Krijger v Owiti (Civil Suit 419 of 2010) [2024] KEHC 9065 (KLR) (Civ) (15 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 419 OF 2010

CW MEOLI, J

JULY 15, 2024

BETWEEN

PETER CORNELIUS JACOB KRIJGER .... PLAINTIFF

AND

DR. FREDRICK OWITI .... DEFENDANT

RULING

1. The Notice of Motion dated 22nd December, 2023 (the Motion) brought by the Defendant herein Dr. Fredrick Owiti (hereafter the Applicant), and based on the grounds laid out on its face, as amplified by the affidavit of the Applicant, seeks *inter alia* :-

   "1. That this Court be pleased to grant an order of Stay of execution to restrain the Respondent/Plaintiff, his Auctioneers, his Advocates, their respective agents, employees, personal representatives, successors and/or assigns from attaching, alienating, disposing of, selling by public auction or private treaty the Defendant's movable property and/or execute the decree by any other mode pending the hearing and determination of this suit, application and further court orders.

   2. That the Judgment delivered on the 15th of June 2023 be and is hereby vacated and/or set aside". (sic)

2. The Motion is expressed to be brought under Sections 1A, 1B, 3A, 63(c) and (e) of the *Civil Procedure Act* (CPA) and Order 40, Rules 1(b), 2, 3 and 4 of the *Civil Procedure Rules* (CPR).

3. By his supporting affidavit, the Applicant stated that prior to delivery of judgment in the suit, his former advocate (Mr. Ojwang' Agina) did not keep him appraised of the progress therein since especially regarding the hearing date, to enable him attend court and give testimony in his defence. The

Applicant further stated that he was never served with a hearing notice relating to the hearing of the suit and that the mistake of his former advocate should not be visited upon him.

4. The Applicant similarly averred that his statement of defence dated 9th November, 2010 raises triable issues which ought to be ventilated at the trial and determined on merit. That it would not serve the interest of justice if he were to be condemned unheard and hence it is only fair that the prayers sought be granted.

5. Peter Cornelius Jacob Krijger (hereafter the Respondent) resisted the Motion by filing the Grounds of Opposition dated 2nd February, 2024 to the following effect:

> " Take Notice that the Plaintiff/Respondent, Peter Cornelius Jacob Krijger, shall rely upon the following grounds of Opposition in response to the Defendant/Applicant's Notice of Motion dated 22nd December 2023:-
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> 1. That the Defendant/Judgment-Debtor is in contempt of this court and thus has no audience before this court.
> 2. That the Application is brought with unreasonable delay and the Defendant/ Applicant has been inordinately indolent, only waiting for execution before filing the present Application.
> 3. That the Application lacks merit and is an abuse of the court process.
> 4. That the allegations against the Defendant/Applicant's former counsel, Mr. Ojwang' Agina-Advocate lack merit as the same are wholly unsubstantiated.
> 5. That the Application deliberately seeks to evade or otherwise obstruct the course of justice." sic

6. Pursuant to directions given on 6th March, 2024 the parties filed and exchanged written submissions. To support the Motion, counsel for the Applicant anchored his submissions on Order 12, Rule 7 of the CPR as well as the decisions in *Shah v Mbogo* [1967] EA 116 and *Securicor Courier (K) Ltd v Owino* [1993] eKLR concerning the discretionary power of the court to set aside a judgment/order. Counsel proceeded to argue that if the decree herein is executed, the Applicant will suffer grave loss to his medical practice. Counsel further argued that the Applicant's statement of defence earlier filed, raises triable issues which deserve consideration by the court. For the foregoing reasons, the court was urged to allow the Motion as prayed.

7. The Respondent's counsel relied on the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR as well as the decision in Judiciary of *Kenya v Three Star Contractors Ltd* [2020] eKLR to argue that the delay in bringing the instant Motion has been inordinate and unexplained. Counsel also cited the case of *Shah v Mbogo* (supra) laying emphasis on the discretionary power of the courts in determining applications for the setting aside of judgments/orders. Further, he pointed out that up until the hearing of the suit, the Applicant represented by counsel and that the Applicant absented himself on the various dates during which the matter was scheduled.

8. Counsel asserted that while it is a general legal principle that the mistake of counsel should not be visited upon the client, the principle does not apply in an absolute sense and cannot be used as a means of excusing the indolence of a client, as held in *Christopher Muriithi Ngugu v Eliud Ngugu Evans* [2016] eKLR and previously, in *Tana & Athi River Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR. Hence, the Applicant's averment and argument that he should not be made to suffer for the alleged mistake of his former advocate does not hold water. In closing, the

Respondent's counsel submitted that litigation must come to an end, as held in *Karatina Municipal Council & Another v Kanyi Karoki* [2021] eKLR and *Mariam Mohamed Mbaruku v Hamisi Mzee Ali* [2021] eKLR.

9. The court has considered the material canvassed in respect of the Motion and takes the following view of the matter. First, the two prayers seeking to stay execution appears problematic seeking as it does, to stay execution pending determination of motion and pending the suit. While the former is spent, the suit having been determined via a judgment, no stay of execution can be granted pending the suit. Consequently, prayer (2) is unavailable in the circumstances of the case.

10. As concerns the prayer for setting aside/vacating of the judgment delivered on 15th June, 2023, the Applicant invoked Sections 1A, 1B, 3A, 63(c) and (e) of the *CPA* and Order 40, Rules 1(b), 2, 3 and 4 of the *CPR*. Reviewing these provisions, the court notes that the latter rules and Section 63 relate to the grant of temporary injunctive/interlocutory orders, as sought in prayer (1) of the Motion, which is now spent. Sections 1A and 1B (supra) set out the overriding objective of the *CPA*.

11. Section 3A (supra) being the most applicable provision 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." The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

> " 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."

12. The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, to add the following:

> " Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

13. 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 and 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."

14. The events leading to the instant Motion are as follows. The Respondent had instituted the suit against the Applicant vide the plaint dated 6th September, 2010. The suit was founded on the torts of defamation and breach of doctor-patient confidentiality. It is unclear whether the Applicant had filed a statement of defence as no copy of the same could be immediately traced on the file . Suffice it to say that, the Respondent testified at the trial as the sole witness on 5th November, 2019 and was subjected to cross-examination by Ms. Makasi on behalf of the Applicant's former advocate.

15. Following close of the Respondent's case, the matter was further scheduled for hearing on 10th May, 2021 and 15th May, 2021 during which time the Applicant's former advocate insisted on a physical defence hearing. Resulting in rescheduling of the hearing to 22nd June, 2021 but the matter did not proceed but was set for hearing on 21st July, 2021, and adjourned to 22nd September, 2021 when it was yet again adjourned owing to the absence of the Applicant and his advocate. When the matter finally came up for defence hearing on 28th April, 2022 the Applicant's former advocate closed the defence case without calling any witnesses. The parties were therefore directed to file written submissions. Thereafter, the parties filed written submissions as directed by the court, and judgment was delivered on 15th June, 2023, the court awarding the Respondent a sum of Kshs. 400,000/- as damages for breach of doctor-patient confidentiality, costs of the suit and interest.

16. Subsequently, the matter proceeded for taxation of the Respondent's Party and Party Bill of Costs dated 3rd August, 2023. Going by the record, the Bill of Costs was unopposed. By a ruling delivered on 23rd November, 2023 the taxing master taxed the said Bill of Costs in the sum of Kshs. 269,470/-. Not long thereafter, the Applicant moved the court by way of the instant Motion.

17. Returning to the merits of the Motion, it is apparent that the Applicant's primary reason for urging this court to set aside/vacate its judgment of 15th June, 2023 is that he was never informed of the hearing of the suit by his erstwhile advocate. More specifically, the defence hearing at which he asserted he hoped to defend the suit. The Applicant also generally complained that he did not receive updates on the progress of the suit from the said advocate and he was therefore in the dark, at all material times. The Applicant equally advanced the argument that in the premises, his statement of defence which raises triable issues was not considered on merit, thus denying him the right to be heard before being condemned.

18. As was to be expected, the Respondent vehemently opposed a grant of the orders sought in the Motion, asserting that the Applicant is in contempt of the decree arising from the judgment and therefore not deserving of audience before this court, and that the Motion which was filed inordinately late , lacks merit.

19. The allegations of contempt of court against the Applicant are neither here nor there in the circumstances of the case. However, it is clear from the record that the Motion was filed over six (6) months since delivery of the judgment on 15th June, 2023. In that period , the matter proceeded for taxation and a ruling was delivered at the close of the taxation proceedings, as earlier set out. In the circumstances, the court finds the delay to be inordinate. The Applicant did not explain the delay, and on all accounts must have been prompted to action by execution proceedings.

20. On the more pertinent issue whether any grounds exist to justify the setting aside of the judgment, it is undisputed that the Applicant was at all material times represented by counsel, namely Mr. Agina advocate, who attended most of the court sessions and even filed his final submissions preceding judgment . On the day he closed the defence case, the said counsel did not make any application for

adjournment. Whether the former advocate kept the Applicant apprised on the progress of the matter, at all relevant times is another matter. The Applicant has not demonstrated his own efforts to follow up on the progresss of the suit with his advocate.

21. While the court acknowledges the legal principle that the inadvertence and/or mistake of an advocate ought not to be visited upon the client, ultimately, the suit belongs to the client and onus is on the client 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 adverting to the client's duty of a client vis-à-vis the duty of an advocate stated 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."

22. Moreover, the Court of Appeal stated in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR that :-

> "While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

23. Here, the Applicant did not demonstrate any steps taken by him in proactively following up on the progress of the case, especially. That this was a case over a decade old was a relevant consideration and hence the Applicant was ultimately responsible for taking the initiative in pursuit of his defence. Equally, general legal principle is that a party should not be condemned unheard. However, that right is not absolute and cannot be extended to accommodate indolent parties who display laxity in prosecuting their claims (or defending such claims). In the present instance, the suit was filed in the year 2010, some 24 years ago. What role did the Applicant play in diligently pursuing the closure of the case? Despite being a defendant, he ought to have explained how he sought to expedite the matter in the face of the long delay in its prosecution.

24. Ultimately, the court is of the view that no reasonable or satisfactory explanation has been offered in the Applicant's affidavit material to warrant the grant of the orders sought. Additionally, the court is of the view that vacating or setting aside its judgment and in turn re-opening the suit would be greatly prejudicial to the Respondent, given the nature of the suit and the passage of time since filing. The Respondent already has a judgment in his favour and he should be allowed to enjoy the fruits thereof. Litigation must come to an end.

25. In the court's view therefore, to grant the order for setting aside in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *CPA*. 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."

26. The Notice of Motion dated December 22, 2023 is without merit and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: Mr. Wendo h/b for Mr. Lubullela

C/A: Erick