Mwau v Nation Media Group & 4 others (Civil Suit 286 of 2015)
[2022] KEHC 16618 (KLR) (Civ) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16618 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 286 OF 2015

DO CHEPKWONY, J

NOVEMBER 24, 2022

BETWEEN

HON. JOHN HARUN MWAU ..... PLAINTIFF

AND

NATION MEDIA GROUP ..... 1ST DEFENDANT

MANAGING DIRECTOR/CEO NMG JOE MUGANDA ..... 2ND DEFENDANT

SMRITI VIDYARTHI MOHINDRA ..... 3RD DEFENDANT

MANAGING EDITOR, BROADCAST NMG LINUS KAIKAI .. 4TH DEFENDANT

MANAGING EDITOR, DIGITAL NMG CHURCHIL OTIENO .... 5TH DEFENDANT

RULING

1. The plaintiff/applicant brought a notice of motion application dated September 7, 2021 under the provisions of order 12 rule 7, order 51 rule 1, both of the *Civil Procedure Rules, 2010* and sections 1A, 1B and 3A, all of the *Civil Procedure Act* and seeks for the following orders: -

    a. that this honorable court be pleased to and hereby issues orders setting aside its decision of December 13, 2019 to dismiss the plaintiff's/applicant's suit dated August 21, 2015 together with all other consequential orders.

    b. that the honourable court be pleased to and hereby orders that the suit herein be reinstated for hearing and to issue any further orders and directions for the expeditious disposal of the suit.

c. That costs for this application be in cause.

2. The grounds for the application are that this suit raises various triable issues of public concern given that the case revolves around serious allegations on drug trafficking which is an abominable act in Kenya with stringent and punitive measures. That the suit was dismissed on December 13, 2019 consequent to an error by the law firm which was handling the matter in that, the advocate who had been assigned to handle the matter abruptly left the firm without an update on the matter. That they learnt that the suit had been dismissed when the plaintiff had inquired on its progress and as such the fault was not the plaintiff's but a mistake on the part of an advocate which should not be visited upon the plaintiff. Further, that the plaintiff has been keen on being heard on merit taking into account that he agreed to setting aside of a default judgment which had been entered against the defendants so that both sides could be heard on merit. Lastly, the plaintiff argued that he should not be punished for his advocates' mistakes and the interest of justice would demand that his application be allowed.

3. The affidavit in support of the application was sworn by Ombati Omwanza, the plaintiff/applicant's advocate. Save for containing the annexures of the pleadings filed in court in relation to this matter, the affidavit basically repeats the contents of the grounds in support of the application. I therefore see no need of reproducing the said grounds here. However, the deponent avers that he was unable to follow the progress of the suit upto when the same was dismissed since he was engaged in several election petitions and had entrusted the matter to an advocate who left the firm without updating on its progress.

4. The respondents opposed the application *vide* the replying affidavit sworn by Sekou Owino, the 1st defendant/applicant's Head of Legal Department. He deposited that the suit against the defendant was filed way back on August 21, 2015 and the defendant's entered appearance on December 4, 2015 and filed a defence on the April 19, 2016. That the plaintiff never took any active step to prosecute the suit save for obtaining irregular ex-parte judgment which was later set aside. Following such inertia, the defendants *vide* an application dated August 9, 2019 moved the court to have the suit dismissed and its ruling dated December 13, 2019 dismissed the suit for want of prosecution. Nonetheless, the plaintiff waited until September 7, 2021 to file the present application seeking to set aside the orders dismissing the suit and such delay according to the respondents has not been satisfactorily explained. Lastly, it was averred that the cause of action herein is more than seven (7) years old, and it would be prejudicial to reinstate the suit whereas to the respondents, the same was concluded years ago and removed from their list.

5. On May 19, 2022, the learned counsel, Mr Brian Ouma and Senior Counsel M/S Jan Mohamed appeared before this court on behalf of the plaintiff/applicant and defendant/respondents respectively and canvassed the application by way of oral submissions. Each learned counsel reiterated the grounds made in the affidavits sworn in support and rebuttal of the application and referred to some case law which I have as well considered.

Analysis and Determination

6. Having carefully considered the application, the affidavits sworn in support and rebuttal of the same, submissions made on behalf of the parties, the case law cited and analyzed the provisions relied on, I am persuaded that only one major substantive issue falls squarely for determination, which is, whether the application merits the setting aside of the order/ruling dated December 13, 2019.

7. A party wishing to set aside an order dismissing a suit for want of prosecution and reinstate the same for hearing is regulated is guided by the provisions of order 12 rule 7 of the *Civil Procedure Rules, 2010*, which provides as follows:-

> " Where under this order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just."

8. Clearly, the powers granted to court by the above section are discretionary and have to be exercised judicially, fairly rationally and not capriciously or whimsically. Needless to say then, the applicant is bound to show to the satisfaction of the court that the delay is not prolonged and inexcusable and if it is, that justice can still be done despite the delay. In other words, if the court is satisfied with the plaintiff's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence it would be viable not to dismiss the action but instead direct that it be heard at the earliest time possible and available. Such was the view of the court in the case of *Ivita v Kyumbu* [1984] KLR 441 as cited by the plaintiff's counsel where the court on the same subject made the following observations: -

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time".

9. Similarly in the case of *CMC Holdings Limited v Nzioki* [2004]1 KLR 173, the court expressed its remarkable jurisprudence in the following words: -

> " In law, the discretion that a court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here... In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

10. I also fully agree with the exposition made by court twin to this one in the case of *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] eKLR as regards the burden of prove in an application as the one at hand. It stated thus:-

> " ...where a suit is dismissed for want of prosecution, the onus is on the party applying to reverse the order to explain sufficiently to court as to why his application merits the exercise of the court's discretion.

> ... when then a suit has been dismissed for want of prosecution as was in the instant case, the defendant is considered to have discharged his burden as would be found in the principles. It means further that, for the plaintiff to successfully move the court to exercise discretion in his favour, the burden lies on him to demonstrate the opposite of that which the defendant already did, besides explaining the delay in applying to set aside the order."

11. In this case, it has not been denied that the suit was dismissed for want of prosecution following an application dated August 9, 2019 made by the defendants and before then, the plaintiff had not taken any active step in litigating the matter since the May 4, 2016. Nonetheless, the suit was dismissed *vide* this court's order made on December 13, 2019 and it took the plaintiff another one (1) year and eight (8) months to move the court for setting aside the dismissal orders. That delay has been attributed to the plaintiff counsel's failure to prosecute the matter and updating the plaintiff on the progress despite being instructed to do so.

12. The plaintiff's counsel has also sworn an affidavit in support of the application and acknowledged that the suit was dismissed not of his fault but owing to the advocate's failure to update on the matter and that he learnt of the dismissal order after he inquired on its progress. From this end, the much I understand of the plaintiff's case is that the advocate on record lost track of the suit sometimes in the year, 2017 owing to his engagement in election petitions and learnt on its fate in September, 2021 when the plaintiff sought to know of its progress.

13. In as much as blame is shifted to the plaintiffs advocate and while this court agrees that a mistake of a counsel ought not to be visited upon a client, it must be noted that the unfettered discretion of this court under order 12 rule 7 of the *Civil Procedure Rules* is to be exercised in favour of the applicant where such mistake is bona fide. The question therefore is, is the mistake of the advocate in this case reasonable or bona fide and has it been explained to the satisfaction of the court? I think the threshold has been met in this case. The plaintiff showed interest in prosecuting the suit and took tangible steps in following the suit to be set for hearing only to find that the same had been dismissed for want of prosecution out of inaction by the advocate. In my view, the plaintiff/applicant has demonstrated such an excusable mistake, inadvertence, and or error to warrant the exercise of this court's discretion in his favour.

14. In the end, this court is persuaded that the mistake blamed on the plaintiff's advocate is bona fide and should not be visited on the plaintiff/applicant. The upshot then is that the circumstances are in favour of allowing the plaintiff's application.

15. The order of December 13, 2019 by which the plaintiff's suit was dismissed for want of prosecution is hereby set aside, and the suit reinstated for hearing. The defendants shall however have the costs of this application. This suit should now be fixed for hearing on priority basis.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH __DAY OF NOVEMBER__ , 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ouma counsel for Plaintiff/Applicant

No appearance for and by the Defendants/Respondents

Court Assistant - Simon