Ndirangu t/a Express Services Agency v Nairobi Star Publications Limited (Civil Suit 293 of 2010) [2025] KEHC 98 (KLR) (Civ) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 98 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 293 OF 2010

CW MEOLI, J

JANUARY 16, 2025

BETWEEN

PETER MAINA NDIRANGU T/A EXPRESS SERVICES AGENCY ... PLAINTIFF

AND

NAIROBI STAR PUBLICATIONS LIMITED ..... DEFENDANT

RULING

1. For determination is the motion dated April 24, 2024 by Peter Maina Ndirangu t/a Express Services Agency, the Plaintiff, seeking inter alia that the Court be pleased to set aside the order issued on 26.02.2024 dismissing the Plaintiff's motion dated 19.09.2023 for non-attendance and that the Court be pleased to reinstate the said motion for hearing and determination on merit. The motion is expressed to be brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 12 Rule 7 of the Civil Procedure Rules (CPR) among others. And is premised on grounds on its face, as amplified in the supporting affidavit sworn by Kiarie Mungai, counsel having conduct of the matter on behalf of the Plaintiff.

2. The gist of his affidavit is that the Plaintiff filed an application dated 19.09.2023 seeking to reinstate the suit herein that was dismissed by this Court but the said application for reinstatement was dismissed on 26.02.2024 for non-attendance. Asserting that there was no fault on the part of the Plaintiff, he states that failure to attend Court was not deliberate but due to lengthy waiting in the lobby for admission to the virtual Court session on the date in question. He maintains that the Plaintiff has always been keen on prosecuting the dismissed motion and therefore is deserving of the discretion of the court. He goes on to assert that the motion has been made without undue delay and it is in the interest of justice that the dismissed motion is reinstated for hearing on its merit. Further stating that a party ought not to be shut out from being heard unless such party deliberately seeks to undermine or obstruct the

course of justice. In conclusion he states that Nairobi Star Publications Ltd, the Defendant, will not be prejudiced if the Court sets aside its order made on 26.02.2024.

3. The Defendant opposes the motion by way of a replying affidavit dated 29.11.2024, sworn by Mercy Gichoya counsel on record for the Defendant. She assails the competency of the motion by arguing that Messrs. Kiarie Mungai & Associates, who served her with a hearing notice in respect of the instant motion and purports to be on record for the Plaintiff, are not properly on record having failed to obtain a Court order or consent from Messrs. Nchogu Omwanza & Nyasimi Advocates allowing them to come on record pursuant to Order 9 Rule 9 of the CPR. Hence the motion is being prosecuted by a stranger to the proceedings.

4. Concerning the merits of the motion she urges the court to note the Plaintiff's conduct throughout the proceedings, especially the fact that prior to dismissal of the Plaintiff's motion the suit had earlier been dismissed on 17.02.2014 and subsequently reinstated on application. And was again listed for Notice to Show Cause (NTSC) pursuant to which on 18.03.2022 a ruling was delivered directing the Plaintiff to set down the matter for hearing within 120 days. However, the suit was again dismissed for non-attendance on 21.06.2023, leading to the filing of the motion dated 19.09.2023 that was equally dismissed for non-attendance.

5. Stating that it is the duty of the Plaintiff to attend court and to prosecute the suit filed over fourteen (14) years ago and dismissed more than once for non-attendance by the Plaintiff and or his representative. That in view of the foregoing it is evident that the Plaintiff is not interested in prosecuting the matter and the motion if not an afterthought is an abuse of the Court process. In conclusion, she states that the orders sought herein would be greatly prejudicial to the Defendant who has always been ready and willing to progress the matter therefore the motion ought to be dismissed with costs.

6. In rejoinder by way of a further affidavit, counsel for the Plaintiff clarifies that he was previously working for Messrs. Nchogu Omwanza & Nyasimi Advocates. But currently practicing in the name and style of Messrs. Kiarie Mungai & Associates. That he was at all material times handling the instant matter while working at Messrs. Nchogu Omwanza & Nyasimi Advocates and upon leaving the said firm it was agreed that he would continue handling the matter on behalf of the said firm but not as Messrs. Kiarie Mungai & Associates. Further stating that the notice served upon the Defendant's counsel indicating the latter firm was in error and that from the record no pleadings have been drawn and filed by the said firm. Therefore, for all intents and purposes Messrs. Nchogu Omwanza & Nyasimi Advocates are still on record for the Plaintiff.

7. He reiterated that the dismissal of the motion was occasioned by his delayed admission to the virtual platform and that despite having later logged in and expressed his frustrations to the Court, he was advised to move the court formally. Moreover that, the Plaintiff has not been indolent in prosecuting the suit. He sums up his deposition by stating that the motion is an illustration of the Plaintiff's eagerness to have the matter heard and asserted that it is in the interest of justice that it be allowed.

8. At the hearing of the motion, it was agreed that the Plaintiff's motion be determined on the basis of the respective affidavit material on record, of which the Court has duly considered.

9. Before addressing the merits, the Court has been called upon to determine the challenge to the competency of the motion that is premised on the contention that Messrs. Kiarie Mungai & Associates,

are not properly on record in the matter, having failed to comply with the provisions of Order 9 Rule 9 of the CPR. The latter provision provides that: -

> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

10. Here, it is undisputed that, as matters stand, the suit still stands dismissed pursuant to the dismissal order issued on 21.06.2023 dismissing the Plaintiff's suit and subsequent dismissal of the motion dated 19.09.2023, seeking to reinstate the dismissed suit on 26.02.2024. Thus, for all intents and purposes, the Court's order issued on 26.02.2024 concluded the matter in a manner equivalent to a situation where judgment is delivered. Thus, requiring of any new counsel subsequently coming on record to seek leave of the court and or obtain a consent to come on record from the previous advocate. Kiarie Mungai, by his further affidavit has maintained that no pleadings and or notice of change has been filed by Messrs. Kiarie Mungai & Associates therefore it can reasonably be construed that Messrs. Nchogu Omwanza & Nyasimi Advocates, are still on record for the Plaintiff. He further clarifies that any notice(s) served upon the Defendant's counsel bearing the name Messrs. Kiarie Mungai & Associates was erroneous on his part.

11. With the above in reserve, the Court has reviewed the record and Case Tracking System (CTS) and can confirm that no pleadings and or notice of change has been filed by the Messrs. Kiarie Mungai & Associates. Both the motion and further affidavit have been filed by Messrs. Nchogu Omwanza & Nyasimi Advocates. Hence the Court is inclined to accept counsel's explanation that Messrs. Kiarie Mungai & Associates is not on record for the Plaintiff. Further save for the Defendant's blanket contestation on the issue, no material has been placed before this Court to demonstrate that Messrs. Kiarie Mungai & Associates has indeed attempted and or taken over the matter from Messrs. Nchogu Omwanza & Nyasimi Advocates. Consequently, it is this Court's reasoned deduction that the Defendant's objection pertaining to compliance with Order 9 Rule 9 of the CPR is not well taken.

12. Moving on to the substance of the motion, the Court must determine whether it ought to set aside the ex parte proceedings, directions and or order issued on 26.02.2024. The Plaintiffs' motion is expressed to be brought inter alia under Sections 3A of the CPA and Order 12 Rule 7 of the CPR, the latter whose application in respect of reinstatement of an application as herein sought appears more implicit than direct. More relevant would be the former provision which specifically 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" and Order 51 Rule 15 CPR which provides for applications to set aside ex parte orders.

13. That being said, it is settled that the power to grant or refusal 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. The rationale for the discretion to set aside conferred upon the court was spelt out in the case of Shah –vs- Mbogo and Another [1967] E.A 116:

> " 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."

14. The recorded events leading to the order issued on 26.02.2024 are undisputed. On 25.01.2024, the Court scheduled the Plaintiff's motion dated 19.09.2023 for hearing on 26.02.2024. On the said date due to non-appearance by the Plaintiff and or his counsel, Ongeri, J. made the following order: -

> " 1. The application dated 19/9/2023 was coming up for hearing.
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> 2. There is no appearance by the Applicant.
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> 3. The said application is dismissed for want of prosecution with no orders as to costs." (sic)

15. It is on the premise of the said order that the Plaintiff moved this Court via the present application. In the case of Wachira Karani v Bildad Wachira [2015] KEHC 1850 (KLR), Mativo, J. (as he then was) discussed the applicable principles and the legal threshold for the court's exercises of its discretion in favour of an applicant seeking to set aside ex parte proceedings. Stating inter alia that:

> " Also relevant is the case of Ongom vs Owota[8] where the court held inter alia that the court must be satisfied about one of the two things namely:-
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> (a) either that the defendant was not properly served with summons;
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> (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.
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> It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-
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> "Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.
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> Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"
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> The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others[9] discussing what constitutes sufficient cause had this to say:-
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> "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant"
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> In Daphene Parry vs Murray Alexander Carson, the court had the following to say: -

> ‘Though the court should no ‘doubt’ give a liberal interpretation to the words ‘sufficient cause,’ its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,.....” (sic)

16. The Court concluded by stating that:

> “.....I again repeat the question what does the phrase "sufficient cause" mean. The Supreme Court of India in the case of Parimal vs Veena observed that:-
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> "Sufficient cause" is an expression which has been used in a large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the viewpoint of a reasonable standard of a curious man. In this context, "sufficient cause" means that a party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." ...(sic)

17. Similarly, in this case, it was imperative for the Plaintiff to demonstrate sufficient cause to unlock the Court’s exercise of judicial discretion. At the outset, on 21.06.2023 Ongeri, J., dismissed the Plaintiff’s suit, the second time the suit was dismissed, for want of prosecution as the Plaintiff was absent. As a result of the said order, the Plaintiff on 19.09.2023 filed a motion of even date seeking among other orders the setting aside of this Court’s order issued on 21.06.2023. As earlier captured, on 25.01.2024, this Court scheduled the said motion for hearing on 26.02.2024, and because the Plaintiff and or his counsel failed to appear on the said date, the motion was dismissed by this Court.

18. By the Plaintiff’s affidavit material, a solitary explanation has been advanced for the said non-attendance. Namely, prolonged waiting in the lobby for admission to the virtual Court session counsel on the said date. Counsel has asserted that the failure was not of the Plaintiff’s or his own making, adding that the Plaintiff has always been keen on prosecuting the dismissed motion and therefore is deserving of the exercise of the court’s discretion. The Defendant’s riposte is that this Court ought to examine the Plaintiff’s conduct throughout the proceedings herein as being dilatory given that this is not the first time the suit has been dismissed. Further, it is the duty of the Plaintiff to ensure that his suit is prosecuted and or attended to by counsel and emphasizing that the suit was filed over fourteen (14) years ago. In her view, the Plaintiff is not interested in prosecuting the matter and the instant motion if not an afterthought is an abuse of the Court process.

19. As earlier observed, setting aside a dismissal order involves exercise of discretion. The Court of Appeal in Daqare Transporters Limited v Chevron Kenya Limited [2020] eKLR in considering the discretion of the Court under the provisions of Order 12 Rule 7 of the CPR restated the principle spelt out by its predecessor in Shah v Mbogo (supra), namely, that:

> “The discretion under Order 12 Rule 7 is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable.....” As concerns the Plaintiff’s explanation, the Court takes judicial notice of the vagaries of technology. However, the specific reason that counsel was not admitted to the session and was left waiting in the

lobby leading to dismissal of the motion seems unsupported by the record and history of the matter.

20. First, there, is no indication from the record of the day's proceedings before Ongeri, J., that counsel did eventually manage to log in and address the court concerning his earlier difficulties in joining the virtual platform, as claimed in his affidavit. And even if that was the case, it is inexplicable that it was not until 25.04.2024 that the Plaintiff moved the Court vide the present motion, as no explanation has been offered for the two (2) months delay. Thirdly, this was not the first time the Plaintiff and or his counsel failed to attend court, or to progress his suit, as well demonstrated in the replying affidavit and record. From the record, the suit had been dismissed for want of prosecution in 2014 after a delay of 4 years, and reinstated eight years later vide a ruling delivered on 18.03.2022 which also directed the Plaintiff to set down the matter for hearing within 120 days. However, the suit remained pending, and was again dismissed for non-attendance over a year later on 21.06.2023 for non-attendance, leading to the filing of the motion dated 19.09.2023 some three months later that was equally dismissed for non-attendance in February 2024.

21. An application of this nature involves discretion, hence good and sufficient cause must be shown and where delay is manifest, it must be satisfactorily explained before the Court can exercise its discretion. Undoubtedly, the total delay in this matter is inordinate and unexplained in any event. While keen to absolve his client from any blame, counsel deposes that he had made an explanation to the Court when he eventually managed to address Court on 26.02.2024. However, the delay in presenting the motion when seen in the light of the history of the matter does not portray the plaintiff or his counsel as acting with diligence. Indeed, the Plaintiff was content to leave the task of demonstrating his alleged keenness in the matter to his counsel rather than swear his own affidavit. The Plaintiff was ultimately responsible for ensuring the expeditious progress of the suit.

22. The Court of Appeal in the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR held that:

> " While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

23. Ex facie, the history of the matter casts the Plaintiff to be a dilatory litigant who presumes on the court. His counsel attempted to lay the blame for his non-attendance on the Court while being reticent on the history of delay and his own conduct in prosecuting the matter. The Plaintiff was granted several opportunities to be heard over 13 years when the suit was pending, but which he squandered. Parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the CPA. Moreover, cases belong to parties and ultimately, the parties are responsible to ensure that their cases are progressed in a timely fashion.

24. 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.

25. In Karuturi Networks Limited & another v Daly & Figgis Advocates [2009] KECA 8 (KLR) the Court of Appeal had the following to say concerning the overriding objective in Section 1A and 1B of the CPA: -

> " 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".

26. While Plaintiff is entitled to be heard on the merits of his motion and case, he squandered the opportunity through lethargy and indolence on his part. The Defendant is equally entitled to a speedy resolution of the suit to which it was dragged. It would be a travesty of justice and prejudicial in the circumstances of the case to make the Respondent pay the price for the Plaintiff's persistent blundering and indifferent conduct that borders on negligence. The suit was filed almost fourteen (14) years ago and continued delay not only works prejudice against the Defendant in terms of legal costs, inter alia, but also progressively diminishes the possibility of a fair trial being eventually conducted if the suit were reinstated. In my considered and firm view, no sufficient cause has been shown to justify the Court's exercise of its discretion in the Plaintiff's favour. The justice of the matter lies in bringing closure to the matter by dismissing the motion dated April 24, 2024, with costs to the Defendant. It is so ordered.

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

C. MEOLI

JUDGE

In the presence of

For the Plaintiff:

For the Defendant:

C/A: Erick