



Shah and Parekh v Kenindia Assurance Company Limited (Miscellaneous Civil Application 492 of 2018) [2022] KEHC 14775 (KLR) (Civ) (28 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14775 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION 492 OF 2018

CW MEOLI, J

OCTOBER 28, 2022

BETWEEN

SHAH AND PAREKH APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED RESPONDENT

*(Motion was heard before Kamau J on February 12, 2020
and the ruling scheduled for and delivered on May 11, 2020)*

RULING

1. The pertinent and undisputed facts preceding the motion dated October 7, 2021 by Shah and Parekh Advocates (hereafter the applicant) seeking *inter alia* that Kenindia Assurance Company limited (hereafter the respondent) are as follows. The applicant had brought this suit to recover their professional fees from the respondent. The bill of costs was taxed vide the ruling delivered on May 31, 2019. Subsequently, the Respondent by a motion dated July 16, 2019 sought orders to enlarge time to enable it to file a reference. The motion was heard before Kamau J on February 12, 2020 and the ruling scheduled for and delivered on May 11, 2020 in the absence of both parties. It appears that the COVID-19 pandemic had just been declared in Kenya, and prior to the ruling, the parties had pursuant to the directions of the National Council for Administration of Justice (NCAJ) communicated to the court by emails exhibited in the respondent’s replying affidavit as annexure “WA 2” but not found on the court record, that the ruling could be delivered via email due to restrictions arising from the COVID-19 pandemic. By the said ruling the respondent’s motion was granted and the respondent was directed to file and serve its notice of objection within fourteen (14) days from the date of the ruling and thereafter proceed to file its reference within fourteen (14) days from the date of receipt of the reasons of the taxing master.



2. No reference had been filed by the time of the present motion by which the applicants seek that the respondent be hereby deemed to have abandoned its right to file a notice of objection and reference and the applicant be allowed to proceed to recover their costs as taxed on May 31, 2019. The motion is expressed to be brought under section 1A, 1B & 3A of the *Civil Procedure Act* and order 17 rules 4 and order 51 of the *Civil Procedure Rules*, *inter alia*. It is premised on grounds on the face thereof as amplified in the supporting affidavit sworn by Hasmukhrai Manilal Parekh, a partner in the applicant law firm having conduct of the matter. The deponent outlines the foregoing history and asserts that his firm continues to be prejudiced by the delayed realization of its earned taxed costs for the past several years. He reiterates that the applicant's bill of costs was regularly taxed as such the instant motion ought to be allowed as prayed.
3. The respondent opposed the motion through a replying affidavit deposed by Winnie Awour, head of the legal department at the respondent company. She asserts that the motion has been filed in bad faith, lacks merit and is an abuse of the court process. She narrates that upon the motion dated July 16, 2019 being reserved for ruling on May 11, 2020, the Covid-19 Pandemic struck and on March 17, 2020 all physical court operations were suspended. That on April 1, 2020 the chairperson of the NCAJ had issued directives on operations within the justice sector in the wake of the Covid-19 Pandemic pursuant to which both parties herein consented to have the ruling of May 11, 2020 court delivered by email. She asserts that the said ruling was not delivered via email on the scheduled date and the respondent was unable to comply with the court's directions as ordered in the ruling. That counsel became aware of the ruling upon being served with the instant motion and that in the circumstances, the respondent has not waived its right to file a notice of objection and reference. She asserts that the respondent has not been negligent in filing the notice of objection and reference and that the instant motion is premature and ought to be dismissed.
4. In a brief rejoinder to respondent's deposition Hasmukhrai Manilal Parekh contended that on May 11, 2020, the date scheduled for ruling, the court was hearing matters virtually; that he tried to log into the online court session but was locked out hence did not know whether the ruling was delivered by the court as scheduled. That on May 13, 2020 he instructed his clerk to find out whether the ruling was delivered and despite several visits to the registry the court file could not be traced. He goes on to depose that upon writing a complaint letter to the deputy registrar he received a response confirming delivery of the ruling and asserts that it is likely that the court ignored requests from the respective parties to have the ruling delivered via email as agreed.
5. The motion was canvassed by way of written submissions. counsel for the applicant argued that the respondent has eschewed disclosure of the source of her information that the ruling had not been delivered as scheduled whereas there is evidence to the contrary in the letter from the deputy registrar. It was submitted that the respondent and its advocate were lethargic and never bothered to find out what transpired with respect to their motion. In conclusion counsel asserted that the instant matter has been long pending before court whereas he continues to be kept away from his fees duly earned thus suffers prejudice.
6. The respondent despite being given ample opportunity failed file written submissions but at the oral highlighting on reiterated its affidavit material while seeming to urge its motion with respect to the applicant's motion.
7. The court has considered the record herein, the rival affidavit material and submissions in respect of the motion. That the ruling was indeed delivered online on the scheduled date by Kamau J on May 11, 2020 in the absence of the parties is a fact captured on the record. Also on record are two letters dated July 21, 2020 and January 18, 2021 from the deputy registrar of this court in answer to inquiries by



the applicant, the former confirming the listing of the cause and scheduled delivery of the ruling and the latter the availability of the court file in the registry. In this period, not a single inquiry was made by the respondent which admits by their replying affidavit to have been alerted of the developments in the cause by service of the instant motion.

8. Indeed, even after service upon them of the applicant's motion in October 2021, it was not until March 15, 2022, the date reserved for the hearing of the applicant's motion, that the respondent filed a motion dated March 11, 2022 seeking extension of time to file their reference. During oral highlighting of the applicant's motion, it turned out that the said motion had not been served upon the applicant and yet the respondent's counsel by his oral submissions purported to advert to the motion. The applicant complains, and I think legitimately, that the respondent's conduct herein is prejudicial to the applicant firm which has been unable to recover its taxed costs since May 2019. The applicant has therefore invoked the discretion and inherent powers of this court in line with the overriding objective.
9. It is indeed a truism that the main concern of the court in exercising its discretion or inherent power is to do justice to the parties. The applicant in its motion before this court has relied on section 1A, 1B & 3A of the Civil Procedure Act. The foregoing provisions state that:

“1A. (1) The overriding objective of this act and the rules made hereunder is to facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.”

“1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

“3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”



10. In *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal had the following to say concerning the overriding objective in section 1A and 1B of the *Civil Procedure Act*:

“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...” (emphasis added)

See also: *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR

11. In *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* [2014] eKLR the Supreme Court observed that article 159 (2) of the *Constitution* and section 1A & 3A of the *Civil Procedure Act* command the courts to administer justice in a manner that is efficient, proportionate and cost effective while eschewing technicalities. And that the said provisions were never intended to supplant the rules of procedure or to provide succor to parties who demonstrate scant regard for rules of procedure and timelines, which serve the process of judicial adjudication.
12. The onset of the COVID-19 pandemic may have disrupted court operations as readily admitted by the parties. And granted, the parties had consented to delivery of ruling by email, which consent however is not on the court file and may not have been placed before Kamau J who proceeded to deliver the ruling online. However, by July 2020 some semblance of normalcy had returned as court proceedings moved onto the online platform. From the date of the ruling of Kamau J to the dated of the applicant’s motion, over one and a half years had lapsed, and normal court operations had resumed. The Respondent sat back, taking no step, even by way of inquiry until woken up from slumber by the present motion. In contrast, the applicant plied the court with inquiries since July 2020 seeking to find out the status of the matter. There is no plausible explanation for the respondent’s inaction except an apparent indifferent attitude.
13. This is a matter for recovery of advocate’s costs for which a special and speedy procedure is provided under the Advocate’s Act. The bill of costs having been taxed in May 2019, hence it is now over 3 years since the taxing master’s ruling that the respondent claims to be intent on challenging via a reference. The disclosed lethargic and dilatory conduct of the respondent however speaks louder than the espoused intent. As earlier observed, the respondent’s motion dated March 11, 2022 seeking extension of time came after almost five months since service of the instant motion. It would be against the letter and spirit of the overriding objective and a travesty of justice for the court to decline to intervene on behalf of the applicant in the face of an indolent respondent. As stated in *Karuturi’s* case, dealing with a case justly includes *inter alia* reducing delay, and costs expenses at the same time acting expeditiously and fairly. Accordingly, the court will allow the applicant’s motion with costs. Pursuant to this outcome, the respondent’s motion dated March 11, 2022 is overtaken and has been rendered moot.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28TH DAY OCTOBER 2022.

C.MEOLI

JUDGE



In the presence of:

For the Applicant: Mr. Shah

For the Respondent: N/A

C/A: Carol

