Intercity Utility Services Ltd & another v City Council of Nairobi (Civil Suit 936 of 2005) [2024] KEHC 214 (KLR) (Civ) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 936 OF 2005

CW MEOLI, J

JANUARY 19, 2024

BETWEEN

INTERCITY UTILITY SERVICES LTD ..... 1ST PLAINTIFF

RENCO PARKING SERVICES ..... 2ND PLAINTIFF

AND

CITY COUNCIL OF NAIROBI ..... DEFENDANT

RULING

1. For determination is the amended motion by Intercity Utility Services Ltd and Joseph Maina Kimani t/a Renco Parking Services (hereafter 1st & 2nd Plaintiff(s)/Applicant(s)) dated 15.11.2022 seeking inter alia that the order issued by this court on 23.02.2022 requiring this suit to be prosecuted within three (3) months be varied, reviewed and or set aside and this court be pleased to extend time for the prosecution of the Plaintiffs' suit unconditionally or on such terms as the court may deem as fit and just; that the Plaintiffs be granted leave to amend the Defendant's name in the plaint/pleadings and substitute it with that of Nairobi City County; that the court do grant leave to the Plaintiffs for them to prosecute their suit on merit to finality and make any further order or issue directions as it may deem fit.

2. The motion is expressed to be brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 1 Rule 10(2) & (4), 50 Rule 2 & 6, of the Civil Procedure Rules (CPR) inter alia, and is premised on grounds on the face of the motion, as amplified in the supporting and further supporting affidavit sworn by counsel on record for the Plaintiffs, namely, Bernice Karita, and Charles Njuru Kihara, respectively.

3. The gist of the former affidavit is that on 23.03.2022 when the matter came up for mention, the court upon hearing the respective counsel for the parties herein ordered that the suit be prosecuted to finality within three (3) months of the date thereof. She asserts that in computation of time stipulated by

the court, public holidays and Sundays are not included hence the motion had been presented some nineteen (19) days before the lapsing of the time granted for the prosecution of the suit. She further deposes that she erroneously understood the court order to refer to filing of pleadings within the three (3) months, which was done.

4. Hence, it was only upon sending a representative of the firm to fix a hearing date, that she learned that the suit had "abated" for want of prosecution. That the delay occasioned was not inordinate and was excusable and the consequence thereof ought not to be visited upon the Plaintiffs. In conclusion, she asserts that the Plaintiffs have since filed their witness statements and bundle of documents, are still desirous of having the suit prosecuted to finality and stand to suffer irreparably if the motion is not granted.

5. On the part of the latter counsel, he deposes that upon inception of the matter, the Plaintiff companies had a lead managing director one Joseph Gakure Maina who passed away on 01.01.2013. That on 23.03.2022 counsel was informed by Ms. Bernice Karita that an order was made requiring the Plaintiffs to file their written witness statements and list of documents within ninety (90) days thereof and to subsequently fix a hearing date. He goes on to depose that efforts by Ms. Bernice Karita to reach the Plaintiffs' representatives were unsuccessful Joseph Gakure Maina, having passed on.

6. That a week to the date of swearing his affidavit he had belatedly learnt of the foregoing and his attempts to locate the directors of the Plaintiffs, only bore fruit when on 20.06.2022 he was able to reach one Peter Kahara Munga, described as an unregistered Director/National Officer/Benefactor of the 1st Plaintiff and another John Maina Kimani described as a director of the 2nd Plaintiff who had relocated his business. He further deposes that upon the emergence of the aforesaid persons, witness statements and documents were prepared and filed. That on 23.06.2022 he was informed that the suit had been dismissed for failure to prosecute it within three (3) months. That upon inquiries with Ms. Bernice Karita she was bewildered by the turn of events and reported that she had been working while unwell.

7. He further deposed that having had the opportunity to peruse the court proceedings, he has since realized that the information received was incorrect. He further acknowledges and takes responsibility for the delay in prosecution of the matter while seeking the court's sympathy and understanding, stating that the Plaintiffs are ready and willing to prosecute the suit and open to an award of costs payable to the Defendant for the prejudice caused. That the court under Order 50 Rule 6 of the CPR has unlimited discretion to extend time so that the ends of justice are not defeated by oversight and mistake of counsel.

8. He concludes by deposing that following the promulgation of *the Constitution* 2010 and enactment of the *County Governments Act*, all assets and liabilities of the Defendant were statutorily assumed by the Nairobi County Government. That the subject suit and claim was subsisting and survived the transition as such it is necessary the plaint be amended to reflect the current situation and rightful defendant, which is the Nairobi County Government.

9. City Council of Nairobi (hereafter the Defendant/Respondent) opposes the motion through the replying affidavit dated 30.03.2023, and sworn by Erick Abwao, described as the acting Solicitor General of Nairobi City County, well versed with the matter thus competent to depose. He attacks the motion lacking basis and pointing out that despite the suit herein having been instituted some seventeen (17) years ago, the Plaintiffs had never taken any steps to prosecute the same and that the delay in prosecution has not been properly explained. Moreover, he states that no useful purpose will be served by reinstating the suit as the reliefs sought are against a non-existent party and no basis has been laid warranting the court to review its orders of 23.03.2022.

10. A supplementary affidavit deposed by Peter K. Munga, who describes himself as a director of the 1st Plaintiff, was filed in response to the replying affidavit. The deponent restated the gist of the claim herein and events hitherto and asserted that the Plaintiffs have been handicapped by internal challenges following the demise of one of its senior officers and directors who was well versed with the proceedings and that he together with the Plaintiffs directors were only recently able to resolve the internal affairs of the 1st Plaintiff and are therefore ready to prosecute the suit. That by the date of issuance of the subject order of this court, the Plaintiffs' documents in support of the pleadings had not been filed and served and only upon filing of the same were the Plaintiffs at liberty to take a hearing date within the remain nineteen (19) days.

11. He goes on to depose that the court should be slow to dismiss a suit for want of prosecution if satisfied that the suit can proceed without delay, taking into consideration the prejudice that may be occasioned to the Plaintiffs if the matter is not heard on the merits. Moreover, that parties herein had been negotiating with a view to an amicable out of court settlement. That the Plaintiffs stand to suffer irreparable damage if the motion is not granted, and that in any event, the Defendant can be compensated by an award of costs.

12. The motion was canvassed by way of written submissions. The Applicants' submissions revolved around the related issues whether the court has discretion to vary it orders and whether the Applicants had shown sufficient cause to warrant exercise of the said judicial discretion. Counsel reiterated the contents of the Plaintiffs' affidavit material before the court, emphasizing the assertion that counsel misunderstood this court's order issued on 23.03.2022 and in any event, in counsel's computation of time from the date of the said order, the Plaintiffs still had a window of nineteen (19) days at the time of the asserted expeditious filing of the motion, to prosecute the suit as directed by the court. That, consequently, the court ought to consider whether failure to prosecute the suit as directed constituted an excusable mistake or was meant to deliberately delay the cause of justice and whether the explanation offered is sufficient.

13. Counsel relied on the decision in Mwangi S. Kimenyi v Attorney General & Another [2004] eKLR to submit that given the reasons advanced in the Plaintiffs' affidavit material, the delay in prosecuting the suit was neither inordinate nor intentional and is excusable. Hence the court ought to exercise its discretion in furthering substantive justice by reviewing its order issued on 23.03.2023. Counsel asserted that the Defendant failed to demonstrate the prejudice they have suffered due to the delay and had equally not filed their documents in the suit. That the right to be heard is protected by *the constitution* and ought not to be lightly taken away by the court. The decisions in Wachira Karani v Bildad Wachira [2016] eKLR and Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR were called to aid in that regard.

14. It was submitted that Ms. Bernice Karita, having admitted her mistake in her affidavit material, the same ought not to be visited upon the Plaintiffs herein. The decisions in Burhani Decorators & Contractors v Murmy Foods Limited & Another Nai. Court of Appeal 2012 as cited in Philip Cavine Ochieng v Securex Agencies Limited [2019] eKLR and Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 Others Misc. App. No. 699 of 2017 as cited in Samuel Mathenge Ndiritu v Martha Wangare Wanjira & Another [2017] eKLR were relied on. The Plaintiffs asserted that amendment of the suit would cure the objection raised by the Defendants' counsel.

15. On the part of the Defendant, counsel restated the history of the matter and pertinent events. It was counsel's position that the instant motion was premised on Order 50 Rule 2 & 6 of the CPR which deals with computation and enlargement of time but does not grant the court jurisdiction to entertain the gist of the motion before the court which is the reinstatement of a suit that stood dismissed

on 23.06.2022. Concerning whether the court ought to vary, review or set aside its order made on 23.03.2022, counsel relied on the provisions of Order 45 Rule 1 of the CPR and the decision in Francis Njoroge v Stephen Maina Kamore [2018] eKLR to submit that the Plaintiffs have not cited the former provision in their motion whereas the affidavit material in support of motion does not demonstrate grounds for review of the order issued by this court.

16. Finally, on whether the Plaintiffs ought to be granted leave to prosecute their suit, it was submitted that by dint of Section 1A and 1B of the CPA, it is the duty of the court, litigants, and advocates to ensure that matters are concluded expeditiously without undue delay. That it is evident from the record that the Plaintiffs have not been keen to prosecute the suit for 17 years which delay was manifestly inordinate and inexcusable. It was further submitted that the delay therein is prejudicial, unjust and an abuse of the court process, hence the court ought not to exercise its discretion in favour of the Plaintiffs. The decision in Ronald Mackenzie v Damaris Kiarie [2021] eKLR was called to aid. The court was thus urged to dismiss the amended motion with costs.

17. In response, the Plaintiffs filed supplementary submissions. Responding to the first issue as addressed by the Defendants, counsel submitted that by dint of Article 159(2) of *the Constitution*, this court is empowered to hear and interrogate substantive issues raised rather than determine applications on the basis of mere technicalities. Further stating that, the Plaintiffs' motion is premised on the principles of the overriding objectives and given the expeditious filing of the motion it would be a miscarriage of justice if the court were to dismiss the motion for minor errors, such failure to cite the proper provisions of statute that it is premised on.

18. In response to the second issue, it was contended that courts exist to serve substantive justice. Equally relying on the decision in Wachira Karani (supra) and Francis Njoroge (supra), counsel argued that the motion meets the test for review as the reasons advanced in the Plaintiffs' affidavit material fall within the purview of "for any other sufficient reason". It was further contended that the motion was filed without unreasonable delay and ought to be allowed as prayed. In response to the last issue, while reiterating the contents of the Plaintiffs' affidavit material, it was submitted that amendment of the suit would cure the irregularity in relation to the Defendant. The decision in Republic v Public Procurement Administrative Review Board & Another Ex-parte SGS Kenya Limited [2017] eKLR was relied on.

19. The court has considered the rival affidavit material. At the outset it would be apposite to examine the record, particularly in respect of the events leading up to the instant motion. The motion stems from orders made on 23.03.2022 when the Plaintiffs' advocate appeared for mention of the case. The court was requested by Ms. Karita to allow 14 days for the Plaintiffs to file their witness statements. The Defendant was not represented. The court having reviewed the record of proceedings, issued an order as follows:

> " This suit was filed in 2005. To date it has not been heard. On 7/12/18 it was listed for NTSC why it should not be dismissed. Following a request by counsel for the Plaintiffs it was fixed for mention on 19/2/19 when parties were directed to comply with order 11 of the CPR. Since then, the matter has been listed on several occasions and most recently on 3 occasions before the DR who, exasperated with non-compliance by parties, directed on 27th January 2022 that it be placed before a Judge. This situation cannot be allowed to continue when it is apparent that the Plaintiffs have no desire to perfect the suit for hearing. Seventeen years is long enough a period for the Plaintiffs to have prosecuted their case and their lethargy cannot be entertained further. Pursuant to the overriding objective this court directs that

the Plaintiffs do prosecute the suit fully within 3 months of todays date, failing which it will stand dismissed for want of prosecution."

20. The substantive prayers in the amended motion dated 15.11.2022 are nos. 2(a) and 2(b). The motion invokes Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 1 Rule 10(2) & (4), Order 50 Rule 2 & 6, of the Civil Procedure Rules (CPR) and inter alia seeks the review, varying or setting aside of the orders issued by this court on 23. While the provisions of Order 45 Rule 1 CPR are not invoked in the amended motion, the first limb of prayer 2 (a) includes the words "review.....vary and set aside" together. Evidently, no proper grounds for review as contemplated under Order 45 Rule 1 CPR and as interpreted by superior courts were canvassed by the Plaintiffs in their material, although "sufficient cause" as a ground was introduced in the Plaintiffs' rejoinder arguments. As I understood the Plaintiffs' motion, it is premised primarily on mistake of counsel and difficulty in tracing or contacting the Plaintiffs.

21. For purposes of the limb of prayer 2(a) seeking review, the following cases suffice in demonstration of the purport of the term "mistake or error apparent on the face of the record" as used in Order 45 Rule 1 CPR and the general application of the Rule. Okwengu JA in Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] eKLR, the Court of Appeal pronounced herself as follows: -

> " It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
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> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Emphasis added)

In Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:

> " An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

22. Further, in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR the Court of Appeal held that:

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:
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> "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

23. Clearly, the mistake alleged here is not one contemplated in Order 45 Rule 1 of the CPR and the use of the term "review" in prayer 2(a) is confounding. It appears that the mistake or error asserted in the Plaintiffs' affidavit material is the kind discussed in Shah v Mbogo and Another [1967] E.A 116.Hence the motion also pertinently invokes Section 3A of the *Civil Procedure Act* which would have a bearing on the part of prayer 2(a) seeking to vary or set aside the court's orders of 23.03.2022. The section provides that; -

> " Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

24. As to what constitutes inherent jurisdiction of the court, the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR rendered itself as follows; -

> " 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."

The Supreme Court went further in Board of Governors, Moi High School Kabarak and another versus Malolm 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)

25. That said, in the court's view, the instant motion turns on prayers 2(a) and 2 (b) which the court proposes to consider contemporaneously. But first, on the question of computation of time, Order 50 Rule 2 of the Civil Procedure Rules provides that:

> " Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time".

26. Rule 6 of the same Order provides that; -

> " Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
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> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

27. It was the Plaintiffs' argument that when time was computed under Order 50 Rule 2 of the CPR from 23.03.2022, they had a window of nineteen (19) days within which to prosecute the suit as of the date of filing the motion. The directions issued on 23.03.2022 as replicated above were specific; the Plaintiffs were to prosecute their suit within three (3) months of 23.03.2022, which constituted a total of about ninety (90) days. Order 50 Rule 2 of the Civil Procedure Rules does not aid the Plaintiffs' case as it applies where "any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings", as affirmed in the case of Longinus Oroni Murunga v David Masika Mafumbo [2017] eKLR. The inescapable conclusion therefore was that the Plaintiffs were to prosecute their suit before 23.06.2022 which admittedly was not done. The result being that the Plaintiffs' suit stood dismissed on or about 24.06.2022, the date of the original motion by the Plaintiffs, which was filed on 27.06.2022. Clearly, the motion was filed after lapsing of the time prescribed by the court on 23.03.2022.

28. The court is however empowered under Rule 6 above to grant enlargement of time even when time granted for performing an act has lapsed. The Supreme Court in the case of Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR, distilled the principles governing that discretion as follows:

> " This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time".

29. Additionally, the case of John Tomno Cheserem vs Sammy Kipketer Cheruiyot [2018] eKLR in which a motion was brought under Rule 4 of the Court of Appeal Rules appears to have some relevance to the matter at hand as Rule 4 of the Court of Appeal Rules is in pari materia with the provisions of Order 50 Rule 6 of the Civil Procedure Rules. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The court (Mohammed JA) observed that; -

> "7. The principles guiding the court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion, I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance. In the case of Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No. Nai 332/04 (unreported) this Court rendered itself thus:-
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> > "The exercise of this Court's discretion under Rule 4 has followed a well-beaten path since the structure of "sufficient reason" was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors."
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> (8) The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In Mwangi V. Kenya

Airways Ltd, [2003] KLR 48, the Court having set out matters which a single Judge should take into account when exercising the discretion under Rule 4, went on to hold;-

> "The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the Court of Appeal Rules (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered."

30. Equally, the power the court to grant or refuse to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, that discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of Shah v 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."

31. The Plaintiffs' failure to prosecute the suit within the period prescribed by the court on 23.03.2022, is attributed to the mistake of counsel in construing the orders issued therein to relate to filing of documents within three months, and secondly, in difficulty in reaching the Plaintiffs. This is also the basis of the prayer for enlargement of time for prosecution of the case. Reading the affidavit of Ms. Karita (paragraphs 5-8), it is not clear how the alleged misunderstanding of the purport of the order of 23.03.2022 arose. In one breath, counsel claims that during the proceedings on the 23.03.2022, the court "was adamant" and "instead" of granting her request to file witness statements in 14 days had directed that the suit be prosecuted to "finality" within 3 months.

32. Her next assertion, which is obviously legally faulty was that under Order 50 Rule 2 of the CPR, by the date of the filing of the original motion, the Plaintiffs had a window of 19 days left for the prosecution of the suit, meaning that the suit had not been dismissed by operation of the order of 23.03.2022. In another breath she claims to have misconstrued the court order to mean that all that was required of her was to file her witness statements. Only one of these explanations can be correct. The affidavit of counsel Kihara Njuru merely echoes what Ms. Karita allegedly reported.

33. Ms. Karita may be a novice in legal practice as she asserts, but from her own admission, she understood that the order eventually made was not limited to granting her time for the filing witness statements, as she had sought in her own address to the court on the material day. A party seeking the exercise of the court's discretion in her favour should not be seen to presume on the court. The explanation seems to lack candour. The hackneyed adage that the mistake of counsel ought not to be visited upon his client in no way absolves such counsel of the duty to reasonably demonstrate his alleged mistake to the court. As held by the Supreme Court in Salat's case (supra), a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. To require anything less would result in the watering down, if not the outright abuse of the court's discretion.

34. Apaloo, J.A. (as he then was), famously stated in Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede (1986) eKLR:-

> " I think a distinguished equity judge has said:
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> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."
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> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

35. Recently, however the Court of Appeal in Daqare Transporters Limited v Chevron Kenya Limited [2020] eKLR restated the principles spelt out by its predecessor in Shah v Mbogo (supra) and considered the case of Phillip Cheptoo Chemwolo before stating that:

> " ....The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision".

36. Earlier in Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others, [2015] eKLR no doubt adverting to the overriding objective in section 1A and 1B of the *Civil Procedure Act* , the Court of Appeal made the following remarks:

> " From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side..."

37. The motion was filed some three days after the lapsing of the time granted for prosecution of the case. The motion may have been timeously filed, but the event must be viewed in the context of the entire history of the case. In the court's considered view, even if the mistake alleged herein had been established, no reasonable explanation has been offered for the 17-year delay since inception in prosecuting the suit. The delay is manifestly inordinate, as the history herein attests. No step had been taken to progress this case since institution, prompting the court in 2018 to issue a Notice to Show Cause (NTSC) why the suit should not be dismissed for want of prosecution. Despite directions issued thereafter for the Plaintiffs to comply with Order 11 CPR and several mentions in that regard before the Deputy Registrar, not a single document or statement had been filed until 20th June 2022, some four years since the NTSC.

38. For starters, in the present motion no affidavit was sworn on behalf of the 2nd Plaintiff by way of explaining the delay. As for the affidavit by Peter Munga (described as an unregistered director of the 1st Plaintiff) on behalf of the 1st Plaintiff, vague statements were made concerning the "internal affairs" of the said Plaintiff company. Also cited was the alleged death in 2013 of one Joseph Gakure Maina described as a lead managing director of the Plaintiff companies who allegedly was the repository of the details of the claim herein. No tangible proof was tendered to demonstrate any of the foregoing

averments. Moreover, it is not clear why instead of Peter Munga, the so-called unregistered director/ benefactor, a current and proper principal officer of the 1st Plaintiff was unavailable to swear an affidavit on behalf of the 1st Plaintiff. In addition, the 2nd Plaintiff herein is Joseph Maina Kimani T/A Renco Parking Services and while his relationship with the 1st Plaintiff is unclear, no explanation was proffered for his failure to swear his own affidavit.

39. Pertinent depositions contained in the affidavit of the two counsels to my mind only serve to demonstrate that the Plaintiffs long lost interest in their own matter. The depositions demonstrate that the Plaintiffs had ceased communication with their advocates regarding their case, as exemplified by counsel's evident lack of ready contacts with their clients as they made frantic efforts pursuant to the orders of 23.03.2022, to trace them.

40. Indeed, the foregoing would also explain why despite the Defendant herein having been legally superseded by the Nairobi City County Government with the promulgation of the 2010 Constitution, no steps had been taken until now to substitute the said succeeding entity as the defendant herein. Cases belong to parties who filed them, and not to their advocates. The parties have a duty under the overriding objective to follow up on the progress of their cases. It is unconvincing for the 1st Plaintiff to avow seventeen years later their ardent desire to prosecute the case.

41. It is a truism that justice cuts both ways. The prejudice to the Defendant arising from prolonged delay, especially by way of legal costs, is obvious. The Defendant, being a public body, is funded by the Exchequer. Taxpayers should not pay the price of the tardiness of the Plaintiffs. The words of Chesoni J (as he then was) in the case of Ivita v Kyumbu (1984) KLR 441 albeit made in respect to an application for dismissal of a suit for want of prosecution are pertinent here: -

> " The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

42. The above decision must be read through the prism of the overriding objective introduced more recently in Sections 1A and 1B of the *Civil Procedure Act*. Upon a perusal of the affidavits of Peter Munga and counsel, it is evident that the possibility of mounting a fair trial may have been compromised by the inordinate delay herein. A trial cannot possibly be scheduled in this matter any time soon as the Plaintiffs intend to amend their plaint to substitute a new defendant. The new defendant may wish to file a defence and file documents and witness statements. That will take up more time, hence further delay.

43. At a time when courts are deluged with heavy workloads, they cannot allow any party to litigate at leisure, and must firmly discharge their duty under the overriding objective. In that regard, the Court

of Appeal stated in Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09 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".

See Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki [2018] eKLR.

44. In the result, the court finds no justification for varying, or setting aside of the order of 23.03.2022 or for enlargement of time as sought in prayer 2(a) of the amended motion. As stated in Shah Vs Mbogo (supra) the object of the discretion for setting aside of orders was to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, and not to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice. Through their own lethargy and slovenly conduct, the Plaintiffs have delayed the course of justice for 18 years now, and it is too little too late for them to plead their right to be heard on merits, having squandered the opportunity. In the court's view, the Plaintiffs are not deserving of the court's exercise of discretion.

45. Finally, the Court notes that no prayer for reinstatement of the dismissed suit was included in the motion by the Plaintiffs. Judging from the Plaintiffs' contentions about the computation of time since the order of 23.03.2022, which the court found misconceived, the Plaintiffs apparently believed that their case was still subsisting as of the date of their motion. Despite amending their initial motion five months later, the Plaintiffs, inexplicably, did not find it necessary to include a prayer for reinstatement of the suit. Be that as it may, the court is persuaded that the justice of the matter lies in declining prayer 2(a) of the amended motion. Consequently, prayer 2 (b) seeking leave to amend the plaint is rendered moot, and no useful purpose will be served by considering its merits which, given the delay in bringing the motion, appear doubtful.

46. The upshot is that the court finds no merit in the amended motion dated 15.11.2022 and the same is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19TH DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of

For the Plaintiff/Applicants: Mr. Kihara Njuru

For the Defendant/ Respondent: Ms. Nyareso

C/A: Carol

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