



**Miguna v Star Publication Ltd & 5 others (Civil Suit 137 of 2016)
[2025] KEHC 4270 (KLR) (Civ) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 137 OF 2016**

**JN MULWA, J
APRIL 3, 2025**

BETWEEN

MIGUNA MIGUNA PLAINTIFF

AND

THE STAR PUBLICATION LTD 1ST DEFENDANT

THE STAR NEWSPAPER 2ND DEFENDANT

RADIO AFRICA LTD 3RD DEFENDANT

WILLIAM PIKE 4TH DEFENDANT

PATRICK VIDIJA 5TH DEFENDANT

WAMBUGU KANYI 6TH DEFENDANT

RULING

1. This ruling is in respect of the motion dated 19/08/2024 filed by Miguna Miguna (the Applicant) against The Star Publication Ltd, The Star Newspaper, Radio Africa Ltd, William Pike, Patrick Vidija and Wambugu Kanyi (hereafter the 1st, 2nd, 3rd, 4th, 5th, & 6th Respondents) pursuant to Section 1A, 1B & 3A of the Civil Procedure Act (CPA), Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules (CPR) seeking *inter alia* -;

1. Spent.
2. That this Honourable Court be pleased to set aside the orders made on 28/06/2024 dismissing the suit and any other subsequent order thereto be varied and or set aside.



3. In granting the above order, this Honourable Court consequently be pleased to reinstate the suit for hearing and set a mention date.
 4. This Honourable Court be pleased to grant any such other or further orders as may be appropriate
 5. Costs of the motion be provided for.
2. The motion is predicated on the grounds set out on its face and supported by the annexed Affidavit sworn by the Applicant, stating that before he could set down the suit for hearing, he was forcefully and unlawfully removed from Kenyan jurisdiction and exiled to Canada by the Government of Kenya in 2018; That it was in October 2022 that the new Kenyan Government Administration lifted the red alerts against him and accorded him a new passport that allowed him to travel back into the Country.
 3. Further the Applicant goes on to depose that he was never served with a Notice To Show Cause (NTSC) that led to the dismissal of his suit, adding that it was only in October 2023 that he was able to instruct erstwhile counsel to ascertain the status of the matter leading to taking out of a mention date thereafter prompting the Respondents to have the suit dismissed on 28/06/2024.
 4. It is the Applicant's further deposition that delay in prosecution of the suit was not deliberate as upon his return to the country he promptly took action upon which he learned of the dismissal of the suit and instructed present counsel to apply for reinstatement of the same. He summarizes by deposing that it is in the interest of justice that the motion is allowed. Urging that any prejudice visited on the Respondents can be cured through costs.
 5. The Respondents opposed the motion by a Replying Affidavit sworn by one Grace Wambui, head of legal at the 3rd Respondent, on grounds that when the matter came up for pre-trial directions on 11/04/2024 neither the Applicant nor counsel on record was present in Court; That on the latter date, it is only upon exhortation of their counsel on record that the matter was slated for NTSC on 28/05/2024 and later before a judge for the same on 28/06/2024 it was eventually dismissed, the Applicant having failed to show cause why the suit ought not to be dismissed, further adding that as at March 2020, the Chief Justice had issued practice directions on remote filing and Court attendances however the Applicant has failed to explain why he did not avail himself of the latter or take any steps upon arriving in the country in October 2022 therefore the motion lacks merit.
 6. In rejoinder by way of a supplementary affidavit, the Applicant deposed that he was not informed by his the erstwhile counsel that the matter was scheduled for pre-trial on 11/04/2024 and iterates that he was never served with the NTSC for 28/05/2024. In summation, he states that on accord of his erstwhile advocate's failure, he instructed his present counsel on record and that the instant motion has been made without inordinate delay.
 7. The motion was disposed of by way of written submissions.
- Issues for determination.
- a. Whether the Court should set aside its dismissal, orders issued on 28/06/2024 and consequently reinstate the Applicant's suit for hearing.
 - b. Who ought to bear the costs of the application?



Whether the Court should set aside its orders issued on 28/06/2024 and consequently reinstate the Applicant's suit.

8. As earlier noted, the Applicant's motion is premised on Sections 3A of the CPA alongside Order 12 Rule 7 of the *CPR*, the latter which specifically states that where 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.

It is trite that the 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.

9. 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 wherein it was observed that ;

“The discretion to set aside an ex-parte 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.”

10. Further, this Court concurs with Mativo, J (as he then was) in *Wachira Karani v Bildad Wachira* [2015] KEHC 1850 (KLR) wherein he distilled that for an applicant to succeed in setting aside ex parte proceedings “...the applicant is required to satisfy to the court that he had a good and sufficient cause” and added 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:-

“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."

11. On the quest to set aside this Court's order of 28/06/2024, this Court gathers from the record that since 2018 there was no activity in the matter up until the suit first came before the Deputy Registrar on 20/02/2024 and later on 11/04/2024 for pre-trial directions at the behest of the Applicant's erstwhile counsel. It can further be garnered that the Applicant's erstwhile counsel was in non-attendance on the latter date prompting the Respondents counsel to urge the Deputy Registrar to have the suit listed for NTSC on why it ought not to be dismissed on 28/05/2024. On the latter date the Deputy Registrar directed that the matter be placed before Majanja, J. on 28/06/2024, for purposes of the NTSC. Upon respective counsel appearing before this Court on the latter date, the Court directed and or ordered that:-

“No cause having been shown the suit is dismissed for want of prosecution with costs”.



12. As earlier observed, the discretion to set aside an ex-parte judgment or proceedings is intended to be exercised to avoid injustice or hardship however, sufficient cause has to be shown why the Court ought to exercise its discretion. Evidently, from the record, as at 28/06/2024, the Applicant was represented by present counsel who came on record on 26/06/2024 going by the Notice of Change of Advocates on record. Given that the matter was coming up for NTSC, the Applicant was required on 28/06/2024 to place before the Court detailed and cogent reasons by way of affidavit material on why the Court ought not to dismiss the suit, a good practice that has developed over time.
13. It would appear that as at 28/6/2024 the Applicant failed to deflect the NTSC by way of any affidavit material whereas counsel appearing before Court on the said date did not offer any cogent reasons on why the suit ought not to be dismissed thus leading to the dismissal order.
14. The Applicant as 28/05/2024, the Applicant's erstwhile counsel was alive to the fact that the matter was slated for NTSC and up until present counsel came on record and attended to the NTSC, it can be reasonably construed that the Applicant was given an opportunity to be heard in their bid to salvage the suit however failed to take up the prospect. Evidently, the question of service is a non-issue as the Applicant's counsel was present in the country when the NTSC came up for hearing a consequence of which no sufficient cause has been demonstrated as to why this Court ought to set aside its order dismissing the suit on 28/06/2024. While the Court takes judicial notice of the events that plagued the Applicant between 2018 to 2022, upon his return, the pertinent events in respect of the prayer for setting aside were between 11/04/2024 and 28/06/2024, to wit, the Applicant ought to have given a cogent explanation why the suit ought not to have been dismissed. Nevertheless, the reason advanced in his supporting affidavit pertaining to the challenges he faced between 2018 to 2024 towards prosecution of the suit, would have been useful to deflect the NTSC had he attended to the NTSC during the hearing. At this juncture those reasons appear to have come too late in the day, a consequence of which the Court is not convinced to exercise its discretion to set aside the order made on 28/06/2024.
15. While this Court is alive to the Applicant's right to be heard on the merits of his suit, he squandered the opportunity when he failed to answer to the NTSC, yet he had counsel on record and additionally he was present in the country since 2022. Further, corollary to the Applicant's right, is the Respondents right to have the suit they were dragged into determined expeditiously. In light of the finding on setting aside, it would be moot to consider the question of whether the Court ought to reinstate the suit on accord of the forestated.
16. As is, no accident, inadvertence or excusable mistake or error has been demonstrated by the Applicant in respect of the NTSC and resultant proceedings of 28/06/2024.
17. The upshot is that the Applicant's Motion dated 19/8/2024 is dismissed with costs.

DELIVERED, DATED AND SIGNED IN NAIROBI BEFORE THIS COURT ON 3RD APRIL, 2025.

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JANET MULWA.

JUDGE

