Gatara v Gatara & another (Civil Suit 166 of 2008)
[2023] KEHC 3443 (KLR) (Civ) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3443 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 166 OF 2008

CW MEOLI, J

APRIL 20, 2023

BETWEEN

ROSE WAMBUI GATARA ..... PLAINTIFF

AND

BEATRICE NJERI GATARA ..... 1ST DEFENDANT

HUMPHERY GITARI IKIARA ..... 2ND DEFENDANT

RULING

1. For determination is the amended motion dated 09.11.2021 by Rose Wambui Gatara (hereafter the Applicant) seeking *inter alia* leave for the firm of Guandaru Thuita & Company Advocates come on record in place of the firm of Messrs. Kinyanjui & Njau Advocates; that the court be pleased to set aside the order dismissing the suit for want of prosecution; and that the suit be reinstated for hearing. The motion is expressed to be brought under Section 1A, 3A, 63 (e) & 100 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, *inter alia*. And is premised on the grounds on the face of the motion as amplified in the Applicant's supporting affidavits sworn on 19.06.2020 and 09.11.2021.

2. The gist of the affidavits is that she had previously instructed the firm of Ngatia & Associates to come on record in place of Kinyanjui & Njau Advocates but after filing the motion dated 19.06.2020, Senior Counsel Fred Ngatia indicated inability to proceed with the matter based on the belated discovery of his familiarity with Beatrice Njeri Gatara & Humphrey Gitari Ikiara (hereafter the Respondents). That she was involved in a road traffic accident on 04.05.2005 and has since been receiving medical treatment locally and abroad for her injuries. Thus, was unable to follow up on the suit and her erstwhile counsel failed to progress the suit or notify her regarding its eventual dismissal.

3. The Applicant further states that she only learned that her suit was dismissed in 2016 when in May 2020 she personally enquired from the court registry on the status of the thereof; that failure to

prosecute the suit or expeditiously file the instant motion was inadvertent and occasioned by her medical condition. In conclusion, she asserts that she has expended and continues to incur substantial medical expenses as a result of her injuries and the would be prejudiced and her right to access to justice curtailed if her application is rejected.

4. The Respondents oppose the motion by way grounds of opposition dated 10.11.2021. They assert that it was the duty of Applicant to prosecute her case having presented it to the court; that she should have been vigilant to pursue her case; that the duty to progress the case ultimately remained with her as much as she had appointed an advocate to represent her; that the cause of action in the matter allegedly arose on 04.05.2005 and the suit instituted on 02.05.2008 dismissed 2015 for want of prosecution; that it is now 15 years since the alleged accident occurred and 5 years since the matter was dismissed for want of prosecution; and that it is not enough for the Applicant to simply blame the advocate but must show tangible steps made to progress the matter, which she has not shown.

5. Further that, the present motion has been brought after inordinate delay; that the possibility that a fair trial can be held is diminished because of the excessive delay which exposes the Respondents to prejudice, and has not been satisfactorily been explained; that the suit was properly dismissed and it has not been shown that the court's discretion was not properly exercised; that the Applicant's remedy lies in negligence against her former advocate and not in setting aside the dismissal order; that the motion violates the Respondent's right to fair hearing under Article 50 of *the Constitution*; and that reinstating the suit herein will be prejudicial to the Respondents who have already closed their file after paying their fees.

6. The motion was canvassed by way of written submissions. Counsel for the Applicant rehashed the contents of the Applicant's affidavit material. In supporting the first prayer, counsel cited Order 9 Rule 9 of the *Civil Procedure Rules* and the decision in *Tirth Construction Limited v Orion Hotels Limited* [2020] eKLR to contend that the suit having been dismissed for want of prosecution, it was essential that the change of advocates be affected by way of a court order or consent of parties.

7. Concerning the prayer for reinstatement, counsel called to aid the decision in *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] eKLR revisited the explanations contained in the affidavit material and asserted that it is in the interest of substantive justice that the court exercises its discretion in favour of the Applicant. He also cited several decisions including *Ivita v Kyumbu* (1984) KLR 441 and *Shah v Mbogo & Another* (1967) EA 116 as cited in *Bilha Ngonyo Isaac v Kembu Farm Ltd & Another* [2018] eKLR in support of the submission that the Respondents had not demonstrated what prejudice they stood to suffer if the suit were reinstated. Counsel further argued that dismissal of a suit is a draconian measure that effectively drives a litigant from the seat of justice. He urged the court ought to exercise its discretion in favour of the Applicant by reinstating the suit.

8. On behalf of the Respondents, counsel relied on the cases of *Tirth Construction Ltd* (*supra*), Eldoret ELC Civil Case No. 95 of 2013 *Kestem Co. Ltd v Ndala Shop Ltd, & Others* and *James Muchene Ngei v Hon. Attorney General & 6 Others* [2022] eKLR to submit that there had been inordinate and unexplained delay in prosecuting the suit which dismissed for want of prosecution.

9. In response to the Applicant's submissions on prejudice, counsel relied on the decision in Meru ELRC No 19 of 2019 Elosy Murugi Nyaga v Tharaka Nithi County Government & Another and Bilha (supra) to contend that the Applicant has shown disinterest in prosecuting her suit and that re-opening it will prejudice the Respondents right to a fair trial due to the age of the suit and delay. Therefore, the court ought not exercise its discretion in favour of the Applicant whose delay in prosecuting the suit amounts to abuse of the court process while her motion is an afterthought. In conclusion, it was

argued that the motion is a waste of precious judicial time. Hence, the court was urged to dismiss the same with costs.

10. The court has considered the material canvassed in respect of the motion. The events leading to the instant motion have in part been captured by the parties in their respective material outlined above. Nonetheless, some of the pertinent facts canvassed therein cannot be verified from the record presently before the court being a reconstructed file, the original having gone missing. That said, what can be gathered from the material before the court is that the suit herein was dismissed for want of prosecution in 2016. Presumably under Order 17 Rule 2 of the *Civil Procedure Rules*.

11. The Applicant's motion does not invoke the more appropriate provisions of Order 17 Rule (2) 6 of the Civil Procedure Rules but invokes inter alia the provisions of Section 3A of the *Civil Procedure Act*, 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".

12. While the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in their favor. In the case *Shah –vs- Mbogo and 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."

13. While the Applicant relied on affidavit material, the Respondents eschewed swearing a replying affidavit, relying instead on their grounds of opposition as they were entitled to do. According to the record, as presently constituted and based on the Applicant's depositions, the suit was filed on 02.05.2008 in respect of a cause of action allegedly arising on 04.05.2005. Any steps taken thereafter cannot be verified from the reconstructed file and it appears that the Applicant's last action prior to dismissal of the suit for want of prosecution was the filing of a list of witnesses on 07.04.2014. As at the date dismissal of the suit in 2016, the Applicant was represented by the firm of Kinyanjui & Njau Advocates.

14. The duration between the dismissal and the discovery of the fact by the Applicant and the filing of the present application, preceded by an application for reconstruction, is roughly five years. The Applicant's explanation for delay is two-pronged. Firstly, that she was preoccupied with the search for treatment for the injuries sustained in the accident. Secondly, that her erstwhile counsel failed to progress the case or notify her regarding dismissal of the suit.

15. Considering that the suit had been filed in 2008 regarding an accident that allegedly occurred in 2005, the delay herein is inordinate. The Applicant's explanation for her delay is supported by various medical receipts/records marked as an annexure "RWG 1 & RWG 2" but these documents indicate treatment received between 2012 and 2014. The Applicant's affidavit is silent on what actions she took between 2008 to 2012 and from 2014 to 2016, and ultimately to 2020. There is no evidence whatsoever to demonstrate the steps taken by the Applicant in this long period to follow up the matter with her advocate. In this situation, it is not enough to heap blame on her own erstwhile counsel; the Applicant is ultimately responsible for the progression of her case. Besides, she does not explain why she did not instruct a different counsel in good time, if indeed she was following up and was dissatisfied with her erstwhile counsel.

16. In *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR though considering a slightly different issue restated the principle spelt out by its predecessor in *Shah v Mbogo* (*supra*), before observing that; -

> " .... The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. "

17. Undisputedly, the Applicant was entitled to be heard on the merits of her case. However, that right cannot be stretched to the detriment of the parties she dragged to court. It is now 18 years since the cause of action arose, 15 years since the suit was filed and well over six years since dismissal. The explanations offered by the Applicant are not satisfactory. Additionally, the Court agrees with the Respondent that re-opening the matter will be prejudicial as it is doubtful whether a fair trial can be held after such a long hiatus.

18. As observed in Ivita's case, 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. In the court's opinion, allowing the reinstatement of the Applicant's suit in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*.

19. The Court of Appeal stated in *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 that: -

> " 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".

20. The court is of the considered opinion that while the prayer for leave to bring on record a new advocate ought to be granted, for whatever it is worth, the prayer seeking the setting aside of the dismissal order and reinstatement of the suit must fail. Save for the prayer for leave to bring on record the new firm of advocates which is granted, the motion dated 9.11.2021 fails on the substantive prayer and is accordingly dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff/ Applicant: Ms. Gikonyo h/b for Mr. Thuita.

For the Defendant/ Respondent: Ms. Kemunto

C/A: Carol