W. Muchanga & E. Olunga t/a Womi Associates v Attorney General (Civil Case 91 of 2012) [2022] KEHC 12049 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12049 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 91 OF 2012

A MABEYA, J

AUGUST 12, 2022

BETWEEN

W. MUCHANGA & E. OLUNGA T/A WOMI ASSOCIATES ..... PLAINTIFF

AND

ATTORNEY GENERAL ..... DEFENDANT

RULING

1. Before court is an application dated April 8, 2020. It was brought under order 9 rule 9, order 12 rule 17, order 45 rule 1 and order 51 rule 1 of the *Civil Procedure Rules*. The application sought the review and setting aside the court's decision of July 25, 2017 that dismissed an application seeking to re-instate the dismissed suit. The application also sought orders that leave be granted to the firms of Amolo & Kibanya Advocates and S Ndege & Company Advocates to come on record for the plaintiff.

2. The application was supported by the affidavit of Wanyonyi Muchanga sworn on April 8, 2020. The applicant's case was that the suit was dismissed *suo motu* on June 19, 2015 without notice to the plaintiff or his advocate as the notice was published on the internet.

3. Subsequently, the application dated December 20, 2016 that sought to set aside the dismissal was itself dismissed on grounds that the advocate who made the application never sought leave to come on record for the plaintiff. A notice of appeal lodged on March 3, 2017 against that decision was subsequently withdrawn.

4. That there was sufficient reason to allow the present application as the parties were negotiating to settle the claim. That the plaintiff's claim was Kshs 1,273,177,936.40 for services rendered and it was unjust to deny him a chance to prove his claim.

5. The application was opposed *vide* the replying affidavit of Emmanuel Kiarie sworn on February 16, 2021, a senior counsel in the respondent's office. It was contended that upon the applicant filing the suit, the respondent filed a notice of preliminary objection on September 3, 2013 on grounds that the suit was time barred. That the preliminary objection was served on the applicant's advocate on September 5, 2013 but the applicant failed to take any reasonable steps to prosecute its claim.

6. It was deponed that on February 3, 2015, the deputy registrar of the civil division issued a notice to show cause why the suit should not be dismissed. That the notice appeared in the judiciary's website being www.judiciary.go.ke as part of the daily cause list. That the judiciary also placed copies of the notices on the noticeboards inside court corridors. That the applicant failed to attend court on June 19, 2015 to show cause why the suit should not be dismissed for want of prosecution resulting in the dismissal of the suit.

7. It was further deponed that the applicant filed the application dated December 20, 2016 one and a half years after the suit was dismissed. The application was also dismissed on July 25, 2017. It was denied that the parties were engaged in any negotiations. That it had been around 13 years since the suit was filed and five and a half years had lapsed since this suit was dismissed for want of prosecution. That granting the orders sought would be prejudicial to the respondent as there had been unreasonable delay in bringing the present application.

8. I have considered the parties contestations and the written submissions. The main issue for determination is whether the orders of July 25, 2017 ought to be set aside.

9. It is trite review proceedings are not an appeal but have to be strictly confined to the scope and ambit of order 45 rule 1 of the *Civil Procedure Rules, 2010* and section 80 of the *Civil Procedure Act*.

10. Review will be granted upon discovery of new and important matter or evidence that was not in the knowledge of the applicant 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. Such an application however, has to be made without unreasonable delay.

11. The applicant herein based his application on the ground that there was an error on the face of the record. It was submitted that the court erred by finding that the advocates did not seek leave of court then proceeded to determine the application on merit. According to the applicant, it was an error on the face of the record for the court to have determined that application on merit.

12. On the ground of any other sufficient reason, the applicant submitted that the court had a duty to aim to achieve the just determination of proceedings and this could not be attained when the suit was dismissed suo moto. That the court should therefore allow the present application.

13. On the first ground of error, I am unable to see any error on the face of the record. The court properly considered the merit of the application and made a determination thereof as it was bound to. The issue of the failure of the advocate to apply for leave to come on record was but only one of the reasons for the dismissal of the suit.

14. On sufficient reason, the Court of Appeal held in *Tokesi Mambili and Others v Simion Litsanga* (civil appeal 90 of 2001-Kisumu) that: -

> "Where the application is based on sufficient reason it is for the court to exercise its discretion."

15. In the present application, there was no sufficient reasons that were either pleaded or demonstrated to warrant interference with the subject order. The grounds advanced were akin to grounds of appeal against the order.

16. On the timeous lodgment of the application, the applicant also failed to satisfy that requirement. The court notes that the suit was filed in 2008. It was dismissed in 2016 because of delay or lack of prosecution thereof. It took the applicant one and a half years to attempt to re-instate it. That attempt failed on July 25, 2017. Then it waited for three more years to lodge the current application. That was inordinate delay that was not explained.

17. The applicant submitted that the replying affidavit of the respondent was objectionable as the same was sworn by a counsel. That the matters were contentious.

18. I don't think that the matters sworn to by counsel were contentious. They are matters of a procedural nature and expected to be in his knowledge. They are on record save as to the issue of negotiations which, in any event had been raised and denied in the application dated December 20, 2016.

19. In view of the foregoing, I find no merit in the application dated April 8, 2020. The same is therefore dismissed with costs to the respondent.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE