Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties) (Constitutional Petition E006 of 2020) [2022] KEHC 12951 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEHC 12951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E006 OF 2020

JM MATIVO, J

SEPTEMBER 21, 2022

BETWEEN

DOCK WORKERS UNION OF KENYA ..... PETITIONER

AND

KENYA PORTS AUTHORITY ..... RESPONDENT

AND

PORTSIDE FREIGHT TERMINALS LIMITED ..... INTERESTED PARTY

MERCANTILE CARGO TERMINAL OPERATORS LIMITED .... INTERESTED PARTY

RULING

1. This ruling disposes the respondent's application dated March 2, 2022 seeking an order that this petition be dismissed for want of prosecution. The applicant also prays for costs of the application. The application is premised on the following grounds:-

   (a) that the petition challenges various agreements the respondent had purportedly entered into with the interested parties;

   (b) that contemporaneous with the petition, the applicant filed an application seeking conservatory orders which was dismissed on February 5, 2021 but since then the petitioner has not taken any steps to prosecute this petition even though the respondent and the interested party filed substantive responses to the petition;

   (c) that there has been a delay of over 13 months which is unreasonable, inordinate and inexcusable;

(d) that the law mandates timely disposal of court proceedings; and,

(e) that it is in the interests of justice that this application be allowed.

2. The application is opposed. Mr Oduor Henry John, the petitioner's advocate filed a replying affidavit dated April 26, 2022 stating :-

(a) that in March 2021, he was occupied with the treatment of his late father which made him unable to follow up this matter and after the death of his father, he went into depression;

(b) the failure to prosecute the petition was not deliberate; and,

(c) it is in the interests of justice that the application be declined.

3. The applicant filed a supplementary affidavit on April 27, 2022 sworn by a one Stephen Kyandih. Its salient points are:-

(a) that the affidavit of Mr Oduor Henry John contains falsehoods because he did not go into depression as alleged;

(b) that he is aware that the said Mr Oduor Henry John filed Mombasa ELRC Petition No E005 of 2022, Catherine Wangari v Kenya Ports Authority on February 22, 2022 and he personally appeared in court to prosecute it.

4. Both interested parties did not file a response to the application but in their submissions, they strongly supported the application.

5. Mr Kondere, counsel for the respondent/applicant did not file written submissions. He adopted the grounds in support of the application and the supporting affidavit. He argued that no steps have been taken for over 12 months, and no plausible explanation has been offered for the failure to prosecute the petition. He argued that the explanation offered by counsel for the petitioner is not in good faith because he was attending other court matters during the time, he claims he was depressed. He submitted that a case belongs to a litigant, so even if he were to accept the advocate had personal challenges, the client ought to have taken steps. He also argued that after the petitioner's application to be supplied with documents was dismissed, he took no action, and wondered how the petitioner will proceed without the documents.

6. Mr Buti, counsel for the 1st interested party supported the application and pointed out that no relief has been sought against the 1st interested party. He argued that the overriding objective of the rules is to provide timely disposal of cases.

7. Counsel for the 2nd interested party Mr Sindiyo also supported the application. He pointed out that the petition was filed under certificate of urgency and after the petitioners application was dismissed, the petitioner went underground for 18 months.

8. Mr Oduor, counsel for the petitioner relied on his replying affidavit and his supplementary affidavit and the submissions dated May 5, 2022. He argued that the court should as much as possible strive to sustain the suit, and, that the petitioner has offered a reasonable explanation. He urged the court to grant the petitioner another chance, arguing that no prejudice will be suffered by the respondent if the application is declined.

9. A convenient point to start this determination is to refer to an excerpt from *Utalii Transporters Co Ltd & others v NIC Bank & another*[1] that: -

> " the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat.
>
> ...the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of suit for want of prosecution. These principles are: -
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> a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;
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> b. Whether the delay is intentional, contumelious and, therefore, inexcusable;
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> c. whether the delay is an abuse of the court process;
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> d. whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;
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> e. what prejudice will the dismissal occasion the plaintiff;
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> f. whether the plaintiff has offered a reasonable explanation for the delay;
>
> g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?

10. The common practice in our legal system is that the applicant must explain the cause of delay as precisely as possible in the affidavit supporting the application. The delay may be condoned if sufficient cause is shown. However, condonation of delay may be refused when there is exceptionally inordinate delay. As was held in *Mbogo Gatuiku v AG*[2]

> "even a delay of a day or two calls for an explanation.' The doctrine of "every day's delay must be explained"

has to be applied in a rational, common-sensical and pragmatic manner, and a pedantic approach should not be adopted. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. There cannot be a presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of *mala fides*.

11. As I stated in *Co-operative Bank of Kenya Ltd v Alice Njeri Ngotho*[3] in order to have the advantage of the courts exercise of discretion, the party in default must show that he was prevented by sufficient cause from prosecuting his case. Sufficient cause means something beyond the control of the party. The words "sufficient cause" should be liberally construed. The applicant must satisfy the court that

1 [2014] eKLR.

2 HCCC 1983 of 1980, High Court, Nairobi.

3 Miscellaneous Application No E074 of 2019

he was not negligent and inactive. It must be considered that when the time for filing the application or an appeal lapses a valuable right accrues to the successful litigant.

12. In the above cited case, I stated that I am aware of the fact that refusal to condone delay would result in foreclosing the suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. In fact, it is always just, fair and appropriate that matters should be heard on merits rather than shutting the doors of justice at the threshold. Since sufficient cause has not been defined, thus, the courts are left to exercise a discretion to come to the conclusion whether circumstances exist establishing sufficient cause. The only guiding principle to be seen is whether a party has acted with reasonable diligence and had not been negligent and callous in the prosecution of the matter.

13. Additionally, in *Co-operative Bank of Kenya Ltd v Alice Njeri Ngotho*, I stated that condonation is not for the mere asking. It is incumbent upon the party in default to prove that (s)he is not guilty of deliberate delay or he/she did not willfully disregard the timeframes provided for in the Rules. In *S v Mantsha* [4] it was stated: -

> "(5) ... As the appellant was seeking an indulgence, he was required to show good cause for condonation to be granted. Good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal.
>
> (11) In considering an application for condonation a court must take into account a number of considerations. These include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice."

14. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out. [5] Authorities emphasize that it is unwise to give a precise meaning to the term good cause. When dealing with words such as "good cause" and "sufficient cause" courts have refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words. [6] The court's discretion must be exercised after a proper consideration of all the relevant circumstances.

15. With the foregoing as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default. The petitioner approached this court on November 2, 2020 under certificate of urgency. Concurrent with the petition, the petitioner filed an application seeking conservatory orders. The application was dismissed on February 5, 2021. Since then, the petitioner never took any action to move this case forward. It is this inaction which triggered the instant application.

[4] 2009 (1) SACR 414 (SCA).

[5] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA).

[6] *Cairns' Executors v Gaarn 1912 AD 181 at 186; Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3).

16. The instant application is dated March 2, 2022, one year after the petitioner's application was dismissed. The petitioners counsel stated that he went into depression after his father died so, he was unable to accord this file the attention it deserved. He said prior to his father's death, he was preoccupied in facilitating his treatment. This reason is appealing. However, on record is a replying affidavit by the respondent's counsel dismissing the said reason as falsehoods. Counsel deposed on oath that during the period in question, the applicant's counsel was actually appearing in court attending to other matters one of which both the respondents counsel and the Petitioner's counsel were handling. The case number was provided. This revelation left a serious dent on the petitioner's counsel's core reason. Importantly, there was no attempt to dislodge this allegation. In absence of a counter argument or formidable rebuttal, I have no reason to doubt it. I find and hold that the reason proffered for the failure to act is not convincing. Th delay is inordinate. As stated earlier, even a delay of one day must be accounted for.

17. I am alive to the fact that there are no hard-and-fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognized. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and, third, the defendant must be seriously prejudiced thereby. Ultimately the inquiry will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefore and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to do in order to bring the action expeditiously to trial.

18. The purpose of the rules is to promote access to the courts and to ensure that the right to have disputes that can be resolved by the application of law by a fair public hearing before a court is given effect to. These rules are to be applied so as to facilitate the expeditious handling of disputes and the minimization of costs involved. As was held in *Giddey NO v JC Barnard and Partners*,[7] the right of access to courts is not absolute. It is subject to reasonable and justifiable limitations. Accordingly, in *Beinash and another v Ernst & Young and others*[8] it was held that restricting access to vexatious litigants serves an indispensable purpose designed to secure the rights of those litigants who have meritorious disputes and, further, is a necessary step to protect bona fide litigants, the processes of the courts and the administration of justice.

19. By a parity of reasoning, Boruchowitz AJA in *Cassimjee v Minister of Finance*[9] stated that the plaintiff's failure to prosecute his claim for an unreasonable period during which time the case lay dormant, was so unreasonable or inordinate that it constituted an abuse of the court's process. It was held that, in the circumstances of the case, this delay was inexcusable and caused substantial prejudice to the defendant, which warranted a dismissal of the action.

7 2007 (5) SA 525 (CC).

8 1999 (2) SA 116 (CC)),

9 (455/11) [2012] ZASCA 101; 2014 (3) SA 198 (SCA) (1 June 2012).

20. An approach that commends itself is that postulated by Salmon LJ in the English case of *Allen v Sir Alfred McAlpine & Sons Limited; Bostic v Bermondsey & Southwark Group Hospital Management Committee. Sternberg & another v Hammond & another*,[10] where the following was stated at 561e-h:

> "[A] defendant may apply to have an action dismissed for want of prosecution either
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> (a) because of the plaintiff's failure to comply with the Rules of the Supreme Court or
>
> (b) under the court's inherent jurisdiction.
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> In my view it matters not whether the application comes under limb (a) or (b), the same principles apply. They are as follows: In order for such an application to succeed, the defendant must show:
>
> (i) that there has been inordinate delay.... What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognize inordinate delay when it occurs.
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> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
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> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself; prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial."

21. In light of these principles, it is my view that the rules permit a court to dismiss, in appropriate circumstances, an action for want of prosecution. It will constitute a justifiable limitation of a plaintiff's constitutional right of access to the courts. An intention not to prosecute a suit may reasonably be inferred particularly where there is an inordinate or unreasonable delay in prosecuting the case or application. In order to have the advantage of the courts exercise of discretion, the plaintiff must show that he was prevented by sufficient cause from prosecuting the case. Sufficient cause means something beyond the control of the party. The words "sufficient cause" should be liberally construed. The applicant must satisfy the court that he was not negligent and inactive. It must be considered that when there is a delay in prosecuting a case or the time filing the application or an appeal lapses a valuable right accrues to the successful litigant.

22. Condonation is not a mere formality and is not to be had "merely for the asking."[11] What is required is an explanation not only of the delay in the timeous prosecution of the case but also the delay in seeking condonation for non-compliance. The applicant must show that he/she did not willfully disregard the timeframes provided for in the Rules. It is obliged to satisfy the court that there is sufficient or good cause for excusing it from compliance.

23. Condonation may be refused where there has been a flagrant breach of the rules especially where no explanation is proffered. The party accused of delay should convince the court to exercise its discretion

[10] [1968] 1 All ER 543 (CA).

[11] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para [6].

in his favour. A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering whether the delay is excusable include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

24. In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.[12]

25. From the preceding two paragraphs, the following can be distilled: -

    a. The court has a discretion which should be exercised judicially.

    b. There ought to be fairness to both sides.

    c. Relevant facts to consider include: degree of lateness and of noncompliance; the explanation offered by the applicant; the prospects of success; the interest of the respondent in the finality of the judgment; any unnecessary delay in the administration of justice; and the importance of the case.

    d. The factors should not be considered individually but as part of an objective conspectus of all the facts.

    e. If there are no prospects of success there would be no point in granting condonation.

    f. A slight delay and a good explanation may help to compensate for prospects of success which are not strong.

    g. The importance of the issue and strong prospects of success may tend to compensate for a long delay.

    h. The respondent's interest in finality must be considered.

26. These factors should not be considered in a piecemeal fashion but cumulatively so the court can determine whether sufficient cause has been shown to grant condonation. 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*[13] 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

12 See *Melane v Santam Insurance Co Ltd*, 1962 (4) SA 531 (AD) at 532 B—E.

13 Civil Appeal No 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

27. In *Daphene Parry v Murray Alexander Carson*[14] 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, and the appeal should be dismissed as time barred, even at the risk of injustice and hardship to the appellant" (Emphasis added)

28. I find nothing to show that the delay has been shown not to be intentional, contumelious and, therefore, excusable. The delay has not been satisfactorily explained nor has sufficient cause been shown. In my view, the interests of justice in the circumstances of this case do not dictate a lenient exercise of the discretion of the court in favour of the petitioner.

29. In conclusion, I find that the respondent's application dated March 2, 2022 is merited. Accordingly, I allow the said application and hereby dismiss the petitioner's petition dated October 26, 2020 with no orders as to costs.

Orders accordingly. Right of appeal.

SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF SEPTEMBER 2022

John M Mativo

Judge

SIGNED, DATED DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2022

OLGA SEWE

JUDGE

[14] (1963) EA 546