Mungatana v Standard Limited & 3 others (Civil Case 1317 of 2005)
[2025] KEHC 137 (KLR) (Civ) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 137 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 1317 OF 2005

CW MEOLI, J

JANUARY 16, 2025

BETWEEN

HON DANSON MUNGATANA ..... PLAINTIFF

AND

THE STANDARD LIMITED ..... 1ST DEFENDANT

TOM MSHINDI ..... 2ND DEFENDANT

KWENDO OPANGA ..... 3RD DEFENDANT

CHAACHA MWITA ..... 4TH DEFENDANT

RULING

1. The Notice of Motion dated 20.11.2024 (the Motion) by the Plaintiff Hon. Danson Mungatana (hereafter the Applicant) is seeking to set aside the dismissal order made by this court on 20.03.2024 and reinstatement of the Applicant's suit. It is premised on the grounds laid out on its face and the affidavit of the Applicant's advocate Onesmus Mwangi. The Motion is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Articles 50 and 159(2)(d) of *the Constitution*.

2. The thrust of the supporting affidavit is that on 24.10.2023 the Applicant was directed to prosecute the suit by 29.02.2024 failing which it would stand dismissed and to file and serve his relevant witness statements within a period of seven (7) days. Equally, The Standard Limited, Tom Mshindi, Kwendo Opanga and Chaacha Mwita (hereafter the 1st, 2nd, 3rd and 4th Respondents) were directed to file their list and bundle of documents within 14 days. That on his part, the Applicant fully complied with the said directions. However, his attempts to obtain a hearing date from the court registry failed, as allegedly, the court file could not be traced.

3. That subsequently, the Applicant's advocate filed an application dated 25.01.2024 seeking extension of the timelines in the order made on 24.10.2024, upon which the court gave directions for the parties to appear before it on 14.02.2024 for directions but the court was not sitting. And that the matter was therefore rescheduled to 11.03.2024 and subsequently to 20.03.2024 when the Applicant's advocate was informed that the suit stood dismissed for want of prosecution, pursuant to the order of 24.10.2023.

4. Asserting that the Applicant was keen on the progress and prosecution of the suit, counsel states that he will suffer grave prejudice if condemned unheard. And adding that the Respondents do not stand to be prejudiced since they will have a chance to defend the suit, in any event.

5. The Motion by filing Grounds of Opposition dated 11.12.2024 and filed in the 1st Respondent's name although all four (4) Respondents were represented by the same firm of advocates. The court will therefore deem the grounds as the Respondents' joint response to the Motion. The grounds are to the following effect: -

> " 1. That the Application as drawn and filed is bad in law, frivolous, vexatious and is an abuse of the process of this Honourable Court and the Respondent hereby gives notice that it shall seek to strike it out in limine.
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> 2. That the Plaintiff/Applicant failed to comply with the express directions of this Honourable Court issued on 24th October 2023, which required the matter to be prosecuted by 29th February 2024, failing which it would stand dismissed. The Plaintiff/Applicant's non-compliance demonstrates a lack of diligence and respect for the judicial process, and no sufficient explanation has been provided for this failure.
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> 3. That the application to reinstate the suit, dated 20th November 2024, was filed over ten months after the court's directive, and the Plaintiff/Applicant's explanation of difficulties in obtaining a hearing date due to the file being untraceable is unsubstantiated and insufficient to justify their inaction.
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> 4. That the Plaintiff/Applicant has failed to demonstrate sufficient cause for the reinstatement of the suit as required under the law. The application does not meet the conditions for review or reinstatement, including the discovery of new and important matter, an error apparent on the face of the record, or any other sufficient reason under Order 45 Rule 1 of the Civil Procedure Rules.
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> 5. That the Plaintiff/Applicant has exhibited a consistent history of indolence in prosecuting this matter, as evidenced by their delays in filing requisite applications and failing to pursue hearings within the timelines provided by the court.
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> 6. That reinstating the suit at this stage would result in undue prejudice to the Defendants/Respondents, who have been subjected to prolonged litigation since the inception of this matter. The delays have caused unnecessary financial, mental, and emotional strain on the Defendants/Respondents.
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> 7. That the Plaintiff/Applicant's assertion that they have been actively following up on the matter is contradicted by their failure to prosecute the case within the timelines set by the court. Their claim of having an arguable case with higher chances of success is speculative and unsupported by evidence.

8. That reinstating the suit in the absence of compliance with valid court orders undermines the authority of this Honourable Court and sets a dangerous precedent that encourages litigants to disregard judicial directions, thereby violating public policy and judicial integrity.

9. That the Plaintiff/Applicant has failed to comply with the mandatory procedural requirements for the filing and prosecution of their application, rendering the application defective and without merit.

10. That the Plaintiff/Applicant's explanation regarding the court not sitting on 14th February 2024 and 11th March 2024 does not absolve them of their responsibility to diligently pursue the matter, particularly since the orders issued on 24th October 2023 were explicit and self-executing.

11. That the interests of justice demand that court orders be obeyed. Reinstating the suit would defeat the purpose of the court's timelines, create unnecessary delays, and unduly prejudice the Defendants/Respondents.

12. That the Application is an abuse of Court process and deserves only an Order of dismissal with costs payable by the Applicant. (sic)

6. When the Motion came up in court on 9.12.2024 it was the concurrence by the parties that the same be determined on the basis of the affidavit evidence and response on record.

7. Thus, the court has considered the rival material on record. The Motion essentially seeks to aside the dismissal order of 20.03.2024 and reinstatement of the suit. The Motion was brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 51, Rule 1 of the Civil Procedure Rules (CPR) and Articles 50 and 159(2)(d) of *the Constitution*. While Sections 1A, 1B and 3A provide for the overriding objectives of the CPA, and the court's inherent power, respectively, Order 51, Rule 1 of the CPR provides a general application procedure where no specific procedure is prescribed by the Rules. Articles 50 and 159 of *the Constitution* guarantee the right to a fair hearing and the duty of the court to uphold substantive justice above procedural technicalities, respectively.

8. Section 3A (supra) reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court." The Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR stated concerning the provision that:

> " Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that
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> > "Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

9. The Supreme Court went further in Board of Governors, Moi High School Kabarak and another v Malcolm Bell [2013] eKLR, to add the following:

> " Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

10. Evidently therefore, the court's power to grant or refuse to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. In addition, the onus is on an applicant to tender credible material upon which the court can be persuaded to exercise its discretion in his or her favor. In the case of Shah v Mbogo & Another [1967] E.A 116 the rationale for the discretion was spelt out in the following manner:

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

11. The principles enunciated in Shah v Mbogo (supra) were further amplified by the court in Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein apply with equal force in this matter.

12. The court having perused the record and more particularly, the key events leading up to the subject dismissal order and notes the following. The Applicant instituted the suit in 2005 via the plaint dated 31.10.2005 seeking damages against the Respondents for defamation. The Respondents subsequently entered appearance and filed their joint statement of defence dated 13.12.2005, therein denying the key averments in the plaint and liability. Not much happened thereafter by way of compliance with Order 11 CPR.

13. Eventually the suit was listed for pre-trial directions on 24.11.2011 when the parties were directed to file and serve their respective pre-trial documents. Subsequently on 27.01.2012 the suit was certified ready for hearing. Nevertheless, it is apparent from the record that the hearing scheduled for 26.06.2012 collapsed due to an adjournment sought by the Applicant's advocate, and intimation by the parties to explore an out-of-court settlement.

14. Evidently, no settlement was reached, and the last substantive action recorded in the matter was on 15.06.2017 when the parties were given a mention date for 19.07.2017 for purposes of recording a consent in that regard. However, on the said 19.07.2017 none of the parties were in attendance, nor any further progressive steps taken for the next six years. Resultantly, a notice to show cause (NTSC) was issued by the court on 10.05.2023. The NTSC required the parties to attend court on 30.06.2023 to show cause as to why the suit should not be dismissed for want of prosecution.

15. When the NTSC eventually came up on 14.07.2023 counsel for the Applicant successfully sought that the NTSC be "vacated", the court however imposing a condition requiring the Applicant to prosecute his suit within 60 days, failing which it would stand dismissed. There was no compliance and subsequently this court on 24.10.2023 extended the time and ordered that the suit be fully prosecuted by 29.02.2024 failing which it would automatically stand dismissed for want of prosecution. The court

further directed the Applicant to comply with the pre-trial directions under Order 11 of the CPR within seven (7) days.

16. The record shows that the matter did not proceed on 24.02.2024, the first date fixed by the Applicant for hearing, as the court was not sitting, or on 11.03.2024 (a date past the stipulated period) as the suit had not been listed. Nevertheless, when the matter was next listed before this court on 20.03.2024 the court upon referring to its earlier orders made on 24.10.2023 formally pronounced the suit automatically dismissed for want of prosecution pursuant to non- compliance with the said order. The said order gave rise to the instant Motion.

17. From the affidavit material supporting the Motion, the primary explanation given for failure and delay on the part of the Applicant in prosecuting his suit within the stipulated timelines is that his advocate could not obtain an early hearing date from the court registry. Allegedly because the court file could not be traced. The Applicant's advocate further explained that he thereafter filed an application dated 25.01.2024 seeking extension of the period in the order issued on 24.10.2023 but the same was not heard.

18. The Respondents by their grounds of opposition challenged the above allegations and faulted the Applicant for the delay in prosecution of the suit. Pointing out that allegations about the court file going missing and impeding the Applicant's efforts at obtaining a hearing date, were unsubstantiated. And that the Applicant has generally shown indolence in the matter, failing to take diligent steps in prosecuting the suit and adding that there was inordinate delay in moving the court since the order of 24.10.2023 was made.

19. Upon review of the record, the court observed that despite the limited time frame granted on 24.10.2023 for the prosecution of the suit, the Applicant's advocate vide two letters to the registry dated 18.12.2023 and 23.01.2024 requested not a hearing date but a date for directions. Notwithstanding the fact that the suit had long been certified ready for hearing on 27.01.2012 and further directions on filing of witness statements given on 24.10.2023. By the second letter, the advocate purported that the court file had only been retrieved on the said date, a position the Deputy Registrar (DR)refuted as per her handwritten endorsement on the said letter.

20. There is no plausible explanation for this conduct on the part of counsel, other than lethargy and indolence. No explanation has been given as to why the Applicant and/or his advocates waited until 18.12.2023 to request for a date, and not even for hearing but for the mention of the suit. Indeed, no evidence was tendered to demonstrate that contrary to the DR's endorsement on the face of the advocate's second letter, the court file had indeed been missing. And nothing on the record of supports such allegations. The next action by the Applicant involved the filing of the motion dated 25.01.2024, a month before the lapse of the time allowed for the prosecution of the suit; an action that in the court's view amounts to too little too late, coming after the initial floundering requests for mention dates.

21. Thus, the Applicant was less than candid with the court and his counsel's depositions are essentially an attempt at misleading the court on the true position in the matter. Apart from the one occasion when a hearing date which was in any event only days from the lapse of the prosecution period granted on 24.10.2023 collapsed, other reasons offered by the Applicant to explain the delay in prosecuting the suit are unsupported.

22. Besides, it is apparent from the record that no progressive steps had had taken place in the matter since 15.06.2017 when the court was told that the parties were engaged in an out-of-court settlement. Which fact demonstrates the Applicant's lack of interest in the matter through abandonment of the suit almost six years, until the NTSC of 14.07.2023. No credible explanation has been given for this dormancy period of six (6) years which constitutes inordinate delay. Not to mention the further delay

of over eight (8) months between 20.03.2024 being the date when the court formalized the dismissal for default of its earlier order of 24.10.2023 and the 20.11.2014, being the date of the instant Motion. Equally, the said delay has not been explained.

23. In the court's considered view, the Applicant has not demonstrated any keen interest or seriousness in prosecuting the suit since its inception. The suit was filed nearly 20 years ago, and opportunities granted to the Applicant to prosecute it, were squandered. He thus cannot be heard to plead that he will be condemned unheard if the present application is denied. While a plaintiff is entitled to be heard on the merits of his or her case, it would be a travesty of justice to extend that right to accommodate unmitigated indolence on the part of such plaintiff, all at the expense of the defendant dragged to court, and who is similarly entitled to an expedited determination of the case against him. Justice indeed cuts both ways.

24. In the present case, no explanation at all has been offered in the Applicant's affidavit material for the inordinate overall delay in the prosecution of the suit for the past almost twenty years, the Applicant merely concerting his efforts around the most recent events in the suit.

25. Consequently, the court is of the view that no reasonable or satisfactory explanation has been given by the Applicant for the inordinate delay in prosecuting his suit. Additionally, the court can well envisage the apprehension by the Respondents that re-opening the matter will work prejudice against them given the passage of time as well as the nature of the case. As held in Ivita v Kyumbu [1984] KLR 441, extended delay impacts adversely on the possibility of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. This decision must be read and applied through the prism of the overriding objective introduced more recently through Section 1A and 1B of the CPA and the present reality that courts are weighed down by the exponential increase in litigation. Hence, the courts can no longer afford any party the luxury of prosecuting their case at their leisure.

26. Thus, in the court's view, to allow the reinstatement of the suit in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*. The Court of Appeal stated the following in Karuturi Networks Ltd & Anor v Daly & Figgis Advocates, Civil Appl. NAI. 293/09 regarding the overriding objective that:

> " 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."

27. In the result, the court finds that the Notice of Motion dated 20.11.2024 is without merit. The Motion is hereby dismissed, with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF JANUARY 2025.

C. MEOLI

JUDGE

In the presence of

For the Applicant:

For the Respondents:

C/A: Erick