



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL REFERENCE NO 282 of 2008
CONSOLIDATED WITH
CONSTITUTIONAL PETITION NO. 295 OF 2008

JAMES MWANGI KABUTHIAPETITIONER/APPLICANT

VERSUS

STATUTORY MANAGER INVESCO ASSURANCE COMPANY LTD1ST RESPONDENT

INVESCO ASSURANCE COMPANY LTD2ND RESPONDENT

THE COMMISSIONER OF INSURANCE3RD RESPONDENT

THE MINISTER OF FINANCE 4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 5TH RESPONDENT

JAMES NJOKA MWANGI6TH RESPONDENT

RULING

1. The application before this Court is dated 13th June 2013. It seeks to re-instate the petitioner’s application dated 14th September 2012 which was dismissed by this Court on 11th June 2013 for want of prosecution.
2. The said application dated 14th September 2012 was seeking to re-instate the petitioner’s Notice of Motion in this matter which had been dismissed for want of prosecution on 24th October 2011 by the Court (Warsame J as he then was) on the application of Counsel for the 6th and 7th respondent and in the absence of Counsel for the applicant. The matter had been dismissed with costs to the 6th and 7th respondents.

Procedural History

3. The matter was first placed before me on 15th March 2012 when, with no appearance by any of the parties, I observed that it had been dismissed on 24th October 2011.
4. It appears that the petitioner was moved to seek re-instatement of the matter by the filing of a Bill of Costs for taxation. The record indicates that when the matter came up before Mrs. Gicheha Deputy Registrar, on 18th September 2012, Mr. Kimwera for the petitioner indicated that he was not ready to proceed with the taxation; that he would be seeking to have the taxation stayed as he had been trying to file an application. He was granted time to file his application dated 14th September 2012 before the close of the day and the matter was set for mention before the Presiding Judge on 12th October 2012. The matter then came up several times before the court but did not proceed for various reasons.
5. On 3rd May 2013, Odunga J directed in the presence of the parties that the matter be placed before a Judge in the Constitutional and Human Rights Division as it was a constitutional reference, and it was placed before me on 28th May 2013.
6. When the matter came up on that date, there was no appearance for the applicant and the 6th and 7th respondent. Ms. Ndirangu for the 3rd respondent observed that it had been difficult to get the applicant to appear in court on the matter and that it was the 3rd, 6th and 7th respondents who had been taking dates for the hearing of the matter. She therefore asked the court to dismiss the application. The Court, however, directed that the matter be set down for hearing on 11th June 2013, and directed the 3rd respondent to issue a hearing notice.
7. When the matter came up for hearing on that day, Counsel for the applicant was not present in Court. However, Learned Counsel, Mr. Kaumba, indicated that he had been requested by a pupil from the firm of Kimwera & Co. Advocates, who were on record for the applicant, to hold Mr. Kimwera's brief. According to Mr. Kaumba, the instructions given to him by the pupil to convey to the Court were that the applicant's Counsel had had a verbal communication with the firm of M/s Lucy Kambuni & Co. Advocates who were on record for the 3rd respondent that they would proceed with the application dated 14th September 2012 by way of written submissions which he intended to file within a period of 7 days from that date.
8. Ms. Mburugu, Counsel for the 3rd respondent, indicated that there had indeed been such discussions but no agreement had been reached as claimed by Counsel for the applicant. She opposed the application to allow the applicant to file submissions within 7 days and asked that the application be dismissed.
9. In light of the age of the matter which had been dismissed for want of prosecution more than a year before, and which had not been prosecuted for 3 years prior to its dismissal, I directed that the matter would proceed. Mr. Kaumba then indicated that he had no instructions to proceed with the matter, and I therefore dismissed the application dated 14th September 2012 with costs to the respondents. It is this order of dismissal that the applicant now seeks to set aside.

The Application

10. The application dated 13th June 2013 seeks the following orders:
 - a. ***This application be certified as urgent and the same be heard and determined.***
 - b. ***That application dated 14th September 2012 dismissed for want of prosecution be re admitted and reinstated for hearing.***
 - c. ***Costs of this application be in the cause.***

d. *Any other order this Honourable Court may deem fit to grant.*

11. The application is expressed to be brought on the following grounds.

1. *The applicant counsel was handling another matter at Thika Magistrates Court namely Civil Case No 393 of 2000 involving a party that was physically challenged which had (sic).*
2. *The date for hearing was taken without taking into account the applicants diary.*
3. *The applicant counsel practices from upcountry a fact the 3rd respondent never takes into account while taking dates.*
4. *There were negotiations that the matter be resolved by written submissions.*
5. *The applicant is still ready and willing and will suffer irreparable loss.*

The Submissions

12. Mr. Mandala presented the case for the applicant when it came up for hearing before me on 17th September 2013. In his submissions on behalf of the applicant, Mr. Mandala asked the court to re-instate the application dated 14th September 2012 and re-admit it for hearing. He relied on the affidavit sworn by **Mr. Kimwere Josphat**, Counsel on record for the applicant, on 13th June 2013.

13. In his affidavit, Mr. Kimwere avers that he had attended Court on 3rd May 2013 to prosecute his application but it was listed in the wrong Division. He contends that he informed Counsel for the 6th and 7th respondents that he would not be available on 28th May 2013 when the matter was scheduled for mention with a view to taking a hearing date; and that they informally agreed to dispose of the matter by way of written submissions and he would send someone to hold his brief for the purpose of recording that consent. Mr. Kimwere alleges that he was therefore surprised when he was informed that a hearing date had been taken for 11th June 2013 by Counsel for the 3rd respondent without taking into account his diary, the verbal agreement between them, and the fact that he is an upcountry lawyer with High Court matters in other High Courts upcountry.

14. Mr. Kimwere alleges that he was not available on 11th June 2013 as he had another matter in Thika, Civil Case No. 393 of 2000 Kamau Muturi –vs- Samuel Ng’ang’a Mwangi, involving a physically challenged person, and that it was not fair to adjourn the matter as there were no dates at the Thika Registry. According to Mr. Kimwere, he wrote a letter to that effect but his assistant forgot to dispatch the letter to the Advocate for the 3rd respondent by personal service but posted it.

15. Counsel for the applicant maintained, however, that he had instructed his assistant to appear in Court on the date of the hearing but the assistant found that the matter had been dismissed. He submitted that the mistakes of the advocate should not be visited on the client; that no prejudice will be suffered that cannot be compensated by way of costs, and he asked that the application be allowed.

16. Ms. Mburugu for the 3rd respondent opposed the application. She relied on the affidavit sworn by Ms. Kageni Mburugu on 15th July 2013. According to the 3rd respondent, the main reason for their opposition to the application to re-instate is that the applicant has not shown any eagerness to prosecute this petition. She observed that the petition was dismissed on the 23rd of October 2011 for want of prosecution; and that the petitioner did not do anything until he was served with a Bill of Costs by the 6th and 7th respondents.

17. She referred the Court to the chronology of events set out at length in her affidavit, noting that the

date for hearing was taken and the hearing notice duly served, and that the petitioner's Counsel was represented by someone holding his brief.

18. Ms. Mburugu cast doubts on the letter allegedly sent to the offices of the 3rd respondent's Counsel with regard to the matter, observing that it had no address. She noted further that while the applicant's Advocate claimed to be an up country law firm, their main address was given as Nairobi.
19. In her affidavit, Ms. Mburugu points out that Mr. Kimwere was not present in Court and was not ready to proceed with his application for re-instatement when it came up before the court on 4th December 2012; that he asked through Counsel holding his brief for leave to file a supplementary affidavit which has never been done; that he failed to appear for the applicant when the matter came up in Court on 14th February 2013; that he was present in Court on 3rd May 2013 when parties were directed to appear before the Constitutional and Human Rights Division; and that he was duly served but failed to appear on 11th June 2013 when the matter was set for hearing. She termed the application before the Court as vexatious and an abuse of the court process.
20. The 6th and 7th respondents also filed an affidavit in opposition to the application to re-instate the application dated 14th September 2012. Like the 3rd respondent, the deponent, Mr. Jeremiah Mbutia who swore the affidavit dated 24th June 2013 on behalf of the 6th and 7th respondents, reiterated the chronology of events leading to the dismissal of the applicant's claim and the application dated 14th September 2012 and maintained that the applicant had no one to blame but himself for the dismissal of the application dated 14th September 2012 on 11th June 2013.
21. According to these respondents, Counsel for the petitioner was aware that the matter was set for mention on 28th May 2013 for the purpose of taking a hearing date but did not attend; that the hearing date of 11th June was taken regularly and service effected on the petitioner's Counsel; that the said Counsel preferred to attend to a matter in the lower court instead of appearing before the High Court; that though he alleges that he is based up country, his main office is shown on his letter head as being in Nairobi and for him to fail to attend court to deal with the matter on the basis of the flimsy excuses set out in his affidavit was not excusable. The 6th and 7th respondents asked that the application be dismissed with costs.

Determination

22. Having considered the pleadings in this matter and the respective submissions of the parties, I take the following view of the matter.
23. First, it cannot escape attention that the petitioner's case was dismissed for want of prosecution, on a date when his Counsel did not appear, on 24th October 2011, and almost a year elapsed before the application now sought to be re-instated was filed.
24. It is also noteworthy from the record that when the parties appeared in Court before Odunga, J on 3rd May 2013, the mention date for 28th May 2013 was taken by consent. There is no indication from the record that the applicant's Counsel expressed any inability to attend Court on that day for the taking of a hearing date.
25. Even though Counsel was fully aware that the matter was coming up for hearing on 11th June 2013, he still did not show up. The reason given for the failure of Counsel to appear in Court on that date is that he was involved in another matter involving a physically challenged person at the Thika Law Courts being Civil Case No 393 of 2000. He alleges that he spoke to his colleagues and they had agreed verbally to file written submissions on the application. He submitted that despite this verbal agreement, the 3rd respondent's Counsel went ahead and fixed the matter for hearing on the date he had been informed about the Thika matter.

26. He also alleges that he wrote a letter regarding his inability to appear, but that his assistant posted it instead of despatching it by way of personal service. He also emphasises that he practices from upcountry and has many other matters in other High Court stations such as Nyeri and Kerugoya, and it is therefore not easy to get to Nairobi in two weeks.
27. I have looked at the letter annexed to the affidavit of Mr. Kimwere. I agree with Ms. Mburugu that the letter bears no postal address, just a physical address, so it was unlikely to have been posted. I also observe that while Mr. Kimwere insists that he operates from 'upcountry', his letterhead actually gives his main office as Popman House, Moi Avenue, Nairobi. Thirdly, I take judicial notice that the 'upcountry' stations that he refers to are all within a two hour radius or less of Nairobi. Most importantly, though, a Counsel who takes up a matter and files it in a particular court is deemed to take on full responsibility for the prosecution of that case. He cannot, in my view, be heard to complain that the Court is not located in a place where his convenience is served.
28. What emerges from the chronology of events set out above is a party who has no serious interest in pursuing his claim before the court, and who only does so when there is a possibility of having to incur financial costs. There is no reason why this matter, filed in May 2008, was not prosecuted in the three years prior to its dismissal by Warsame J on 24th October 2011; there is no reason why an application for its re-instatement was not made until September 2012, and then only because the applicant was confronted with a Bill of Costs; and there is also no reason why the application to re-instate was not dealt with except that the applicant's Counsel could not be bothered to give the matter his attention.
29. Counsel argues that the applicant should not be punished for the fault of his Counsel. However, a party does have a responsibility to follow up a matter that he has chosen to file in court and, if his Counsel is indolent or too busy, seek alternative legal representation. He also has the option of pursuing his Counsel in damages for conducting his suit negligently.
30. At any rate, I do not believe that the interests of justice are served by re-instating the application dated 14th September 2012. This application is therefore dismissed. The Court will, however, spare the applicant additional costs, and so I shall make no order as to costs.

Dated, Delivered and Signed at Nairobi this 12th day of November 2013.

MUMBI NGUGI

JUDGE

Mr. Mandala instructed by the firm of Kimwere Josphat & Co. Advocates for the Applicant

Ms. Mburugu instructed by the firm of L.M. Kambuni & Associates Advocates for the 3rd Respondent.

Mr. Mbuthia instructed by the firm of J.N. Mbuthia & Co. Advocates for the 6th and 7th Respondents.