Sujal Construction Ltd v Medicross Kenya Ltd (Civil Appeal E279 of 2023) [2025] KEHC 4478 (KLR) (Civ) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E279 OF 2023

LP KASSAN, J

APRIL 8, 2025

BETWEEN

SUJAL CONSTRUCTION LTD ..... APPELLANT

AND

MEDICROSS KENYA LTD ..... RESPONDENT

(Being an appeal against the Ruling of the Hon. S.A. Opande (PM) delivered on 9th March, 2023 in Nairobi Milimani CMCC No. 1065 OF 2018)

JUDGMENT

1. This appeal emanates from the ruling delivered on 09/03/2023 by the lower Court in Nairobi Milimani CMCC No. 1065 OF 2018 (hereafter the lower Court suit). The germane history of the matter leading to the instant appeal is that Sujal Construction Ltd, (hereinafter the Appellant), the plaintiff before the lower Court, initiated suit by way of plaint as against Medicross Kenya Ltd, (hereinafter the Respondent), the defendant before the lower Court seeking inter alia special damages in the sum of Kshs.1,636,260/-, costs of the suit and interest on the former at Court's rate from date of filing suit until judgment.

2. Pursuant to an order of lower Court, the Respondent filed a defence denying the key averments in the plaint meanwhile contemporaneously filed a counter-claim seeking inter alia that the Appellant was in breach of contract, damages for breach of contract, set-off of Kshs. 650,000/- and costs of the suit and counterclaim.

3. On 17/08/2020, the suit came up for hearing before the trial Court however given the absence of the Appellant and or its counsel duly on record, the Court proceeded to dismiss the suit for want of prosecution.

4. The latter thus prompted the Appellant to move the lower Court vide a motion dated 20/12/2021 expressed to the brought among others pursuant to Section 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* (CPA), Order 9 Rule 9 and Order 12 Rule 7 of the Civil Procedure Rules (CPR) seeking inter alia that the honorable Court be pleased to set aside its orders dated 17/08/2020 dismissing the suit and to reinstate the same for hearing and final determination. The grounds on the face of the motion were amplified in the supporting affidavit sworn by Irene N. Shikuku, whose gist was that the suit was fixed for hearing on 17/11/2020 and service of the notice duly effected on the Respondent advocate. However, on the latter date the suit did not proceed as the matter was not listed in the days causelist. That on 11/08/2021 the Appellant's advocate drew a notice of change of advocates and concurrently sought a mention date for purposes of fixing a hearing date.

5. It was further deposed that efforts to procure a mention date for the suit was unsuccessful and a follow up with the lower Court registry on the issue of retrieval, was met with a response that file could not be traced. She goes on to depose that the Appellant's request to have the matter mapped on the Case Tracking System (CTS) took time however the same was only managed on November, 2021, to wit, it was discovered that the suit had come up for hearing on 17/08/2020 and was dismissed for want of prosecution. She deposes that it was an honest belief that the hearing of the matter was mis-diarized as 17/11/2020 instead of 17/08/2020 hence failure by the Appellant's advocate to attend Court on the latter date. That failure to attend Court was inadvertent whereas the Appellant has always been willing and ready to prosecute its case to its logical conclusion. She concluded by stating that the motion has been filed without unreasonable delay whereas any prejudice to the Respondent may be compensated by way of costs.

6. In retort the Respondent filed grounds of opposition whose essence was that the Appellant had failed to demonstrate that it had approached the Court at the earliest opportunity with a request for reinstatement; that the Appellant's inaction made it guilty of laches; that the Appellant had failed to provide sufficient reasons to have the decision dismissing the suit for want of prosecution set aside; and that it was in the interest of justice that the trial Court dismisses the motion with costs.

7. The Appellant's motion was disposed of by way of written submissions. By way of a ruling delivered on 09/03/2023, the trial Court found the Appellant's motion lacking in merit and proceeded to dismiss the same with costs.

8. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -

    1. The Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's Advocates' reason for non-attendance on the date the suit was dismissed and therefore arrived at a wrong decision in law in dismissing the Appellant's Application dated 21st December 2021.

    2. The Learned Trial Magistrate erred in law and in fact in failing to consider that the Appellant's advocates have actively sought to prosecute the suit in the subordinate court.

    3. The Learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's explanation for the delay in filing the Application dated 21st December 2021 hence arriving at a finding that was against the weight of the evidence.

    4. The Learned Trial Magistrate erred in law and in fact in finding that the fact that the Respondent was in court on the hearing date cannot excuse the Appellant's absence.

5. The Learned Magistrate erred in law in failing to consider and apply the express provisions of Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Articles 50(1) and 159(2)(d) of *the Constitution* of Kenya.

6. That the Learned Trial Magistrate erred in law in failing to exercise his discretion to avoid occasioning injustice to the Appellant due to an inadvertent or excusable mistake or error on the part of the Appellant's Advocates.

7. The Learned Trial Magistrate erred in fact and in law in failing to consider the triable issues raised by the Appellant, which merited a full hearing and determination of the Appellant's case.

8. The Learned Trial Magistrate erred in law by awarding costs to the Respondent herein." (sic)

9. Before this Court, directions were taken on disposal of the appeal by way of written submissions of which this Court has duly considered alongside the record of appeal, the pleadings before the lower Court as well as the submissions by the respective parties. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123 and Abok, James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.

10. The Appellant's motion before the lower Court was expressed to be brought inter alia pursuant to Section 3A of the CPA and Order 12 Rule 7 of the CPR. The trial Court in dismissing the Appellant's motion stated inter alia that-:

> " I have considered the application, the grounds of opposition and the rival submissions. If the hearing date of 17th August 2020 date was fixed by the Applicant and the applicant genuinely failed to diarize the same, I find no basis for having taken over one year to make the current application. The fact that the defendants were in Court on the said date cannot excuse the Applicant's absence. The application dated 20th December 2021 is too late in the day and the same is disallowed as it is an abuse of the Court process. Costs shall be borne to the Plaintiff." (sic)

11. As earlier captured in this judgment, the Appellant's suit was dismissed for want of prosecution upon the Appellant and or its counsel failure to attend to the matter when it came up for hearing. In seeking to have the latter order set aside, the Appellant relied 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."

12. That 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."

13. The Appellant while calling to aid the decision in Fatuma Hamisi Mwarasi v Orini Limited, Reefview Investments Ltd & 3 others [2020] eKLR, Ibrahim Mohamed Leo & Another v Hussein Mohamed Leo & 4 others [2020] eKLR and Wachira Karani v Bildad Wachira [2016] eKLR submitted that failure to attend Court was due to misdiarization which mistake of counsel ought not be visited on the innocent litigant. It was further posited that from the record the Appellant was not indolent and had taken active steps towards prosecution of the suit whereas timely prosecution of the same was hindered by the Covid-19 pandemic. Counsel went on to argue that there was no inordinate delay in filing the motion meanwhile any delay was satisfactorily explained and that the Appellant or counsel lacked control over delayed mapping. The decisions in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others (2013) eKLR and Peter Mwaura Kanyoro v Ndungu Mwangi & Another (2018) eKLR were relied on in the forestated regard.

14. On prejudice, the Appellant restated the exhortation in Philip Keipto Chemwolo v Augustine Kubende (1982-1988)1 KAR 1036 and Cape Suppliers Limited v Sinohydro Corporation Limited (Civil Case 848 of 2010) [2022] KEHC 16878 (KLR) to assert that failure to allow the appeal is more likely to visit prejudice upon the Appellant meanwhile any prejudice meted on the Respondent can reasonably be compensated by an award of costs. In summation, counsel urged this Court ought to uphold the Appellant's right to a fair hearing by allowing the appeal in the interest of justice. The decisions in Richard Ncharpi Leiyagu (supra) and John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR were relied on.

15. On the part of the Respondent, counsel called to aid the decision in Wachira Karani (supra), Caroline Mwirigi v African Wildlife Foundation [2021] eKLR and Invesco Assurance Co. Ltd v Onyange Barrack [2018] eKLR to submit that setting aside a dismissal order involves discretion whereas the Appellant had failed before the trial Court to sufficiently explain the delay and or why the Court ought to exercise discretion in its favour. On failure to prosecute the suit, it was summarily submitted that it was not enough for the Appellant to simply blame counsel without showing any tangible steps taken by it towards follow up of the matter. The decision in Netta Gohil v Fidelity Commercial Bank Ltd [2019] eKLR was cited in the latter regard. In conclusion, the Court was urged to dismiss the appeal with costs.

16. With the above in reserve, it can be purposefully stated that the appeal turns on the key issue whether the Appellant is entitled to an order setting aside the dismissal of the suit and or whether the trial Court misdirected itself and as a result arrived at a wrong decision. In answering the questions, the Court will endeavor to contemporaneously address Appellant's grounds of appeal.

17. It is trite that the grant or refusal of an application to set aside or vary such judgment or any consequential decree or order, is discretionary. The discretion is wide and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. See Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR and United India Insurance Co. Ltd v. East African Underwriters (K) Ltd [1985] E.A 898. As can be garnered from the record of appeal the events leading to the dismissal of the Appellant's suit are undisputed. The suit was tangibly dismissed for non-attendance by the Appellant and or counsel when the matter came up for hearing whereas the reason advanced for non-attendance in the Appellant's motion that was since dismissed before the trial Court, was misdiarization.

18. In 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:-
>
> (a) either that the defendant was not properly served with summons;
>
> (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.
>
> 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:-
>
> > "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.
> >
> > 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"
>
> 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:-
>
> > "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"

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)

19. 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:-
>
> > "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)

20. Similarly, in this appeal, it was imperative for the Appellant to demonstrate before the trial Court sufficient cause to unlock the exercise of judicial discretion. At the risk repetition, by the Appellant's affidavit material, the solitary explanation advanced for the said non-attendance on 17/08/2020, is misdiarization. It was asserted that failure to attend Court on 17/08/2020 was inadvertent and that such mistake ought not be visited on the Appellant. It has further been argued that Appellant had always been keen on prosecuting the dismissed suit meanwhile delay in prosecution of the suit was hampered by the Covid-19 Pandemic and delay in mapping of the suit therefore the Appellant is deserving of the exercise of the Court's discretion. The Respondent's summarized response, is that there was inordinate delay in approaching the Court to set aside the dismissal order which delay was not sufficiently explained.

21. 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). As concerns the Appellant's explanation, while misdiarization is a likely occurrence within the course of practice, it is concomitantly obligatory of the Appellant to expeditiously move the Court to remedy any inadvertent omission on the part of Appellant or counsel.

22. The courts have been very cautious in setting a minimum period of time that can constitute an "inordinate delay". Makhandia JA in Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui [2019] KECA 112 (KLR), wherein it was observed that; -

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour.

23. Having analyzed the test in which the Court ought to apply before reinstatement of a suit, I wish to make the following notes that will ultimately determine this matter;

    a. This Suit was dismissed on its first hearing. It is imperative for Courts to take into account the demeanor of a party seeking reinstatement of a suit by looking at the previous records. For example, if the records show that such a party occasioned numerous adjournments before, that would certainly act as a red flag for dismissal. In fact, at the time when the matter was in Court

before the hearing date was taken, there was no full compliance or in other words, the matter was not ripe for hearing.

b. Covid-19, delayed mapping and Misdiarizing the matter. There is no doubt that this case was active at the heart of Covid-19 and during this time ,some Courts were closed and policies hurriedly developed to break the impasse. Creation and effectualization of Virtual hearings was not a mean feat. I happen to have worked as a head of station in this time (Eldoret) and I can confirm that that period was very difficult. In fact, i had to create a separate cause list for many matters "hanging" without dates and send notices to respective advocates. At the time, we developed a policy of "non dismissal of matters" without ensuring that advocates are properly notified of their respective dates and in case a matter is dismissed for a non-attendance, results were to be relayed immediately to respective advocates for you would not know who was in isolation at the time of hearing (whether client or advocate) as a results of Covid. Today, the issue of "mapping" although has improved still faces challenges. I can only imagine how difficult it was at the time when 'virtual hearing was cutting milk teeth' especially the upper incisors. The issue of misdiarizing is a common phenomenon not just in this case. I have seen a hearing notice for 17th of November 2020 with a stamp next to the Respondent's address meaning that it was received by the Respondent unless that stamp does not belong to the respondent as it is ineligible. Since the matter was dismissed on 17th August 2020, it would have been courteous for the respondent's advocate to inform the Appellant instead of letting the Appellant chase a wild goose. The fact that such hearing notice was served, demonstrates that indeed the matter was misdiarized.

c. Change of advocates:

> The former advocate has not been afforded an opportunity to explain why he did not follow up the matter. I know that this cannot be practicably possible but the reality is that the said advocate is supposed to be in a clear position to shed light on developments after 17th August 2020. No one knows the reason as to why the Applicant decided to change advocates.

d. I have read the pleadings and I am convinced that this is a matter that is supposed to be heard and determined for the interest of justice.

e. Dismissal of cases for want of prosecution. In many instances, cases filed in Courts are akin to dark hovering clouds above the surface of the Earth which signifies possible rain- an expectation of a Plaintiff. It is only when a defence is filed and full trial done that the truth comes out because a defence can act as a strong wind that blows away the dark clouds and prevent the rain drops. Sometimes, it is rational to allow the wind (defence evidence) to blow through dark water laddened clouds (plaintiff evidence) to see if it will rain or not -and this only comes in inte-rpartes hearing and is oftenly referred to fair hearing/ substantive justice without due regard to procedural technicalities. If the wind is feeble or small, the rain will certainly drop and so is the opposite.

The upshot of the above is that the Application has merit and is allowed. Since fair trial was faulted, each party shall bear own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

HON. L. KASSAN

JUDGE

In the presence of;

Sikuku for the Appellant

Mongen for the Respondent

Carol – Court Assistant