Okore v Livoi (Environment & Land Case 67 of 2018)
[2023] KEELC 493 (KLR) (6 February 2023) (Ruling)

Neutral citation: [2023] KEELC 493 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 67 OF 2018

FO NYAGAKA, J

FEBRUARY 6, 2023

BETWEEN

FRANCIS KIPKURGUT OKORE ..... PLAINTIFF

AND

EDWARD LIVOI ..... DEFENDANT

RULING

1. This suit was dismissed for want of prosecution on November 19, 2019. By a Notice of Motion dated November 30, 2021 amended on January 06, 2022 the plaintiff applied to this court to set aside the order of dismissal. The Amended Notice of Motion was filed on January 07, 2022. It was brought under section 3A of the *Civil Procedure Act* and orders 12 rule 7 and order 17 rule 17(2)(2) of the *Civil Procedure Rules, 2010*. The applicant sought the following orders:-

    1. That the order made on November 19, 2019 dismissing this case for want of prosecution be set aside.

    2. That the costs of this application be provided for.

2. The application was based on two grounds, namely, that the plaintiff and his advocate were not aware that the suit had been fixed for dismissal for want of prosecution until August 10, 2021 and that the plaintiff was desirous of prosecuting his case.

3. The application was said to have been supported by the Affidavit of Simeo Mugalavai Kenyonzo. However, as I write this ruling, and after checking through the court filing system and emails, there is no Affidavit in support of the application. What is in the court filing system is the original application dated October 30, 2021. To it was attached a supporting Affidavit sworn by learned counsel S M Keyonzo on that date. Thus, as things stand, in relation to the application I am supposed to determine, it is bare: it has no factual support evidence in form of an Affidavit, and it is not one of those that the

Civil Procedure Rules contemplate where one need not file an Affidavit in support thereof, as will be clear in paragraph 21 below where this court will be considering the merits of the application.

4. The application was opposed very strongly. The applicant swore an Affidavit on October 3, 2022 and filed it on October 14, 2022. In it, he deponed that the applicant filed Kitale CMCC no 97 of 2005 over the same subject. It was struck out and he preferred an appeal from the order of the court. He did that through Kitale High Court no 34 of 2015. He swore further that the appeal was dismissed for want of prosecution. He annexed and marked as EL-1 a copy of the Memorandum of Appeal in the matter. He then deponed that the suit was *res judicata*, bad in law and statute-barred.

5. He responded to paragraph 4 of the Supporting Affidavit stating that the Memorandum of Appearance and Defence were filed on March 4, 2019 and not March 4, 2011 hence the defendant could not have filed the two documents before the suit commenced. He stated further that annextures which were marked as SMK1 and SMK2 were not attached to the Affidavit or served at all on September 23, 2022 as deponed by the applicant hence the respondent could not refer to them. He deponed further that the applicant had never been keen to prosecute his case. He then swore that the application was a waste of judicial time, lacked merits and ought to have been dismissed.

6. The applicant's learned counsel then filed a Further Affidavit on 21/11/2022. It was sworn on November 2, 2022. In the Affidavit, he admitted in deposition that indeed the applicant had filed Kitale CMCC no 97 of 2005 and that was a tact disclosed at paragraph 6 of the Plaint. He deponed further that the suit was struck out because of being in the wrong forum hence was not heard on merit. He also swore that after the dismissal, the plaintiff filed Kitale High Court Civil Appeal no 34 of 2015 but he was unaware that the appeal was dismissed for want of prosecution. He stated on oath that there was no other suit pending between the parties and the dispute was not *res judicata*. He then argued that there was no judgment attached to the Replying Affidavit to show that the suit was heard by a court of competent jurisdiction.

7. The application was disposed of by way of written submissions. The applicant filed his on November 17, 2022. The respondent filed his on November 21, 2022.

8. The applicant summarized the content of the application and submitted that by a letter dated November 19, 2020 he requested the firm of Ms Katama Ngeywa & Co Advocates to attend court on December17, 2020 to take a date for hearing of the suit. This was to be done with the firm of Ms Kidiavai. He summed it that it was in the course of all the steps he took to fix a hearing date that he discovered that the suit had been dismissed for want of prosecution.

9. He further submitted that the Replying Affidavit did not address the issue at hand but rather about another matter altogether. It was his submission that the applicant's counsel had shown how he was not aware of the date of November 19, 2019 when the matter was dismissed for non-appearance. The reason given was that he was unaware of the hearing date, a fact which had not been contravened. Regarding whether the suit was time-barred or not he submitted that that was a matter for trial.

10. He cited the case of *Mbogo v Shah & Another* [1967] EA 116 which outlined the principles for setting aside an *ex parte* order or judgment. That was the first time the matter came up for hearing but was dismissed. He argued that having taken steps to fix the matter for hearing even after the suit was dismissed but not to his knowledge, it was indicative of a party desirous of proceeding with his matter.

11. The respondent on the other hand submitted that since the suit was both *res judicata* and time-barred, the application dated January 06, 2022 lacked merit. It was contended by them that the suit did not meet the conditions for setting aside orders as stipulated under order 12 rule 7 and Order 17 rule 17(2)(2) of the Civil Procedure Rules. He reiterated the filing of Kitale CMCC no 97 of 2005 and

the subsequent appeal thereto in Kitale HCCA no 34 of 2015. He then stated that the Appeal was dismissed for want of prosecution.

12. He argued that the miscommunication by an advocate who was not even properly on record was itself a good reason for the grant of the orders sought. In any event it was four years after the suit was dismissed and that delay was not explained. Again, he submitted that the suit was filed after the passage of twelve years after the alleged encroachment hence it was time-barred. Lastly, he argued that by the time the suit was dismissed it had abated under order 24 Rule 3(2) of the *Civil Procedure Rules*.

13. The respondent cited a paragraph from an unnamed authority: he did not cite it), in which the judge summed it up that "as to whether there is sufficient cause for the revival of the suit, as I have stated above, there is not sufficient cause or good cause shown to the satisfaction of this court to warrant the exercise of the court's discretion. The burden of proving that sufficient cause exists is placed on the applicant..." He then argued that the applicant herein had not shown sufficient cause to warrant revival of this suit or setting aside the orders of November 19, 2019.

14. His view was that the applicant could have appointed another advocate who practiced within the jurisdiction of the station where the matter was filed rather than appointing on very far and that other using Ms Kiadiavai & Co Advocates to run errands on their behalf. To him, doing the opposite to the above made the applicant to sleep on his rights. He then stated that the application lacked merits and ought to be dismissed.

Issues, analysis and determination

15. I have considered the application before me, the law, the facts about it, and the submissions by learned counsel on the same. I am of the view that the following are the issues that lie for determination before the court:-

    a. Whether the application is proper, in law;

    b. Whether the application is merited;

    c. What orders to issue and on costs.

16. I will now analyze the issues as listed.

(a) Whether the application is proper in law

17. The application before me is the Amended Notice of Motion dated January 06, 2022. As stated above the application was based on two grounds, which were that both the plaintiff and his advocate were not aware that the suit had been dismissed for want of prosecution until August 10, 2021 because they were not aware that it had been fixed for that step, and the plaintiff was desirous of prosecuting his case.

18. The application was drafted and crafted as being supported by the Affidavit of learned counsel, Simeo M. Keyonzo. As stated at paragraph 3 above, the Amended Notice of Motion was not supported by any Affidavit. This court was only surprised that when it fixed the application for *inter partes* hearing, that was when it turned out that the respondent had filed a Replying Affidavit in response to an Affidavit sworn by the said learned counsel Simeo M Keyonzo on November 30, 2021. That Affidavit was in support of a Notice of Motion dated November 30, 2021. It was the Motion that was subsequently amended on January 06, 2022. In any event, it was sworn in contravention of the express and constant reminder by courts that contentious facts call for depositions by parties and not their learned counsel.

19. In presidential election petition, *Odinga & 16 Others v Ruto & 10 Others; Law Society of Kenya & 4 Others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of

2022 (Consolidated)) [2022] KESC 54 (KLR) (Election Petitions) (5th September 2022) (Judgment), the Supreme Court cautioned counsel not to swear Affidavits on behalf of clients. It stated further that it is a recipe for perjury and may lead to counsel being held responsible. It stated as follows:-

> "This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing to falsehoods and may also be liable to cross-examination to prove the matters deponed. We must remind counsel who appear before this court, or indeed before any other court, or tribunal of the provisions of Sections 113 and 114 of the Penal Code, that swearing to falsehoods is a criminal offence, and too that it is an offence to present misleading or fabricated evidence in any judicial proceedings."

20. This court too reminds all that seldom, if at all in extremely rare instances, should counsel swear an Affidavit on behalf of his client. Only in those facts which are squarely within the possession or knowledge of counsel and which his/her client cannot be factually competent to swear are the ones where counsel may depone to them. Far from it is the instant case. For instance, although it is not a fact which will be considered in this application as is explained elsewhere, counsel deponed that his client is desirous of prosecuting the suit.

21. Where a suit has been dismissed for want of prosecution and the party does not show anywhere by way of Affidavit to explain why he was absent from court or what steps he himself took, besides counsel, to ensure that his matter proceeded to hearing, that is not an issue or fact the court can take from his learned counsel as truth. That must be learned counsel only who wants the suit to be brought to life after dismissal. The facts must be rejected on that account.

22. In my humble view, regarding the instant case where there is no supporting affidavit, my understanding of the law is that only applications brought under order 2 Rule 15(1)(a) of the Civil Procedure Rules, praying for striking out pleadings for reason that they do not disclose any reasonable cause of action are the only ones which ought not to be supported factually, that is to say, by way of Affidavit. Any other application which is of the nature as the instant one should be supported by an Affidavit because the court has to be given the factual basis for it.

23. In the instant case, there was no Affidavit in support of the application, whether it was sworn on the same date or earlier and whether it was filed separately or with the application. Learned counsel must have presumed that having filed the application dated November 30, 2022 and amended it subsequently, on January 06, 2022, the Affidavit in support of the earlier application would be in support of the latter application. With due respect, that cannot be. There cannot, in law be a 'transplant' of an Affidavit of another application to another. I have cautiously used the term "transplant" in order to depict a better picture of what the court was called upon to do in the instant application. That was akin to advanced medical practice of transplants of body organs.

24. Herein, the applicant wished the court to 'remove' the Affidavit sworn on November 30, 2021 in support of the application sworn on that date and use it to support the instant application. Well, that is a difficult thing for this court to do. In any event, I have taken time to research on whether there exists a law that permits that and I am fallen short of getting one.

25. The closest I came to in situations where a party may overlook a legal requirement and 'escape' falling into a pit of destruction or, put it plainly, the court fails to reject his/her step was where the *Constitution*

of Kenya calls on courts not to resolve disputes or matters on technicalities but substantively. However, I did the best I could to satisfy myself as to whether such a fundamental error or mistake is a technicality or not. I was fully satisfied that this was not a mere technicality but a serious omission which goes to both the procedural and substantive content of the application dated January 06, 2022. Thus, the application of article 159(2)(d) of the *Constitution* cannot cure the defect. It cannot permit this court to carry out transplants of facts and evidence in respect of different issues to the ones before it. To do so would breed a practice of law which permits disorder and lack of proper reason.

26. Having found that the instant application was not supported by any Affidavit, the issue left of me to determine is whether the grounds in support of it are of law or fact. In my view, as to whether the applicant knew or did not know of the material date the suit was dismissed for want of prosecution, that is a fact which ought to have been placed before the court. That is the similar point about whether or not he is desirous of proceeding with the instant suit or not.

27. Lastly, this court is left to determine what then, in absence of a replying affidavit to be replied to, becomes of the Replying Affidavit which was sworn by the defendant on October 3, 2022 and filed on October 14, 2022. This court appreciates the content of the Affidavit by Edward Livoi. However, it cannot base the deposition therein to determine the instant application since that answer was in relation to the application dated November 30, 2021. That application was not before me for determination. It therefore goes without saying that the contents of the Further Affidavit, sworn on November 21, 2022 and filed the same date too cannot be used to determine the factual basis of the instant application. What both parties did on the two occasions they filed the Relying Affidavit and Further Affidavit was to deal with an application which was abandoned and not before the court for hearing. Thus, the application dated January 06, 2022 is not proper and ought to be dismissed for want of factual support, which facts have neither been proven nor tested.

(b) Whether the application is merited

28. The application dated January 06, 2022 was brought under order 12 rule 7 and order 17 rule 17(2)(2) of the Civil Procedure Rules. It was also based on section 3A of the *Civil Procedure Act*. Section 3A of the Act is on the inherent powers of this court to make any orders as it may deem fit for the ends of justice to be met and/or to avoid the abuse of the process of the court.

29. Order 12 Rule 7 provides that "where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just." The provision contemplates that the applicant explains to the satisfaction of the court why his suit was dismissed and that must be by way of Affidavit in support of the application. Absent of that the application fails.

30. Order 17 rule 17(2)(2) does not exist in law. The provision which exists that may be close to what the applicant had in mind is order 17 Rule 2 (2) of the Civil Procedure Rules. The provision is to the effect that where cause is shown to the satisfaction of the court as to why the suit should not be dismissed for want of prosecution where no step has been taken for one year previous to the issuance of the notice, the court may make such orders as it thinks fit as to the hearing of the suit. Whether the provision is the one the applicant had in mind or another, this court is of the view that it is not applicable in the instant application. The application is not about the plaintiff showing cause why the suit should not be dismissed, that he failed to do on November 19, 2019. It is water under the bridge.

31. Thus, turning to the Notice of Motion before me, I have found out in the preceding paragraphs that the application dated January 06, 2019 was not supported by any facts what could bring it within the provisions of law. For that reason, I find that the application is unmerited.

(c) What orders to issue and who to bear costs

32. This court has arrived at the conclusion that the instant application does not have any merit. Therefore, the unavoidable step to take is to dismiss it in entirety. And since costs follow the event, the application having been lost and the respondent having been brought to court in such proceedings that have been lost, the applicant will bear the costs of the application.

33. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 6TH DAY OF FEBRUARY 2023

HON DR *IUR* FRED NYAGAKA

JUDGE, ELC KITALE