



**Muhoro v Mathau & 2 others (Civil Suit 90 of 2016)  
[2024] KEHC 7053 (KLR) (Civ) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7053 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 90 OF 2016**

**CW MEOLI, J**

**JUNE 13, 2024**

**BETWEEN**

**FRANCIS NDEGWA MUHORO ..... PLAINTIFF**

**AND**

**PAYTON MATHAU ..... 1<sup>ST</sup> DEFENDANT**

**KELVIN MUTAROKI ..... 2<sup>ND</sup> DEFENDANT**

**AL-NUR MEDIA AFRICA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before the court for determination is the Notice of Motion dated 15<sup>th</sup> March, 2023 (the Motion) brought by Francis Ndegwa Muhoro (hereafter the Applicant) based on the grounds laid out on its face as amplified in the affidavit of the Applicant's advocate Gakii Kithinji. The motion seeks the setting aside of the dismissal order made by this court on 13<sup>th</sup> March, 2023 and consequently, the reinstatement of the suit for hearing.
2. In her supporting affidavit which by and large reiterated the grounds of the Motion, the Applicant's advocate stated that on 13<sup>th</sup> March, 2023 when the matter was scheduled for hearing, it was listed at No. 20 on the cause list; that having logged onto the virtual platform, she was present at all material times, but experienced a technical problem just prior to the matter being called out, hence dropping off from the virtual court; and that by the time she logged in again, the suit had already been called out and dismissed due to non-attendance on her part. It was therefore her averment that the non-attendance resulted from factors beyond her control and for which the Applicant should not be penalized. She asserted that the Applicant is keen on prosecuting the suit and that no prejudice will be suffered by the adverse parties if the Motion is allowed.



3. Payton Mathau, Kelvin Mutaroki and Al-Nur Media Africa Limited (hereafter the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents) resisted the Motion by way of a replying affidavit sworn by the 2<sup>nd</sup> Respondent on 4<sup>th</sup> December, 2023 on his behalf and on behalf of his counterparts. The Respondents view the Motion as frivolous, vexatious and a waste of judicial time. The 2<sup>nd</sup> Respondent further deposed that no sufficient reasons have been given to explain the non-attendance on the part of the Applicant's advocate on the scheduled hearing date; that the Applicant has overall been indolent in prosecuting his suit for the past seven (7) years since its institution, thereby encumbering its timely conclusion; and that the Applicant cannot therefore claim to be interested in pursuing the claim, as his conduct demonstrates the contrary. Finally, the 2<sup>nd</sup> Respondent stated that the mere fact that the matter has dragged on this far is reason enough to state that the Respondents herein stand to be prejudiced if the suit is reinstated for hearing.
4. The parties filed and exchanged written submissions in respect of the Motion. Counsel for the Applicant anchored his submissions on the decision in *Shah v Mbogo* (1967) EA 166 and Order 12, Rule 7 of the [Civil Procedure Rules](#) (CPR) on the discretionary power of the court in setting aside of orders. Counsel proceeded to recount the history of the matter in showing that the Respondents' accusations of indolence on the part of the Applicant are unjustified. Counsel reiterated the explanation for her non-attendance on 13th March, 2023 terming it non- unavoidable and excusable. Citing the decision in [Philip Keipto Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende](#) [1982-88] 1 KAR 103 counsel contended that the Applicant should not be penalized for the mistake that occurred, asserting that the Respondents will not be unduly prejudiced, and could be compensated by an award of costs. Counsel finally submitted that the Motion ought to be allowed.
5. On the part of the Respondents' counsel, the decisions in [Ronald Mackenzie v Damaris Kiarie](#) [2021] eKLR and in [Utalii Transport Company Limited & 3 others v NIC Bank Limited & another](#) [2014] eKLR were cited. In support of the submission that it is the duty of a plaintiff to take active steps in ensuring the expeditious prosecution of his or her case. Counsel equally setting out instances in the history of the suit in demonstration of asserted lack of interest by the Applicant in pursuing his claim. Counsel stating that the decision whether or not to set aside a dismissal order lies with the discretion of the court, as restated in the case of [Bilba Ngonyo Isaac vs. Kembu Farm Ltd & another & another](#) [2018] eKLR whilst echoing the decision in *Shah v Mbogo & Another* (1967) EA 116. That in the present instance, the Applicant has not met the threshold to warrant reinstatement of his suit. Further citing the case of [Mobile Kitale Service Station v Mobil Oil Kenya Limited & another](#) [2004] eKLR the Respondents' counsel reiterated the need for expeditious disposal of suits, and an end to litigation. He urged the court to dismiss the Motion be dismissed with.
6. The court upon considering the material canvassed in respect of the Motion. Whilst it is acknowledged that the discretion of the court in setting 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. In the case of renowned case of *Shah v Mbogo & 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.”
7. The principles articulated in *Shah v Mbogo* (*supra*) were 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.

8. The court has considered the rival affidavit material concerning the events surrounding the dismissal of the suit. The history of the matter is that the suit, founded on the tort of defamation, was filed on 24<sup>th</sup> March, 2016. The plaint was accompanied by an application of like date, through which the Applicant sought interlocutory injunctive orders, granted subsequently by the ruling delivered on 14<sup>th</sup> April, 2016, by Njuguna J. However, during the course of the proceedings, the Judge recused herself from further handling the matter, vide her order made on 20<sup>th</sup> April, 2017. Subsequently, the matter was listed on various occasions, but it was not until 13<sup>th</sup> December, 2018 that Mbogholi Msagha J (as he then was); upon noting the parties' compliance with pre-trial directions certified the suit ready for hearing. The suit was thereafter fixed for hearing on various dates but did not proceed for different reasons, including the reason that the court was not sitting on scheduled hearing dates. The hearing date material to this application, namely, 13<sup>th</sup> March, 2023 was fixed ex parte by the Applicant's counsel on 24<sup>th</sup> November, 2022.
9. On 13<sup>th</sup> of March, 2023 when the matter was called out, only the Respondents' advocate was in attendance. At 11.10 am, the Applicant's advocate was absent, and the court dismissed the suit with costs. The record shows that soon thereafter, the Applicant's advocate logged in to the virtual court, explaining that she had encountered technical challenges in joining the session, whereupon the court conveyed to the said advocate its dismissal orders in the matter. The said dismissal order prompted the instant Motion.
10. The question for determination is whether the explanation given by the Applicant's advocate for non-attendance constitutes sufficient reason to warrant setting aside of the dismissal order. While the court acknowledges that parties and/or their advocates may experience technical hitches in appearing on the virtual court platform, in this case, the Applicant's advocate logged in to the court session at 11.30am and made no reference to earlier presence on the platform, as alleged in her affidavit, which is vague on timelines. Even assuming that counsel was always present on the platform from 9.00am when court sessions ordinarily commence, upon dropping off, she could have quickly rejoined on another device, and it is unbelievable that 11.30am is the earliest time she was able to rejoin the session.
11. Besides, the matter was listed for hearing, and it was expected that the Plaintiff himself would be in attendance; he obviously was not in attendance either. He has not even found it necessary to swear an affidavit in this regard and left it to his counsel to depose to matters, including his interest in the suit which are within his knowledge. The court finds counsel's explanations contrived and takes a dim view of the fact that the Plaintiff has stayed in the shadows of his counsel regarding this application.
12. It may not be easy or useful to pinpoint from the history of the case which party was to blame for which adjournment or period of delay. However, the buck stops with the Plaintiff; the suit belongs to the Plaintiff who filed it, not his advocate, and the responsibility for prosecuting it rests with the Plaintiff. It is not enough that his counsel set the suit down for hearing on several occasions and to blame the court and other parties when the suit had been pending for 7 years at dismissal, and not a single witness had testified.
13. In *Ivita -v- Kyumbu* (1984) KLR 441, the court spelt out the applicable test in a matter of this nature 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.”

12. 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. Even though denying a party the right to hearing should come as a last resort, Section 1A and 1B of the *CPA*, reinforce the need for expedition in disposal of cases. In *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal had this to say concerning the application of the overriding objective in Section 1A and 1B of the *Civil Procedure Act*:

“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”.

14. Delay is inimical to the overriding objective for the expeditious, just, proportionate and affordable resolution of disputes. Delay ought not to be taken lightly or excused, because, it results in prejudice to the party dragged to court and the clogging of the system of administration of justice. Reviewing all the foregoing, the court while not totally convinced by the Applicant’s explanations is of the view that any further delay and prejudice can be curbed by imposition of appropriate conditions, while awarding costs to the Respondents.
15. Consequently, the Notice of Motion dated 15<sup>th</sup> March, 2023 is allowed, albeit reluctantly, on the condition that the Applicant shall fully prosecute his reinstated suit within 90 (ninety) days of today’s date, failing which the suit shall stand automatically dismissed with costs, for want of prosecution. The costs of the Motion are awarded to the Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF JUNE 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: N/A

For the Respondents: Ms. Khadija

C/A: Erick

