Ogola & another v Kahuro (Civil Suit 112 of 2004)
[2024] KEHC 3958 (KLR) (Civ) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3958 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 112 OF 2004

CW MEOLI, J

APRIL 18, 2024

BETWEEN

EDWIN LUKE OGOLA .... 1ST PLAINTIFF

FLORENCE O. OGOLA .... 2ND PLAINTIFF

AND

STEPHEN KAHURO .... DEFENDANT

RULING

1. For determination is the motion dated 23.06.2023 by Edwin Luke Ogola and Florence O. Ogola (hereafter the 1st and 2nd Plaintiff(s)/Applicant(s) seeking inter alia that their suit be reinstated and that the court be pleased to set aside the order issued by Hon. Mbacho on 11.05.2023. The motion is expressed to be brought pursuant to Article 159 of the *Constitution*, Order 17 Rule 2 and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR). It is based on the grounds on the face of the motion, as amplified in the supporting affidavit sworn by the Lucy Kamau, counsel for the Plaintiffs and duly authorized to depose.

2. The gist of her deposition is that the suit herein was scheduled for mention on 11.05.2023 and on the previous day having downloaded the Causelist from the Kenya Law Reports, the deponent noted that the same was to be listed for mention before Hon. Mumassaba; that she logged in to the virtual session court early but, the matter was not mentioned as scheduled in the causelist; and that upon requesting the Court to call out the matter, the Court informed her that the matter was indeed listed, however the physical court file was not before the Court. She thus maintains that the motion is merited and ought to be allowed in the interest of justice.

3. Stephen Kahuro (hereafter the Defendant) and or his counsel did not participate in the instant proceedings by either filing a response and or submissions to the motion, despite notice. On 06.12.2023

the motion was argued orally. Counsel appearing for the Plaintiffs maintained that the suit herein was dismissed on 27.04.2023 without service of notice to the Plaintiffs and their counsel. She reiterated the affidavit material and asserted that the Plaintiffs are desirous of prosecuting the suit to conclusion. Hence, the motion ought to be allowed as prayed.

4. That Court has considered the motion and perused the record before it in its entirety. The Plaintiff's suit was dismissed pursuant to an order of this Court on 27.04.2023. The Plaintiffs motion invokes alongside Article 159 of the *Constitution* , the provisions of Order 17 Rule 2 of the *CPR*, which provides that :-

> "(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> (5) A suit stands dismissed after two years where no step has been undertaken.
>
> (6) A party may apply to court after dismissal of a suit under this Order."

5. Rule 2(6) of the foregoing Order grants the court jurisdiction to entertain an application of this nature. While the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in their favor. In the case of *Shah –vs- Mbogo* and Another [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

> "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."

6. The principles enunciated in *Shah –vs- Mbogo* (*supra*) were further amplified by Platt JA in *Bouchard International (Services) Ltd vs. M'Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal measure in this matter. Indeed, the dismissal order issued herein can be construed to be an equivalent of a judgment, as it determined the suit conclusively by way of dismissal.

7. By her affidavit material, the Plaintiffs' advocate has asserted that the matter was initially scheduled for mention on 11.05.2023 and despite the matter being listed before Hon. Mumassaba on the said date (Annexure LK-1), the court file was not before court. The history of this matter is captured on the record. The suit herein was originally filed on 10.02.2004 against Intikhab Trading Co. Ltd (as the 1st Defendant) and Stephen Kahuro (as the 2nd Defendant). The plaint was later amended on 07.06.2004 and further amended on 21.12.2006. The 2nd Defendant filed his statement of defence on 08.05.2007 and on 01.03.2011 the Plaintiff filed a Notice of Withdrawal of Suit as against the Intikhab Trading Co. Ltd. Subsequently, when the matter came up for hearing on 04.10.2011 it could not take off due

to the respective parties' non-compliance with pretrial directions. The court scheduled the matter for mention on 07.11.2011. On the latter date the suit was stood over generally due to non-appearance of either party.

8. After almost four years, the Plaintiff's counsel fixed the matter for hearing on 17.06.2015. Once more, the matter did not take off, the court being informed that the parties were negotiating to record a settlement. A mention was set for 22.07.2015. With no settlement having been reached on the latter date the Court ordered that a hearing date be fixed by the parties. Next, the matter was set down for 21.09.2016 but did not take off on the scheduled date on the premise that parties were attempting to negotiate on an amicable out of court settlement. Subsequent mentions on 16.11.2016 and 01.02.2017 yielded no settlement and the suit was stood over generally. The Plaintiffs fixed a fresh hearing on 16.10.2017 and 22.11.2018 but it was adjourned at the instigation of counsel for the Plaintiffs.

9. This was followed by mentions on 05.12.2018 and 01.04.2019 and the hearing date set for 11.12.2019. On the latter date, the Court endorsed the order in respect Notice of Withdrawal of suit as against Intikhab Trading Co. Ltd, while counsel appearing for the 2nd Defendant sought time within which to file an application to cease acting. The matter was mentioned on 21.01.2020 and 27.02.2020, the court eventually directing on the latter date that a hearing date be fixed at the registry. There was no compliance, and the court registry suo moto proceeded to fix the matter for mention on 11.05.2023. However, before that date, the file was placed before this Court on on 27.04.2023 during the then ongoing national Judiciary Case census activity. Upon perusal of the entirety of the record this Court ordered as follows;-

> " No steps undertaken to prosecute this suit since February 2020. Suit therefore stands dismissed for want of prosecution under Order 17 Rule 2(5) CPR. File be closed." (sic)

10. The Plaintiffs contention is that though on 11.05.2023 the matter was listed before Hon. Mumassaba, the file was not in Court and that the suit was dismissed without notice to the Plaintiffs and or their counsel. It is evident from the history of the matter that the suit had on several occasions not proceeded at the instigation of the Plaintiffs. After a lengthy delay in the matter, the last substantive steps prior to dismissal was when counsel attend court on 27.02.2020 and was directed to fix a hearing date in the registry. The suit herein was filed in 2004 and since its institution the same has never proceeded for hearing. Pursuant to Legal Notice No. 22 of 2020 various provisions of the Civil Procedure Rules were amended. Order 17 Rule 2 was amended by the insertion of two new sub-rules (5) and (6) , after sub-rule (4). Thus Order 17 Rule 2 sub-rules 5 and 6 state: -

    (5) A suit stands dismissed after two years where no step has been undertaken.

    (6) A party may apply to court after dismissal of a suit under this Order.

11. The effect of sb-rule 5 was that where there was no activity in a suit after a period of two years, the same would automatically stand dismissed for want of prosecution. Between 27.02.2020 there were no attempts by the Plaintiffs to progress the suit until 27.04.2023 when the Court by way of an order affirmed that the suit stood dismissed for want of prosecution pursuant to Order 17 Rule 2(5) of the *CPR*. The Plaintiffs' claim that no notice was served upon them does not aid their cause; the suit stood dismissed as of 27.02.2022 by operation of the law. There is no requirement for notice to parties under the provision, as alluded to by the Plaintiffs.

12. It is trite that cases belong to litigant. Here there is no evidence of any steps the Plaintiffs took to prosecute the suit since 27.02.2020, even discounting the sorry history of multiple adjournments. The Plaintiffs assertions that the file was not in court 11.05.2023, goes to demonstrate that they did not keep abreast of their case, because if they had, they ought to have been aware of the dismissal which

was updated on the Case Tracking System (CTS) of the Judiciary. It took almost a year for them to move the court. As for the inordinate delay of over two years since 27.02.2020 and the general delay characterizing the case, no explanation has been proffered by the Plaintiffs.

13. The period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the court's discretion only. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR succinctly addressed the argument of delay as follows;-

> "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. There have to be valid and clear reasons, upon which discretion can be favourably exercisable......"

14. No explanation has been offered here beyond the Plaintiffs' misplaced clamour for notice. True, the Plaintiffs were entitled to be heard on the merits of their case, but the right cannot be stretched to the detriment of the parties they dragged to court. It is now 23 years since the cause of action arose, 20 years since the suit was filed and the motion was filed close to a year since dismissal of the suit. Additionally, re-opening the matter will be prejudicial as it is doubtful that a fair trial can be held after such a long hiatus.

15. In *Rajesh Rughani v Fifty Investments Limited & Another* [2016] eKLR the Court of Appeal stated that: -

> "The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita -v- Kyumbu* (1984) KLR 441). The test was expressed as follows:
>
>> The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is to both the plaintiff and the 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 the disappearance of human memory resulting from lapse of time; the defendant must 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."

16. As observed in Ivita case above, extended delay impacts adversely on the possibility of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. Notwithstanding the fact that pre-trial directions have been taken on the matter, it is the court's considered opinion that allowing the reinstatement of the Plaintiffs' suit in the present circumstances would run afoul of the overriding objective in Section 1A and 1B of the *CPA*, in addition to working prejudice against the Defendant. Consequently, the Court finds no merit in the Plaintiffs' motion, and it is hereby dismissed with no orders as to costs, the 2nd Defendant not having participated in the motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff/ Applicant: Mr. Obuori

For the Defendant/ Respondent: N/A

C/A: Erick