Omondi v Attorney General (Civil Suit 66 of 2018)
[2024] KEHC 4637 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4637 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 66 OF 2018

CW MEOLI, J

APRIL 11, 2024

BETWEEN

PHILIP OMONDI ..... APPLICANT

AND

HON ATTORNEY GENERAL ..... RESPONDENT

RULING

1. The Notice of Motion dated 11th July, 2023 (the Motion) was brought by Philip Omondi (hereafter the Applicant) and is supported by the grounds set out on its face and the sworn affidavit of the Applicant's advocate, Hesbon Owino Opiyo. The Applicant is seeking to have the dismissal order made on 24th February, 2022 set aside and the suit reinstated for hearing.

2. The advocate stated in his affidavit that prior to the dismissal order; neither the Applicant nor his advocate was served with the notice to show cause. The advocate went on to assert that the delay in prosecuting the suit was occasioned by the fact that the Applicant's advocate had previously lost touch with him making it impossible to receive further instructions pertaining to the suit, but that the Applicant remains keen on prosecuting the suit. He further asserted that unless the orders sought are granted, the Applicant will suffer great prejudice as he will be condemned unheard.

3. The Motion was opposed by the Hon. Attorney General (hereafter the Respondent) through the replying affidavit sworn by Joseph Ngumbi on 4th October 2023. Therein, he averred that the delay on the part of the Applicant, in prosecuting the suit, is inordinate and inexcusable. That the delay is a clear indication of disinterest on the part of the Applicant in prosecuting his suit, as demonstrated by his failure to contact his advocate accordingly. That the Motion were to be granted, the Respondent would suffer grave prejudice owing to the likelihood of difficulty in tracing defence witnesses due to the prolonged passage of time since the suit was instituted. The advocate's position is that in view of the foregoing, the Motion ought to be dismissed with costs.

4. The parties canvassed the Motion by filing and exchanging written submissions. Counsel for the Applicant anchored his submissions on the decisions in *Wanjiku Kamau v Tabitha Kamau & 3 others* [2014] eKLR and *Esther Wamaitha Njihia & 2 others v Safaricom Ltd* [2014] eKLR on the discretionary power of courts in setting aside judgments/orders. Counsel reiterated the earlier averments regarding the alleged non-service of the notice to show cause, adding that the mistake on the part of the registry staff should not be visited upon the Applicant. On those grounds, the court was urged to exercise its discretion in favour of the Applicant, by allowing the Motion as prayed.

5. In response thereto, counsel for the Respondent reiterated his earlier averments that no proper grounds have been presented by the Applicant to justify issuance of the orders sought, in view of the inordinate and inexcusable delay by the Applicant in prosecuting the suit. Counsel further contended that the Respondent is at risk of prejudice if the suit were reinstated as it may be condemned to pay a colossal sum in special damages, while delay in the matter was a direct consequence of the Applicant's indolence. For those reasons, counsel urged the court to dismiss the Motion, with costs.

6. The court has considered the rival affidavit material and the contending submissions and related authorities. The Motion seeks the setting aside of the dismissal order of 24th February, 2022 and consequently, reinstatement of the suit.

7. Dismissal of suits for want of prosecution and reinstatement thereof is provided for in Order 17 Rule 2(1) and 2(6) respectively, of the *Civil Procedure Rules* (CPR). Section 3A of the *Civil Procedure Act* also cited in the Motion, reserves 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 that regard, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated that:-

> " 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 v 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."

8. The 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 as conferred on the court was spelt out in the case of *Shah v Mbogo & 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."

9. The Applicant's suit was dismissed for want of prosecution, pursuant to a notice to show cause (NTSC) under Order 17 Rule 2 of the *CPR*. The notice was scheduled for 24.02.2022 and the said date had been served by way of registered mail upon the parties as evidenced by the affidavit of service by Rosemary Wanjiru dated 27th January 2022. The record shows that while Mr. Ngumbi for the Defendant attended, the Applicant's advocate was absent at the hearing of the NTSC. Although the dismissal order on the file erroneously cited Order 42 rule 35(2) of the *CPR*, the NTSC had been issued under Order 17 Rule 2 CPR and the date of the NTSC was 24.02.2022.

10. In trying to unravel the erroneous date in the dismissal order on the file, the court retrieved both the cause list of 24.02.2022 and the summary of activities in the case from the Judiciary Case Tracking System (CTS), both which have been placed on this file. The cause list of 24.02.2022 lists this suit at item 57 under matters slated for NTSC, while the case summary indicates that the suit was dismissed on 24.02.2022 for want of prosecution, as stated in the Applicant's affidavit. Further it is evident from the case summary that no further action happened subsequent to dismissal until the present motion was filed on 12.07.2023. On the date of the NTSC, the cause list had 157 matters, majority of which (from item11) were due for NTSC, and it is possible that the wrong date and Order of the CPR were inserted in the dismissal order on the file.

11. This court will therefore amend the date of dismissal order to read 24.02.2022, and dismissal pursuant to Order 17, Rule 2 of the *Civil Procedure Rules*. The error is hereby corrected under section 100 of the *Civil Procedure Act*.

12. Order 17 Rule 2 of the *CPR* states 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.
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> (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.
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> (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."

13. As earlier mentioned, whilst it is acknowledged that the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to tender credible material upon which the court should exercise its discretion in his or her favor, as spelt out in the case of Shah v Mbogo & Another (supra) and further amplified by the court in *Bouchard International (Services) Ltd v M'Mwereria* [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein apply with equal force in this matter.

14. Going by the affidavit material tendered to support the Motion, the Applicant's advocate stated that no notice to show cause was served upon his firm prior to the dismissal order being made and that the said advocate was unable to contact the Applicant for purposes of receiving further instructions in the suit, hence the delay. This position in particular, was countered by the Respondent, who stated through its advocate that since the time of filing the statement of defence, no further action took place in the suit. That this was therefore a clear indication that the Applicant had lost interest in the suit and hence the dismissal order is warranted.

15. The court has already referred to the copy of the NTSC notice issued on 13th January 2022 and which triggered the dismissal order of 24.02.2022. The affidavit of service by Rosemary Wanjiru, sworn on 27th January 2022 evidences service of the NTSC upon the parties herein through their respective advocates. The Applicant's advocate has not disputed the mailing address to which the notice was dispatched by way of registered mail, and merely makes bald denials of service. On their part, the Defendants attended court on 24.02.2022, itself evidence of receipt of notice. In the circumstances, the court is satisfied that due service of the notice was effected upon the Applicant's advocate, and no explanation has been given for his absence.

16. Moreover, it is apparent from the record that the last action in the suit was the entry of appearance by the Respondent coupled with the filing of its statement of defence dated 3rd July, 2018. The Applicant had not filed his witness statements or documents four years since filing his suit. The Applicant did not offer any credible explanation for his prolonged inaction in the suit prior to dismissal. Indeed, his advocate swore that he had lost contact with the Applicant. This suggesting that the Applicant had failed to follow up on it.

17. It is a legal principle that ultimately, a suit belongs to the advocate's client and it is therefore upon the litigant to follow up on the progress of his or her case with the advocate. In *B1-Mach Engineers Ltd v James Kahoro Mwangi* (2011) eKLR the court stated regarding the duty of the client vis-à-vis that of an advocate that :

> " The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erst while advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty for the client to pursue his matter. If the client was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate."

18. Here, the Applicant did not demonstrate any steps taken in giving the requisite instructions or proactively following up on his case with his advocate, prior to its dismissal. The delay of close to four (4) years between the last action in the suit and its dismissal in 2022 has therefore not been sufficiently explained.

19. It is not in doubt that a plaintiff is entitled to be heard on the merits of his or her case. However, that right cannot be extended to accommodate parties who are lax in prosecuting their cases and even so, without any reasonable explanation. In the present instance, the suit was filed six years ago, in the year 2018. Ultimately, the court is of the view that no reasonable or satisfactory explanation has been offered by or on behalf of the Applicant, for the inordinate delay in prosecution of the suit.

20. Additionally, the court notes the sentiments by the Respondent that re-opening the matter would likely be prejudicial to it, for the reasons set out hereinabove and which position was echoed in the decision in *Ivita v Kyumbu* [1984] KLR 441. To the effect that 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.

21. In the court's view, to allow the reinstatement of the present suit in view of the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*. The Court

of Appeal stated the following in *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09:

> " 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."

22. Consequently, the Notice of Motion dated 11th July, 2023 is found to be without merit and is hereby dismissed with costs to the Defendant/Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: N/A

C/A: Erick