1st defendant argued that it is not disputed that on December 5, 2019 the plaintiff was ordered to prosecute the suit within six months failing which it would stand dismissed and therefore it stood dismissed on June 5, 2020. In support, reference was made to the case of *Titus Kiragu v Jackson Mathai & another* [2013] eKLR where the High Court held that once a suit has abated, it is 'dead as a dodo' and any act on the suit will be void and a nullity.



3. In opposition the plaintiff argued that even where there is a default clause in the orders made by court, time can still be enlarged and this position was considered by the Court of Appeal in *Caltex Oil (K) Limited v Rono Limited* [2011] eKLR where it was stated;

However, the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it always retains power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the court still retains control of the order notwithstanding that there has been default. That would necessarily depend on the true construction of the default clause.

The applicant's counsel relied on some passages in Mula: Code of Civil Procedure, Code 15th Ed page 907 to the effect that a court has power to extend time even though the order has provided that, in default of compliance with a period specified therein the matter should stand dismissed and although the order has worked itself out as a result of default.

Indeed, in the Indian case of *Periasami Asari vs Illuppur Panchayat Board*: AIR 1973 MAD. 250, it was held:

“The principle that when the effect of the order granting time (in the event of non-compliance) has to operate automatically the court has no power to extend time as it becomes functus officio did apply when the suit is finally disposed of. If the order is not final and the court retains control over it and seized of the matter, it will have power to extend time.”

The passages cited by the applicant's counsel and the Periasami Asari Case interpret the Indian rule 148 which generally grants the court power to extend the time granted by the court. The Indian rule is identical to our S.95 of *Civil Procedure Code* and rule 6 of order 50 Civil Procedure Rules. Although S.95 CPA and rule 6 of order 50 *CPR* are applicable to proceedings in the High Court and in subordinate courts exercising civil jurisdiction, an order of this court has the same status and the same principles, in our view, apply to the construction of orders made by this court in exercise of jurisdiction to extend time under rule 4 and generally in exercise of its appellate jurisdiction.

4. On the second application, the plaintiff filed a motion dated June 24, 2021 seeking the following orders
 1. That the time granted to the plaintiff to prosecute this matter be extended and consequent directions given
 2. Costs be provided for.
5. The application was based on the grounds on the face of the motion and the supporting affidavit of Leonard Kamweti. It was indicated that on December 4, 2019 the court directed that the matter be prosecuted within 6 months failing which the matter will stand dismissed. There were no early hearing dates at the court registry and the earliest available date was March 18, 2020 which was allotted for the hearing of the matter. On Sunday March 15, 2020 normal court operations were suspended as a measure to curb the spread of Covid 19 virus and thereafter the judiciary gave directions on limited court operations. On March 18, 2020 when the case was scheduled to be heard, no hearings were proceeding and the court registry put a notice confirming having taken out the suit from hearing. The advocates wrote to the deputy registrar on May 29, 2020 asking for a fresh hearing date and subsequently the matter was fixed for hearing on September 30, 2020.



6. The advocate for the 1st defendant protested the allocation of the hearing date by his email dated June 5, 2020. On September 30, 2020 the court was not ready to hear the matter and again the matter was taken out. The matter was again allocated for hearing on June 29, 2021 on which date the 1st defendant elected to prosecute the preliminary objection herein.
7. Counsel for the plaintiff submitted that order 50 rule 6 of the *Civil Procedure Rules* and section 95 of the *Civil Procedure Act* give this court the power to enlarge time as they provide as follows;

Power to enlarge time [order 50, rule 6.]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

Section 95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

8. The plaintiffs argued that the factors to be considered were cited in Board of trustees of African independent *Pentecostal Church of Africa Church v Peter Mungai Kimani* [2016] eKLR
 - i. Whether there has been indolence or unexplained delay on the part of the applicant.
 - ii. Whether the applicant is guilty of abuse of the court process.
 - iii. Whether the enlargement will prejudice the defendant.
 - iv. Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case.
 - v. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy.
 - vi. Whether it is just and fair to enlarge time in the circumstances of the case.
9. The plaintiff submitted that he was not indolent as it is clear from the record that the plaintiffs advocate attended the registry and fixed the suit for hearing on May 18, 2020 which fell within the six months period. The matter was taken out because of disruptions on the operations of the judiciary caused by the pandemic. The plaintiff has always wanted to prosecute the case and there has been no delay on their part. The plaintiffs added that the defendants will not suffer any prejudice if, the court grants enlargement of time in order for the suit to be heard to finality.
10. The application was opposed by the 1st defendant's grounds of opposition dated June 28, 2021. The 1st defendant submitted that it is clear that the plaintiff did not comply with the court directions. The plaintiff fixed the date for hearing on May 18, 2020 which was about 17 days from the last day he had been given to prosecute the suit and there was no explanation as to why they did so. There was no evidence adduced that the plaintiff made an effort to explain to the court the urgency of the matter



and the plaintiff cannot now blame the Covid 19 pandemic yet he had over 3 months to prosecute this matter. In fact the plaintiff only filed for an extension of time after the 1st defendant pointed out that the suit stood dismissed. Section 95 of the Civil Procedure Act and order 50 rule 6 of the Civil Procedure Rules only apply to the extension of time for doing acts within a suit.

11. The 2nd and 3rd defendants opposed the application dated June 24, 2021. In their grounds of opposition dated June 30, 2021, it was submitted that the matter stood dismissed on June 5, 2020 and therefore the court has no jurisdiction or power to extend time to prosecute the suit. In support they cited *Elegant Colour Labs Nairobi Ltd v. Housing Finance Company (K) Limited & 2 others* [2010] eKLR the court held as follows;

“Even presently there is no valid application to extend the summons although such an application, would in my view, be valid only if it had been filed while the said original summons were still valid on or before July 15, 2009.”

12. They added that the court should consider that there have been inordinate and inexcusable delays since the year 2011 when the matter was filed by the plaintiff and the court had on October 11, 2019 issued a notice to show cause against the plaintiff. These delays have caused an injustice against the defendants as the matter has been hanging on their shoulders without reaching an end.

Analysis and determination.

13. On the first application, a preliminary objection has been defined by the courts in a number of cases. In the case of *Mukisa Biscuits Manufacturing Co Ltd v West end Distribution Ltd* [1969] EA 696 Preliminary Objection was defined as:-

“A point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

14. The 1st defendant’s objection where is that the court is *functus officio* and lacks jurisdiction to entertain the matter any further. The objection was based on the fact that on December 5, 2019 the Plaintiff was ordered to prosecute the matter within 6 months or the same would stand as dismissed. A question therefore arises as to whether the plaintiff prosecuted the matter within the six months?
15. It is undisputed that the court in its ruling dated December 5, 2019 directed the plaintiff to prosecute the matter within 6 months. It can be inferred that there were no early dates at the court registry and the earliest date available was on March 18, 2020 when the matter was scheduled for hearing. As fate would have it, the judiciary on March 15, 2020 suspended normal court operations as some of the means to curb spread of Covid 19 and when the suit came up for hearing it was taken out. The plaintiff by his own initiative followed up with the Deputy Registrar and requested for another hearing date and the matter was then fixed for hearing on September 30, 2020.
16. It is this courts view that the plaintiff was not indolent and prosecuted this suit as directed by the court. It was not the plaintiff who took out the matter but rather due to the direction of the court. The suit cannot therefore be dismissed as the plaintiff acted as ordered. The earlier orders that the suit be prosecuted within six (6) months were frustrated by the advent of the Corona virus. There is also no guarantee that the court could absorb the workload and fully hear and determine the suit within the



six (6) months period. The court has the residual power to enlarge the time it set for the prosecution of the case. The trial judicial officer could as well fall sick after hearing part of the case and resume hearing after the expiry of the six (6) months period. That scenario cannot be revisited on the plaintiff.

17. The defendants contend that the plaintiff did not prevail upon the registry to be given an earlier hearing date. The plaintiff does not have any powers to take an earlier hearing date. The dates are given by the registry and all what a litigant can do is to take the date given by the court. The plaintiff cannot be punished for failure to prosecute the case within six months as ordered yet the same court was not available to hear the case.
18. In the end this court finds that the 1st defendant's preliminary objection dated June 8, 2021 lacks merit and is hereby dismissed. The plaintiff's application dated June 24, 2021 is hereby granted as prayed. The plaintiff to prosecute his case within 180 days hereof. Costs shall abide the outcome of the suit.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MARCH, 2022.

S.J. CHITEMBWE

JUDGE

