



Multi Link General Supplies Limited v Njue & 7 others; Independent Policing Oversight Authority (Interested Party) (Constitutional Petition 34 of 2019) [2024] KEHC 2816 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2816 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION 34 OF 2019**

OA SEWE, J

MARCH 14, 2024

**IN THE MATTER OF ARTICLES 20, 22 & 23 OF THE CONSTITUTION OF KENYA
AND**

IN THE MATTER OF CONTRAVENTION OR THREATENED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONFISCATION OF GOODS TO WIT MOTOR VEHICLES TYRES AND RIMS

BETWEEN

MULTI LINK GENERAL SUPPLIES LIMITED PETITIONER

AND

WASHINGTON NJUE 1ST RESPONDENT

OKELLO JUMA 2ND RESPONDENT

BONAYA BONSO 3RD RESPONDENT

ALI HASSAN 4TH RESPONDENT

INSPECTOR GENERAL OF POLICE 5TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION 6TH RESPONDENT

THE ATTORNEY GENERAL 7TH RESPONDENT

SINO TRAILER INDUSTRY KENYA LTD 8TH RESPONDENT

AND



INDEPENDENT POLICING OVERSIGHT AUTHORITY INTERESTED PARTY

RULING

1. The Notice of Motion dated 21st August 2023 was filed herein by the petitioner under Article 159 of *the Constitution* of Kenya, Sections 1, 1A, 3A, 63(e) and 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 12 Rule 7, Order 45, and Order 51 of the Civil Procedure Rules, 2010. The petitioner thereby prayed for orders that:
 - (a) The Order of this Court made on the 22nd September 2022 dismissing the Petition filed herein on 18th April 2019 together with all other consequential orders be reviewed, varied and/or set aside.
 - (b) The Court do issue an order reinstating the Petition, filed herein which was dismissed on 22nd September 2022 for reason of want of prosecution.
 - (c) The Costs of the application be in the cause.
2. The application was premised on the grounds that the order of dismissal made on the 22nd September 2022 was made through no fault or wrongdoing on the part of the applicant, but through the fault of the Advocates on record. The petitioner further averred that it should not be made to suffer the penalty for not having its case heard on merit on account of the mistake of its counsel, as it has always been keen on prosecuting the Petition in which one witness had already testified. It therefore asserted that it is in the interest of justice that the dismissal order be reviewed and the Petition reinstated for hearing and determination on merits.
3. In its Supporting Affidavit sworn by its director, Daniel Kinyua Njuguna, the petitioner averred that the Petition was filed on its behalf by the firm of Wandai Matheka & Company Advocates; and that on the 23rd May 2019, they changed Advocates and appointed the firm of Jimmy Kahindi & Associates who duly represented them from then on; including at the hearing of the Petition on the 8th October 2019 and several other dates thereafter. The petitioner explained that, in the course of time, they lost communication with their Advocates and upon inquiry, they were informed that the Counsel who was handling their matter had since left the firm and never apprised the firm on the progress of the matter herein.
4. Thus, the petitioner deposed that, upon learning that its Petition had been dismissed for want of prosecution on the 22nd September 2022, it promptly put in the instant application under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules for review of the said orders. It insisted that failure to attend court was due to an inadvertent error occasioned by lack of communication between it and its previous Advocates. At paragraphs 12, 13 and 14 of the Supporting Affidavit, the petitioner averred that it stands to suffer irreparable harm if the Petition is not reinstated for hearing and determination on merit.
5. The application was resisted by the respondents; to which end the 1st to 5th respondents relied on the Grounds of Opposition dated 19th October 2023. They contended that:
 - (a) The application for review has been brought after undue delay of eleven (11) months.



- (b) No requisite authority in the form of a company resolution appointing the firm of M/s Chelulei Cherotich and Associates to act for the Petitioner or authorizing the deponent to file the current application.
 - (c) The firm of M/s Chelulei Cherotich and Associates is not properly on record as they have not obtained consent from the previous Counsels on record nor have they obtained leave from the court to come on record as required under Order 9 rule 9 of the Civil Procedure Rules.
 - (d) There is presently a similar matter before the court, being Kingsway Tires Limited v Multilink General Supplies Limited & Another arising from the same facts.
6. On its part, the interested party relied on its Replying Affidavit, sworn on 23rd October 2023 by its Legal Officer, Ms. Ann Kamau. It refuted the assertions by the petitioner and stated that, the lack of due diligence on the part of their Advocate is no excuse, as it is the responsibility of the petitioner as a litigant to be vigilant and ensure the expeditious prosecution of its case to its logical conclusion. The interested party pointed out that the matter had been adjourned severally at the behest of the petitioner prior to its dismissal; and that the allegation that one witness had testified on the 8th October 2019 is false; granted that the witness was stood down for failure to annex a certificate of proof of electronic evidence of a video.
 7. The interested party reiterated the fact that the matter was dormant from the 15th July 2021 up until the 20th May 2022 an estimate of eleven (11) months; on which account a Notice to Show Cause for dismissal for want of prosecution was issued. That despite service of the said notice to show cause, neither the Petitioner nor his Advocates attended court on the 21st September 2022. Thus, the interested party opposed the reinstatement of the Petition as it has taken the petitioner almost one (1) year to discover that it was dismissed; which only goes to confirm that it has lost interest in the Petition.
 8. The Petition was urged by way of written submissions, pursuant to the directions given herein on 23rd October 2023. In the petitioner's written submissions dated 10th November 2023, counsel proposed three issues for determination, namely:
 - (a) Whether the Court should review, vary and/or set aside its order given on 22nd September 2022;
 - (b) Whether the Court should reinstate the Petition dismissed on 22nd September 2022;
 - (c) Whether Order 9 Rule 9 of the Civil Procedure Rules is applicable in this case.
 9. In respect of the prayer for review, the petitioner relied on Section 80 of the *Civil Procedure Act* as read with Order 45(1) and (2) of the Civil Procedure Rules, as well as Rule 25 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (the Mutunga Rules) to support the submission that the Court has the discretion to grant the prayers sought. Reliance was also placed on *Gabriel Otiende & 4 Others v County Commissioner, Siaya County & 2 Others*, *John Nyapola Okuku & 3 others (Interested Parties [2021] eKLR* and *CMC Holdings Ltd v Nzioki [2004] 1 KLR 173*.
 10. On whether the Court should reinstate the Petition for hearing and determination on merits, the petitioner urged the Court to not visit the mistake of counsel on it. In this regard, the petitioner relied on the cases of *Susan Chebuso Mkanda v Eshikuku Girls Secondary School & 5 Others [2020] eKLR*, *Belinda Murai & Others v Amos Wainaina [1978] KLR 2782*, *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR*, *H A M v S O S [2021] eKLR* and *Philip Chemwolo & another v Augustine Kubende [1982-88] 1 KAR 103*, for the



proposition that the door of justice should not be closed because a mistake has been made by a lawyer who ought to know better.

11. On the applicability of Order 9 Rule 9 of the Civil Procedure Rules, the petitioner urged the Court to taken into account the mischief that the provision is intended to prevent; namely the protection of advocates who after judgment are sacked before being paid their fees. Thus, counsel for the petitioner took the view that the circumstances of this matter do not fall within the ambit of Rule 9 of Order 9, Civil Procedure Rules as the said Rule is not applicable to dismissals.
12. Counsel for the interested party, Ms. Nzwii, proposed only one issue for determination vide the written submissions dated 30th January 2024, namely, whether the petitioner has demonstrated sufficient grounds to warrant reinstatement of the dismissed Petition. She accordingly submitted that, since the power to set aside a dismissal order is discretionary, the Court must be persuaded that the requisite threshold had been met. The interested party added that justice must be done to the respondents as well as the interested party; and therefore the respondents and the interested party should not be disturbed for no good reason.
13. Further to the foregoing, the interested party submitted that the petitioner is guilty of laches and as such does not deserve another opportunity before the Court through reinstatement of the Petition. Reference was made to paragraphs 8, 9, 10, 11 and 12 of the interested party's Replying Affidavit as to the extent of indolence on the part of the petitioner. Hence, on the authority of *Kenya Flower Council v Meru County Government* [2019] eKLR the Court was urged to find that the petitioner is guilty of laches; and therefore is not entitled to the discretion of the Court.
14. As to the reason for the dismissal, the interested party was of the view that the petitioner's erstwhile Advocate ought not to be blamed at all, in the absence of proof that the petitioner was vigilant enough in pursuing its Petition. According to the interested party no evidence, whether in the form of letters, email and/or SMS printouts, has been produced before the Court to prove the allegation that the petitioner made attempts to contact its Advocates. Hence, the interested party relied on *Olempaka & 5 Others v Public Service Board of Baringo & another; National Cohesion and Integration Commission (Interested Party)* for the proposition that the burden of proof lies on the party seeking the Court's discretion to reinstate a suit to adduce sufficient and plausible reasons in support of the application.
15. I have carefully considered the application in the light of the pleadings and proceedings filed herein. I have similarly taken into consideration the responses filed on behalf of the respondents and the interested party. I note that both the respondents and the interested party raised preliminary issues which would warrant the striking out of the application. For instance, at paragraphs 3 and 4 of the Grounds of Opposition filed on behalf of the 1st to 5th respondents, it was asserted that the application is incompetent for lack of authority of the petitioner's Board of Directors. I however have no hesitation in dismissing that argument, considering that the petitioner is not here, seeking to institute a fresh Petition, but reinstatement of the Petition that it filed way back on 18th April 2013. No specific provision of the law was brought to my attention that requires that such authority be filed with an application for review under Section 80 of the *Civil Procedure Act* or Order 45 Rule 1 of the Civil Procedure Rules.
16. Secondly, and more importantly, the Petition was filed pursuant to the Mutunga Rules; and there is no such requirement thereunder that board resolutions be availed. Authorities abound in this regard,



such as the case of *Offshore Trading Company Limited v Attorney General & 2 others* [2021] eKLR, in which it was held:

“...the matter pending before this Court is a Constitutional Petition in which Civil Procedure Rules are not applicable in regard to filing of Constitutional Petitions. The applicable law and procedure of filing Constitutional Petitions is provided for under “The Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013, otherwise known as Chief Justice Mutunga Rules which provide the procedure for filing of Constitutional Petitions and which have no requirement that the Petitioner must exhibit a board resolution or swear a verifying Affidavit. In addition thereto *the Constitution* abhors Technical objections of this nature expressly at Articles 22, 3(b)(d) and 159 of *the Constitution*...”

17. I was not persuaded otherwise. I therefore find no merit in the respondents’ contention that the authority of the Board of the petitioner was a prerequisite to the filing of the instant applicant. The second objection was that the suit is sub judice to Mombasa Magistrates Court Civil Case No. 149 of 2020: *Kingsway Tires Limited v Multilink General Supplies Limited and Robert Kaage*, which is said to be pending hearing and determination. Such an assertion could only have been proved by way of an affidavit accompanied by annexures. No such effort was made by the respondents; and therefore I likewise find no merit in the objection.

18. Perhaps the only valid point raised by the respondents is in connection with Order 9 Rule 9 of the Civil Procedure Rules. At paragraph 5 of the Grounds of Opposition filed on behalf of the 1st to 5th respondents, it was contended that the firm of M/s Chelulei Cherotich and Associates had neither obtained consent of the previous counsel on record nor the leave of the Court to come on record as required by Order 9 Rule 9 of the Civil Procedure Rules; and therefore the application filed herein is incompetent. That provision states:

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.

19. In the instant matter, the applicant’s counsel came on record vide the Notice of Change of Advocates dated 15th August 2023. No application was made for leave, with notice to the parties and no consent between the outgoing advocate and the incoming advocate as envisaged by Rule 9. It is manifest then that the firm of M/s Chelulei Cherotich & Associates Advocates are improperly on record.

20. As has been pointed out herein above, the petitioner was of the posturing that Order 9 Rule 9 is not applicable to the circumstances of this case in that it was terminated by way of dismissal as opposed to judgment. Hence, the question to pose at this juncture is whether a dismissal for want of prosecution is equivalent to a judgment. The Court of Appeal had occasion to grapple with this issue in *Njue Ngai v Ephantus Njiru Ngai & another* [2016] eKLR, and held:

18. Another issue may arise as to whether a dismissal of a suit for non attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by



the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR. stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the plaintiff.” It uses the word “dismissed.” The *Civil Procedure Act* does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/ one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order;” “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8.” [Emphasis added]

21. It is plain then that a dismissal of a case is similar to a judgment and, therefore, this application falls squarely under Order 9 Rule 9 of the Civil Procedure Rules, 2010. Accordingly, the proper procedure was for the firm of M/s Chelulei Cherotich & Associates Advocates to first of all seek leave to come on record before filing the application to set aside the orders of the Court. It is evident that this application offends the express provisions of Order 9 Rule 9, a mandatory requirement, and thus cannot be termed as a mere technicality. Indeed, Order 9 Rule 5 of the Civil Procedure Rules states as follows:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

22. It therefore behooves counsel to pay attention to the applicable rules of procedure since Article 159(2) (d) of *the Constitution* was never intended to completely displace such rules; a point aptly made by Hon. Kiage, JA, in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR thus:

“I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules



of procedure and to create an anarchical free-for-all in the administration of justice...it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”

23. The Court of Appeal reiterated the same position thus in *Mumo Matem* (supra):

“(42)... In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases.

24. In the premises, it is my finding that the application dated 21st August 2023 is indeed incompetent; having been filed by a stranger to the proceedings. The same is hereby struck out with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF MARCH 2024

OLGA SEWE

JUDGE

