



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 1055 OF 2000

BETWEEN

POSTAL CORPORATION OF KENYA.....PLAINTIFF

AND

PAUL G. NDARUA.....1ST DEFENDANT

DANIEL GATHAIYA AND KEVIN O. BYRNE

T/A GATHAIYA AND PARTNERS.....2ND DEFENDANT

MICHAEL MWENDWA NGILU T/A

NGILU AND ASSOCIATES.....3RD DEFENDANT

J. N. NYAMBANE & S. O. MAGANE T/A

NYAMBANE AND MAGANE ASSOCIATES.....4TH DEFENDANT

L. W. KUNGU T/A EMKA DESIGNERS.....5TH DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. 822 OF 1996

BETWEEN

DANIEL GATHAIYA AND KEVIN O. BYRNE

T/A GATHAIYA AND PARTNERS.....PLAINTIFF

AND

POSTAL CORPORATION OF KENYA.....DEFENDANT

RULING

The Application

1. The application for consideration is the Notice of Motion dated 20th December 2019 filed by the Postal Corporation of Kenya, the plaintiff in **HCCC No. 1055 of 2000**. It is made under **Articles 49** and **159(2)(d)** of the Constitution, **sections 1A, 1B** and **3A** of the **Civil Procedure Act, Order 51 rule 1** of the **Civil Procedure Rules, 2010** and all enabling provisions of the law. The key reliefs sought in the application are

as follows:

[3] *The Honourable court be pleased to review and vacate the Judgment delivered on 31st October 2019 in HCCC No. 1055 OF 2000 Postal Corporation of Kenya –VS- Paul Ndarua & Others dismissing the Applicants case.*

[4] *The Honourable Court be pleased to admit the Applicant's attached Witness statement to the record.*

[5] *The Honourable Court be pleased to give directions on the fair hearing of the matter.*

2. The application is supported by the affidavit of Samwel Mwaura Mburu sworn on 20th December 2019 and the facts set out on the face of the application. The thrust of the grounds and deposition is that the plaintiff filed suit to recover about Kshs. 99,871,603.00 from the defendants which it illegally and fraudulently paid to them, where they purportedly acted as consultants in a non-existent Malindi Post Office Project causing the taxpayers loss. Mr Mburu deposed that given that the transactions were done more than 20 years ago, the applicant had difficulties in identifying a competent witness in time and after frantic efforts, it has now located a witness and had prepared a witness statement to enable the court determine the matter.

1st Defendant's Case

3. The application was opposed by the 1st and 2nd defendants to the Postal Corporation's claim. The 1st defendant, Paul Ndarua, relied on grounds of opposition dated 24th January 2014 and swore a replying affidavit on the same date. The thrust of its opposition is that the Postal Corporation has not shown why it failed to prosecute its case for the period of 20 years by taking pre-trial directions and filing witness statements in good time. Mr Ndarua deposes that the allegation of loss of tax payers' funds is extraneous to the matter at hand and has not been established. He also states that while the plaintiff is a corporation with employees, he is now an elderly private citizen with ill health who will be severely prejudiced if the suit is revived.

2nd Defendant's Case

4. The 2nd defendant, Gathaiya and Partners, who had filed their own suit; **HCCC 822 of 1996**, opposed the application through the grounds of opposition dated 28th January 2020. Those grounds are rather prolix but the key issue raised is that the plaintiff has been lax in prosecuting the suit. It states that **HCCC No. 822 of 1996** against the Postal Corporation was initially determined in January 2000 however the judgment was set aside and Postal Corporation allowed to defend the suit. The Postal Corporation's suit, **HCCC No. 1055 of 2000** was thereafter consolidated with **HCCC No. 822 of 1996**. The 2nd defendant states that the plaintiff's suit was dismissed after it failed to take any steps to prosecute the suit. The 2nd defendant contends that the plaintiff has given false and misleading information that it was unable to secure a witness notwithstanding that it is a corporate body which was aware of the gravity of the claim. The 2nd defendant further states that it would suffer undue prejudice through no fault of its own because of the delay.

Record of Proceedings

5. After the respective suits were filed and several interlocutory applications later, the matter fell into abeyance. On 6th December 2012, Kamau J., directed that the matter be fixed for a pre-trial conference. The next time the matter was in court was on 26th September 2018 before Nzioka J. On 22nd November 2018, Odero J., fixed the matter for mention on 29th November 2018. It only came up for directions before the Deputy Registrar on 17th December 2018 who informed the parties that the matter had been fixed for notice to show cause why the matter should not be dismissed on 24th January 2019.

6. When the same came up for dismissal, Odero J., discharged the dismissal order *nisi* and allowed the case to proceed for hearing. On the same day, counsel for the 2nd defendant indicated to the court that she would file an application to de-consolidate the suits as the plaintiff in **HCCC No. 822 of 1996** wished to prosecute the suit on his own. The application was filed but later withdrawn with the learned judge directing that the matter be placed before the Deputy Registrar for Case Management Conference.

7. The matter came up before the Deputy Registrar on 12th April 2019, 16th May 2019, 18th June 2019, 17th July 2019 and 29th July 2019. On all these occasions, counsel for the plaintiff did not attend court. On 15th August 2019 when the counsel for the plaintiff attended court, he was notified that the matter was fixed for hearing on 5th September 2019 during the service week.

8. On 5th September 2019 counsel for the plaintiff applied for an adjournment on the ground that he was having difficulty getting his witness who was on leave and would be back in a week. The application was opposed strenuously but ultimately, Limo J., allowed it and directed the parties to comply with **Order 11** of the **Civil Procedure Rules**. The matter came up for case management on 16th September 2019 and 16th October 2019 before the Deputy Registrar. On the latter date the matter was fixed for hearing before me on 31st October 2019.

9. When the matter came up for hearing on 31st October 2019, counsel for the plaintiff applied for an adjournment on the ground that his firm wished to withdraw from acting. He informed the court they had written several letters and visited the offices several times but had not received full instructions. I rejected the application for adjournment on the ground that this was an old matter and that the plaintiff did not seem sufficiently interested in the matter. Upon the dismissal of the adjournment and there being no witness or evidence to be presented, I dismissed the suit with costs.

10. Thereafter, **HCCC No. 822 of 1996**, proceeded for hearing. After the close of the 2nd defendant's case, I dismissed the plaintiff's application for adjournment, closed its case and reserved the matter for judgment. The plaintiff's application to set aside the proceedings

interposed the judgment.

Issue for Determination

11. The issue for determination is whether I should set aside the order dismissing the plaintiff's suit and proceeding without its defence in the other suit on 31st October 2019. Shorn of all technical objections to the application, I think the issue is whether I should exercise my discretion in setting aside the orders made on the material date.

12. There are many instances where the court is called to set aside either an ex-parte judgment, ex-parte proceedings or default orders. The overriding consideration explained by the courts in these cases is to do justice in each case depending on the facts before the court. After all that is the imperative of **Article 159(2)(d)** of the Constitution and the overriding objective under **sections 1A and 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**.

13. A good summary of these principles is found in the case of **Stephen Ndichu v Montys Wines and Spirits Limited ML HCCC No. 149 of 2002 [2006] eKLR** where Azangalala J., held as follows:

*The principles governing the exercise of judicial discretion to set aside ex-parte judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See **Patel v E.A. Cargo Handling Services Ltd [1974] E.A.75**). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see **Shah v Mbogo [1969] E.A.116**). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See **Sebei District Administration v Gasyali [1968] E.A. 300**). It also goes without saying that the reason for failure to attend should be considered.*

Determination

14. When the matter came up for notice to show cause why this suit should not be dismissed on 29th January 2019, the learned Judge discharged the order *nisi* hence the issue whether the plaintiff failed to prosecute the suit prior to that date was dealt with. The fact that the court intimated it would not dismiss the suit should have put the Postal Corporation on the alert. I also note that on 13th February 2019, the defendant withdrew, the application for de-consolidation of the suit to enable both suits to proceed for hearing. The relevant period for consideration, in my view, is from the date the order *nisi* was discharged although it is important to keep in mind the length of delay that caused the court to issue a notice to show cause in the first place and the length of time this case has been on the court rolls.

15. After the order *nisi* was discharged, Odero J., directed the parties to proceed for Case Management before the Deputy Registrar. The matter was fixed for directions before the Deputy Registrar on 12th April 2019, 16th May 2019, 18th June 2019, 17th July 2019 and 29th July 2019. Counsel for the plaintiff did not attend court on any of those days except on 18th August 2019 when the Deputy Registrar fixed the suit for hearing during the service week but as I stated, the matter was adjourned due to non-compliance with pre-trial requirements.

16. The matter went before the Deputy Registrar on 16th September and 16th October 2019 for directions but once again, the plaintiff failed to file witness statements. While expressing the view that this was a 2000 case and had been fixed for hearing during the service week, she fixed the matter for hearing on 31st October 2019 before me.

17. The lack of witness statements and failure to get sufficient instructions, caused the plaintiff's advocates to express their intention to cease acting for it. Failure by the Postal Corporation to act diligently by assisting their advocates prosecute the suit for the period between 13th February 2019 to the hearing date was not explained satisfactorily. I say so because there is nothing apart from bland statements that frantic efforts were being made to procure a witness. From the time the order *nisi* was discharged, there is no evidence that an effort was being exerted to obtain a witness bearing in mind that the Postal Corporation is not in a position of a natural person but a statutory corporation with perpetual succession and necessary resources to prosecute the suit.

18. The Postal Corporation points out that it lost a large sum of money due to fraud perpetrated by the defendants. At this stage, this is only an allegation but this alone is not a good reason to turn a blind eye to its tardiness in prosecuting the suit. Such a liability on its books ought to have stood out as a sore thumb that required urgent treatment especially after the court had expressed its intention to dismiss the suit for want of prosecution.

19. The Postal Corporation has also stated that this case concerns fraud on public funds but to the court, all parties bringing cases ought to be treated equally. The defendants, have been diligent enough and have complied with the court's directions. The 1st defendant even indulged the Postal Corporation by withdrawing its application to deconsolidate the suit. In my view, the Postal Corporation is not entitled to any indulgence for reason only that it is a public Corporation. In fact, it has a greater obligation to the public to prosecute its causes with diligence as a custodian of public funds.

20. By the time the matter came up for hearing, counsel for the Corporation had expressed its difficulty in proceeding and intimated to the court that the firm wished to withdraw from acting. All these instances show that the plaintiff was not interested in prosecuting its claim and was only jolted into action by the impending judgment.

21. On the other hand, the defendants have had to wait to have their day in court. They complied with all the directions and in all instances have expressed their desire to proceed with the hearing. At every stage the matter came up for hearing, they expressed the view that this was an old matter and that it should proceed for hearing. The defendants against whom the suit has now been dismissed should not be prejudiced further by a claim that has now been laid to rest.

22. The right to a fair hearing and access to justice guaranteed under **Articles 50(1)** and **48** of the Constitution and the duty of the court to hear a matter without delay and undue regard to technicalities under **Article 159** of the Constitution do not operate in a vacuum. The duty of the court is to provide an enabling environment and an opportunity for each party to be heard. It is the parties to take advantage of the forum of the court by complying with the rules and for the court to exercise its jurisdiction by giving orders which all go to enhance a fair trial. That is why part of the overriding objective under **sections 1A** and **1B** of the **Civil Procedure Act** also impose on the parties and counsels the responsibility of assisting the court by participating in its processes and complying with directions and orders of the court. I cannot say, in the circumstances of this case, the plaintiff's fundamental right to a fair trial or access to justice was violated.

23. Although the court excused the Postal Corporation's failure to prosecute the suit even after 19 years, it did not act with dispatch by taking all steps to ensure the matter was heard before the court. This court must also bear in mind the right of the defendants to prosecute their own case without being weighed down by the plaintiff and of the other defendants who are forced to defend the case against them to be discharged from weight of pending suits. The delay in the matter, the failure to act with dispatch and the paucity of reasons for failure to obtain a witness and the prejudice to the defendants are not matters can be assuaged by an award of costs.

Disposition

24. Although the Postal Corporation is now ready and willing to prosecute its claim, I am not inclined to exercise my discretion in its favour for the reasons I have set out above. I dismiss the Notice of Motion dated 20th December 2019 with costs to the defendants.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Obuya instructed by TripleOKLaw LLP Advocates for the plaintiff

Mr Mapeza instructed by Kilonzo and Company Advocates for the 1st defendant.

Mr Ndirangu instructed by Kirundi and Company Advocates for the 2nd defendant.

Mr Simiyu instructed by Muma and Kanjama Advocates for the 1st, 2nd, 24th, 25th and 26th defendants/applicant.