Multi link General Supplies limited v Njue & 7 others; Independent Policing Oversight Authority (Interested Party) (Constitutional Petition 34 of 2019) [2024] KEHC 7560 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7560 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION 34 OF 2019

OA SEWE, J

JUNE 13, 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 JOHN ..... 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) Before the Court for determination is the Notice of Motion dated 8th April 2024. It was filed by the petitioner pursuant to 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* and all other enabling provisions of the law. The petitioner seeks 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 its 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 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 still aggrieved and therefore 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 through the firm of Wandai Matheka & Company Advocates. Mr. Njuguna further averred 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 approached the advocates now on record with instructions to put in the instant application for review of the said orders. It insisted that failure to attend court was not deliberate but was due to an inadvertent error occasioned by lack of communication between it and its previous Advocates.

(5) The petitioner further averred that it has been diligent in prosecuting this suit and is not at all guilty of any dilatory conduct. It further stated that, whereas it stands to suffer irreparable harm if the Petition is not reinstated for hearing and determination on merit, the respondent will suffer no prejudice at all if the orders sought are granted.

(6) While the respondents opted to file no response to the application, the interested party relied on its Replying Affidavit, sworn on 23rd May 2024 by is Legal Officer, Ms. Ann Kamau. It refuted the

petitioner's assertions and stated that, the lack of due diligence on the part of the petitioner's Advocates 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 said witness was merely stood down for failure to annex a certificate vouching for the veracity of the electronic evidence he intended to produce.

(7) The interested party reiterated the fact that the matter was dormant from the 15th July 2021 up until the 20th May 2022, a period 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, contending that the fact that it had taken the petitioner almost one (1) year to discover that the Petition had been dismissed only goes to show that it has lost interest in the Petition.

(8) Pursuant to the directions given herein on 11th April 2024, the application was urged by way of written submissions. The petitioner relied on the written submissions dated 2nd May 2024 and centered its arguments on the review provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The petitioner also relied on Rule 25 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* (the Mutunga Rules) to demonstrate that the Court has unfettered discretion to grant the orders sought.

(9) The petitioner proposed two issues for determination and made submissions accordingly. The first issue is whether the Court should review vary and/or set aside the dismissal order dated 22nd September 2022; and the second issue, which is in essence the flip side of the first, is whether the Court should reinstate the Petition. The petitioner reiterated its stance that the Petition was dismissed, not on account of its own fault, but through the mistake of its counsel who failed to attend court when required to. Reliance was placed on *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 and *Diamond Hasham Lalji & Another v Attorney General & 4 Others* [2014] eKLR.

10. On whether the Court should reinstate the Petition dismissed on 22nd September 2023, the petitioner submitted that the door of justice should not be closed to the petitioner for the mistake of its counsel; and that the Court has unfettered discretion to review, vary or set aside the dismissal order. The petitioner relied on *Bilha Ngonyo Isaac v Kembu Farm Ltd & Another* [2018] eKLR, *Belinda Murai & Others v Amos Wainaina* [1978] LLR 2782 and *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & others* [2013] eKLR, among other authorities, for the proposition that the discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error.

(11) Counsel for the interested party, Ms. Nzwii, proposed only one issue for determination vide the written submissions dated 23rd May 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 by having the matter revived for no good reason.

(12) Further to the foregoing, the interested party submitted that the petitioner is guilty of laches and therefore 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 to demonstrate 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.

(13) 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.

(14) I have carefully considered the application in the light of the pleadings filed herein and proceedings to date. I have similarly taken into consideration the response filed on behalf of the interested party. Although the application was brought under the review provisions of the *Civil Procedure Act* and the Rules thereunder, namely Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, the facts hereof do not lend themselves to the strictures of those provisions; there being no allegation of an error on the face of the record, or discovery of new or important matter that could not have been availed when the dismissal order was made.

(15) A perusal of the court record reveals that the Petition was dismissed for want of attendance; and therefore the applicable provision is Rule 7 of Order 12, *Civil Procedure Rules*. When faced with a similar situation in *Edward Waiguru Ngigi v County Government of Nairobi* [2020] eKLR Hon. Korir, J. (as he then was) held:

> 14. In my view, the Applicant has quoted the wrong provisions of the law. Although this procedural error will not affect the outcome of the application, it is important to point it out for record purposes. This application is not about a review of an order or decree under Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 of the *Civil Procedure Rules*, 2010 (CPR). This is also not an Order 10 *CPR* matter. In my view the petition was dismissed under Order 12 Rule 1 of the *CPR* which allows the Court to dismiss a suit for none appearance by both parties. Rule 7 of the same Order, however, provides for reinstatement of a dismissed suit as follows:-
>
> > " Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just."

(16) I am of the same persuasion. I note that, although purporting to approach the Court under the review provisions, the petitioner also cited Order 12 Rule 7 of the *Civil Procedure Rules*. Since there is no specific provision on point under the Mutunga Rules, Rule 7 is probably the most appropriate provision for the application. Moreover, in *Deynes Muriithi & 4 others v Law Society of Kenya & another* [2016] eKLR, the Supreme Court quoted with approval the decision by the High Court at Kisii in *Peter Ochara Anam & 3 Others v. Constituencies Development Fund Board & 4 Others*, Constitutional Petition No. 3 of 2010; [2011] eKLR, in which it was held:

> " In as much as the Constitutional petition is a special jurisdiction, it is in the nature of civil proceedings. In the absence of rules made thereunder, the procedure of handling such a petition must be akin to civil proceedings. It cannot be that merely because it is a special jurisdiction, the rules of evidence for instance should not apply, be ignored nor witnesses

should not be sworn, pleadings should not be signed and questions in cross-examination should not be asked. That will be a direct invitation to judicial chaos and legal absurdity. I do not therefore wholly agree or subscribe to the submissions of the petitioners that the petition being neither a criminal nor civil proceedings, it must be conducted in vacuum" [emphasis supplied by the Supreme Court].

(17) Rule 7 aforementioned simply requires that setting aside be done "on such terms as may be just". It is nevertheless trite that the court's discretion to set aside an *ex parte* order is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error, and is not to assist a person who deliberately seeks to obstruct or delay the course of justice. The petitioner's explanation was that the matter was being handled by its advocates and that there was a breakdown of communication between it and their advocates.

(18) Although the interested party urged the Court to disregard that explanation and find that the petitioner was itself indolent, it is significant that the respondents did not oppose the application. It must always be borne in mind that an interested party, though interested in the outcome of a matter, is not a party. Rule 1 of the *Mutunga Rules* is explicit that:

> " an interested party is a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation." (emphasis added)

(19) For that reason, the Supreme Court pointed out in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* (supra) that:

> " A suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the *Civil Procedure Code*, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

20. In the premises, in the absence of proof of prejudice on the part of the respondent, as is the case, there is no reason why the petitioner should not be given an opportunity to present its case for a determination on the merits. Indeed, in *Belinda Murai & others v Amos Wainaina*, [1979] eKLR Madan, J.A. stated:

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."

(21) Similarly, in *Philip Chemowolo & Another v Augustine Kubende*, [1982-88] KAR 103 at 1040 it was held:

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

(22) For the foregoing reasons, the application dated 8th April 2024 is hereby allowed and orders made as hereunder:

(a) That 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 and are hereby set aside.

(b) That the Petition filed herein on 18th April 2019 be and is hereby reinstated for hearing and determination on its merits.

(c) The Costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 13TH DAY OF JUNE 2024

OLGA SEWE

JUDGE