



REPUBLIC OF KENYA



**Muhoro v Abdulahi (Civil Suit 91 of 2016)  
[2024] KEHC 9609 (KLR) (Civ) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9609 (KLR)

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

**CIVIL**

**CIVIL SUIT 91 OF 2016**

**CW MEOLI, J**

**JULY 23, 2024**

**BETWEEN**

**SAMUEL NDEGWA MUHORO ..... PLAINTIFF**

**AND**

**AHMEDNASSIR M. ABDULAHI ..... DEFENDANT**

**RULING**

1. For determination is the motion dated 13.03.2024 by Francis Ndegwa Muhoro (hereafter the Plaintiff/Applicant) seeking inter alia that the Court be pleased to enlarge the time within which this case is to be prosecuted; and having granted the said enlargement of time to deem the order automatically dismissing this suit for want of prosecution after the expiry of six (6) months be deemed vacated. The motion is expressed to be brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 50 and 51 of the *Civil Procedure Rules* (CPR), among others. The motion is premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Christine Nyambura Kamau, counsel on record for the Applicant.
2. The gist of her deposition is that by the ruling delivered 05.10.2023 the Court ordered that the suit be fully prosecuted within six (6) months of the ruling or it would stand automatically dismissed for want of prosecution. And that thereafter the matter was fixed for pre-trial conference on 07.11.2023 but was not certified ready for hearing as Ahmednassir M. Abdullahi (hereinafter the Defendant/Respondent) had not complied with Order 11 of the *CPR*, hence pretrial directions were re-scheduled for 20.02.2024. She further deposes that on the latter date, the Respondent confirmed compliance with Order 11 *CPR* and the suit was certified ready for hearing; that despite pleas by counsel for the Plaintiff for the earliest hearing date, the court set the hearing for 08.04.2024, which was three (3) days after the expiry of the period granted for the suit be prosecuted ; and that unless the time is extended, the suit will automatically stand dismissed. She concludes by stating that it is in the interest of justice



to have the suit determined on the merits hence the need to allow the prayers sought and that besides, no prejudice will thereby be occasioned to the Respondent.

3. The Respondent opposed the motion through a replying affidavit dated 05.04.2024. Confirming the court's order of 05.10.2023, he states that there has been inordinate and unexplained delay in filing the present motion. He asserts that given the Applicant's conduct since filing the suit resulting in the order of 05.10.2023, and belated motion confirm that the Applicant is no longer interested in prosecuting the suit; that allowing the motion would grossly prejudice him through violation of his constitutional right to be heard without undue delay pursuant to Article 50(2)(e) and 159(2)(b) of the Constitution. He asserts therefore that motion ought to be dismissed with costs.
4. By a supplementary affidavit deposed by Dominic Njuguna Mbigi, counsel on record of the Applicant states that the Respondent had not filed their documents or otherwise comply with Order 11 of the CPR as of 07.11.2023 and only confirmed compliance on 20.02.2024 whereupon the Deputy Registrar gave the earliest hearing date. Therefore, the Respondent is not being candid by blaming the Applicant for delay, himself having taken four (4) months to comply with Order 11 CPR. Thus, hampering the progress of the matter, whereas the Applicant's constitutional right to be heard will be curtailed if the suit is not reinstated.
5. The motion was canvassed by way of written submissions. Counsel for the Applicant invoked the provisions of Article 159 of the Constitution, Section 1A, 1B & 3A of the CPA and Order 50 & 51 of the CPR. To assert that the court's power to enlarge time upon such terms as the justice of the case may require, including where an application after the expiration of time appointed or allowed. That here the motion was presented before the expiry of the time allowed and Respondent's argument that there was inordinate delay is oblivious to the wide discretion of the Court under Order 50 Rule 6 of the CPR. In concluding, counsel called to aid the decision in Twaha v Timmany Issa Abdalla & 2 Others [2015] eKLR in support of the submission that the discretion to extend time is unfettered and that the Applicant has demonstrated circumstances justifying the exercise of the court's discretion in his favor.
6. On behalf of the Respondent, counsel addressing the question of enlargement of time, restated the events leading to the motion. And citing Section 95 of the CPA, contended that the Applicant's motion has not met the threshold for grant of an order of extension of time as there has been inordinate and unexplained delay in filing the motion. Asserting further that if there was a reasonable apprehension that the suit could not be prosecuted within the duration allowed by the Court, the Applicant ought to have moved the Court promptly and not after five (5) months. It was further submitted that the Applicant's conduct since institution of the suit reveals that he is not deserving of the exercise of the Court's discretion, and having on two (2) occasions, been granted him adequate time to prosecute the suit which he failed to do. The decision of this Court in Intercity Utility Services Ltd & Anor v City Council of Nairobi [2024] eKLR was called to aid in this regard.
7. Concerning prejudice, it was pointed out that when parties appeared before the Deputy Registrar on 07.11.2023 and 20.02.2024, the Applicant failed to explain the urgency of the having the matter heard. Citing Article 50(2)(e) and 159(2)(b) of the Constitution and the decision in Nilani v Patel (1969) EA 341, counsel posited that allowing the motion would violate the Respondent's right to be heard without undue delay in view of the Applicant's evident lack of interest in prosecuting the suit. Counsel thus urged the Court to dismiss the motion with costs.
8. The Court has considered the material canvassed in respect of the motion and perused the Court record. The events leading to the present motion have been captured by the parties in their respective affidavit material outlined above. As earlier noted, the Applicant's motion inter alia seeks the enlargement of time within which to prosecute the suit.



9. This application arises pursuant to the ruling delivered on 05.10.2023 with respect to the Applicant's motion dated 10.11.2022 seeking *inter alia* that the court be pleased to review, vary and or set aside its order made on 14.10.2022 dismissing the Applicant's suit for want of prosecution and that the said suit herein be reinstated and expeditiously heard. In allowing the said motion this Court stated in part as follows; -

“29. This suit is founded on defamation. Despite the evident apathy on the part of the Applicant in prosecuting the case since inception, it appears just and reasonable to allow reinstatement on strict terms. The Respondent can be compensated for the delay by way of costs. And reviewing all the pertinent matters, the justice of the matter lies in facilitating the Applicant's right to a hearing. Once there is compliance and pre-trial directions are taken, there would be no plausible reason for further delay in hearing the case to conclusion. For these reasons, the Court reluctantly allows the motion on condition that the suit be fully prosecuted within 6 (six) months of today's date failing which it will stand automatically dismissed with costs, for want of prosecution. The costs of the motion are awarded to the Respondent in any event.” (sic)

10. The Applicant has invoked Section 3A of the [CPA](#) which 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” and Order 50 of the [CPR](#) that addresses the matter of time and extension thereof. The court's power to enlarge time is donated by Order 50 rule 6 of the [CPR](#) which provides that; -

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

11. The foregoing provision is anchored on Section 95 of the [CPA](#) which states that;-

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

12. What then are the applicable principles? In the case of [Nicholas Kiptoo Korir Salat v Independent Electoral and Boundaries Commission and 7 Others](#) [2014] e KLR, the Supreme Court stated that:

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court



Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

Whether there will be any prejudice suffered by the respondents if the extension is granted;

Whether the application has been brought without undue delay; and

Whether in certain cases, like election petitions, public interest should be a consideration for extending time”.

13. The case of *John Tomno Cheserem vs Sammy Kipketer Cheruiyot* [2018] eKLR in which a motion was brought under Rule 4 of the *Court of Appeal Rules* appears to have specific relevance to the matter at hand as Rule 4 of the *Court of Appeal Rules* is in pari materia with the provisions of Order 50 Rule 6 of the *CPR*. The application in that case was for enlargement of time or leave to file a record of appeal out of time. The Court (Mohammed JA) observed that:-

“7. The principles guiding the Court on an application for extension of time premised upon Rule 4 of the Rules are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is therefore upon an applicant under this rule to, explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour. In exercising my discretion I ought to be guided by consideration of the factors started in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and any interested parties if the application is granted, and whether the matter raises issues of public importance. In the case of *Fakir Mohammed V Joseph Mugambi & 2 Others*, Civil Appln No. Nai 332/04 (unreported) this Court rendered itself thus:-

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

- (8) The matters to be considered are not exhaustive and each case may very well raise matters that are not in other cases for consideration. In *Mwangi V. Kenya Airways Ltd*, [2003] KLR 48, the Court having set out matters which a single



Judge should take into account when exercising the discretion under Rule 4, went on to hold:-

“The list of factors a court would take into account in deciding whether or not to grant an extension of time is not exhaustive. Rule 4 of the *Court of Appeal Rules* (Cap. 9 sub-leg) gives the single judge unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed so long as the factor is relevant to the issue being considered.”

14. The order of this Court issued on 05.10.2023 explicitly directed that the Applicant to prosecute his suit within six (6) months of the ruling, failing which it would stand automatically dismissed. This meant that the suit ought to have been prosecuted on or before 05.04.2024. Additionally, in view of the order, the court directed the parties to appear before the Deputy Registrar on 07.11.2023 for purposes of compliance with Order 11 of the CPR. The record reveals that on the said date, counsel for the Respondent sought fourteen (14) days within which to file a witness statement and list of documents while the Applicant indicated having complied with Order 11 of the CPR. The Deputy Registrar granted twenty-one (21) days within which the Respondent was to comply, and the matter was stood over to 20.02.2024 for pre-trial directions. The parties duly appeared before the Deputy Registrar and confirmed having complied with Order 11 of the CPR. Consequently, the Court certified matter ready for hearing and scheduled hearing for 08.04.2024. Prompting the filing of the present motion dated 13.03.2024 some three weeks later.
15. The motion before the court involves the exercise of discretion. It is settled that a party seeking the exercise of the Court’s discretion in their favour should not be seen to presume on the Court. As held by the Supreme Court in *Salat’s case* (*supra*), a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court. To require anything less would result in the watering down, if not the outright abuse of the Court’s discretion. The explanation by the Applicant herein seems genuine. The motion was filed before the lapse of the time granted for prosecution of the suit, however it must be viewed in the context of the entire history of the case.
16. While the prompt prosecution of the suit subsequent to the court’s order was stalled by the Respondent’s application for time to file documents, the Applicant seemingly failed to press the urgency of the matter before the Deputy Registrar, and besides, as earlier stated in the ruling of this court, the Applicant has previously demonstrated apathy in prosecuting his case. In a sense, he is the author of his current dilemma. Having said that, justice cuts both ways. While the prejudice to the Respondent arising from prolonged delay, especially by way of legal costs, is obvious, the words of Chesoni J (as he then was) in the case of *Ivita v Kyumbu* (1984) KLR 441 still ring true: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, ..... The Defendant must however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



17. The decision above must be read through the prism of the overriding objective introduced more recently in Sections 1A and 1B of the Civil Procedure Act giving effect to the constitutional command that justice shall not be delayed. More so at the present time when courts are deluged with heavy caseloads. Based on the affidavit material in respect of the motion and record herein, it appears that the possibility of mounting a fair trial has not been compromised by the delay in prosecuting the suit. The parties having complied with Order 11 of the CPR, it seems likely that an early trial date can be scheduled in this matter so that the suit can be determined on the merits. An award of costs in the court's view would be adequate to compensate the Respondent.
18. In the result, the court hereby allows the Applicant's motion in terms that the time granted on 5.10.2023 for the prosecution of the suit is hereby enlarged by a further period of 6 (six) months with effect from 5<sup>th</sup> April 2024 and ending on 23<sup>rd</sup> October 2024. In the circumstances, the Plaintiff's suit is deemed as subsisting for prosecution by the latter date, failing which, it will automatically stand dismissed for want of prosecution with costs to the Respondent. The court will in view of the impending court recess hereafter proceed to schedule an early hearing date to expedite the matter. The costs of the motion are awarded to the Respondent in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23<sup>RD</sup> DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Plaintiff/ Applicant: N/A

For Defendant / Respondent: Ms. Fahima h/b for Ms. Maina

C/A: Erick

