



**Oceanic Towers Limited v Hussein Builders Limited (Civil Suit E021 of 2021) [2024] KEHC 5992 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5992 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E021 OF 2021  
DKN MAGARE, J  
MAY 24, 2024**

**BETWEEN**

**OCEANIC TOWERS LIMITED ..... PLAINTIFF**

**AND**

**HUSSEIN BUILDERS LIMITED ..... DEFENDANT**

**RULING**

1. This is a Ruling on an Application dated 28<sup>th</sup> September 2023 and filed by the Plaintiff seeking the following prayers:
  - i. Spent.
  - ii. The proceedings of 26<sup>th</sup> July 2023 be set aside and the Plaintiff be granted leave to file additional documents.
  - iii. PW1 be recalled for further cross examination.
2. The Application is supported by the Affidavit of Mitesh Visaria. It is deponed that the evidence sought to be produced was misplaced and was unavailable but inaccessible at the time of filing the suit.
3. The Respondent filed Replying Affidavit dated 17<sup>th</sup> February 2024 in which it was stated *inter alia* that:
  - a. The Application was an afterthought after the hearing of the first witness.
  - b. The Applicant was making attempt to fill the gaps in their case.
  - c. Application was not deserving the court's exercise of discretion.
  - d. The application is an abuse of the court process.



## Submissions

4. I have not had sight of the Applicant's submissions. On the part of the Respondent, they filed submissions dated 3<sup>rd</sup> April 2024 where they submitted that the parties were supposed to furnish their evidence while filing their pleadings. They relied on the case *Johanna Kipkemoi Too v Hellen Tum* (2014) eKLR, where the court stated: -

“It will be seen from the above that both plaintiff and defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.

There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush.”

5. It was further submitted that the bar to be relied on for allowing additional filing of documents should be very high as held in the case of *Mansukbalal Jesang Maru v Frank Wafula* [2021] eKLR.
6. I was urged to dismiss the Application.

## Analysis

7. I have perused the Application, the Supporting Affidavit and its annexures on the one hand and the Replying Affidavit and submissions by the Respondent on the other hand. The issue before me is whether the court should reopen the Plaintiff case and allows the filing of further documents.
7. Even if the case is re-opened, the Applicant alleges in the Application that the additional evidence sought to be filed after the case is reopened relates to the defective materials that were supplied by the Respondent.
8. I note that the same allegation of the supply of defective material was not pleaded in the Plaint and there is no explanation as to how this would be remedied by the Applicant. This appears to be a quest to have a second bite on the cherry.
9. The matter proceeded inter partes. It appears the Applicant is having a re-think on the nature of their case. A party is not allowed to horde evidence and await the other party to expose their cases. This is litigation by instalments. In *Nayan Mansukhlal Salva v Hanikssa Nayan Salva* [2019] eKLR, where the court stated as doth: -

“The principles for adduction of new evidence on appeal were set out in *Tarmohamed & Another v Lakhani & Co* (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in *Ladd v Marshall* (1954)1 WLR, 1489, the Court of Appeal for Eastern Africa stated that:

“except in cases where the application for additional evidence is based on fraud or surprise:

“to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could



not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

10. Staying and setting aside of proceedings is a discretionary function of this court but has to be pegged on exceptional circumstances. The threshold for stay of proceedings has been illuminated in the passages in *Halsbury's Law of England*, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332 that: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

11. It is contented that the new evidence was misfiled in a wrong file and also data crushed in a computer that had the documents. In my view by the time of drafting the pleadings, at least the Applicant knew the evidence sought to be adduced was available only that it is said that it could not be accessed.
12. In analyzing the reasons projected in the Application and the Supporting Affidavit, I find no good reason to re-open the case. There was also no report or documents which was filed, even without leave in court. The Plaintiff simply wants to delay the case in court for reasons other than the ones they are advancing. In assessing due diligence on the part of a party, the Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011) observed that:

“Sufficient cause means that the parties 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 ...

13. What the Applicant is doing is stealing a match on the respondent. He cannot just keep expanding boundaries of non-existent case. The case as pleaded had been prosecuted. The Applicant closed his case. They should keep their peace.
14. In *Ironside Auto Spares Ltd v Mutsui O. Lines Thro' Inchcape Shipping Services Ltd & another* [2008] eKLR, while referring to dismissal, the court posited as to how the court should let sleeping dogs lie: -

“The Judge in that case, when faced with circumstances similar to the ones prevailing in this case, relied on the English case of *Fitzpatrick v Batger & Co. Ltd.* [1967]2 All ER 627. Both



Denning, M.R and Salmon, LJ found and held that a party who goes to sleep for a long time should bear the consequences of his sleep. SALMON LJ said the following at p. –

“I entirely agree .... grossly inordinate delay of the kind which has occurred in this case is quite inexcusable and ought not to be tolerated. It is of the greatest importance and in the interest of justice that these actions should be brought to trial with reasonable expedition---. It is said in this case that the action is not to be dismissed, because the defendants might have taken out a summons ..... much earlier than they ..... did. They no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves..... I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact. The plaintiff is not being deprived of compensation because ..... he has an unanswerable claim ..... for negligence ..... I am quite satisfied that, in the circumstances of this case, where there has been such grossly inordinate delay without any real excuse ..... I have no doubt but that the proper order is to dismiss the action for want of prosecution.”

15. The matter is foreclosed. There is no place of derailing the trial. I find no legal basis on which to exercise my discretion in favour of the Applicant. In the case of *Ramakant Rai v Madan Rai*, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

“Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life.’ Wide enough in all conscience is the field of discretion that remains”.

16. In the circumstances, the Application dated 26/7/2023 is devoid of merit and is accordingly dismissed with costs.

### **Determination**

17. The upshot of the foregoing is that I make the following orders: -
- i. The Notice of Motion dated 26<sup>th</sup> July 2023 is devoid of merit and is hereby dismissed with costs of 20,000/= to Defendant.
  - ii. The costs shall be paid within 30 days, in default execution to issue.
  - iii. The matter shall proceed for directions on 26/6/2024 before the Deputy Registrar, to place before the new court.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24<sup>TH</sup> DAY OF MAY, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



**KIZITO MAGARE**

**JUDGE**

In the presence of: -

No appearance for parties

Court Assistant - Brian

