



REPUBLIC OF KENYA



**Bhamra & another v Makendo & another (Civil Suit 670 of 2007)
[2023] KEHC 17539 (KLR) (Civ) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17539 (KLR)

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

CIVIL

CIVIL SUIT 670 OF 2007

CW MEOLI, J

MAY 11, 2023

BETWEEN

MAVINDER SINGH BHAMRA 1ST PLAINTIFF

JASBIR KAUR BHAMRA 2ND PLAINTIFF

AND

BENSON MAKENDO 1ST DEFENDANT

STEPHEN OKERO OYUGI T/A OYUGI & CO. ADVOCATES . 2ND DEFENDANT

RULING

1. For determination is the motion dated November 30, 2021 by Mavinder Singh Bhamra and Jasbir Kaur Bhamra (hereafter the 1st & 2nd applicant/applicants) seeking inter alia that the honorable court be pleased to set aside the order dismissing the applicants suit and all other consequential orders thereto; and that the court be pleased to reinstate the applicants' suit for determination on merit. The motion is expressed to be brought under section 1A, 1B & 3A of the *Civil Procedure Act*, Order 17 Rule 2 and Order 51, Rule 1 of the *Civil Procedure Rules*, among others. The motion is premised on the grounds on the face of the motion as amplified in the supporting affidavit of 1st applicant on his own behalf and on behalf of the 2nd applicant.
2. The gist of his depositions is that the applicant filed this suit on January 29, 2007 against Benson Makendo and Stephen Oyugi t/a Oyugi & Co. Advocates (hereafter the 1st & 2nd respondent/respondents) and that subsequently, no substantial steps could be taken in the matter as the file could not be traced. That several attempts to locate the file by his counsel were to no avail and the process of reconstruction of the file commenced. That he then learned that the reason the file could not be traced was that the suit had been dismissed and the file archived. Neither he nor counsel on record were served with the relevant notice to show cause and were therefore unaware of the dismissal and that the



- outbreak of the Covid-19 pandemic and related restrictions delayed the retrieval of the file from the archives.
3. He goes on to assert that upon retrieval of the file in November 2021, the process of mapping the case on the e-filing system further delayed the matter. In conclusion, he contends that the motion has been filed in the interest of justice; that the applicants have a good cause of action against the respondents; and that it would only be fair that the parties be allowed to ventilate their respective claims.
 4. The respondents oppose the motion through the replying affidavit deposited by the 2nd respondent on his own behalf and on behalf of his Co-respondent. He asserts that the applicants went into slumber after filing the suit and failed, neglected and or refused to take any steps to progress the case which was properly dismissed. He further disputes the allegation that the court file went missing as purported by the applicants and takes issue with the letter attached to the applicant's affidavit material concerning the allegation pointing out that the letter was not copied to the respondents counsel or received by the court registry. Moreover, that, the said letter was written some nine (9) years after the filing of the suit and that no explanation has been offered for delay in confirming the position of the file. He further states that there is no evidence that the applicants sought leave of the court to reconstruct the file and or how they came to know that the court file was missing, there being no exhibited correspondence between the applicants and the court.
 5. It was further contended that the delay in prosecuting the suit occurred prior to the outbreak of the Covid-19 Pandemic the outbreak is not a reason available to the applicants. Meanwhile, he asserts that the respondents' main witness passed on in the year 2018 and the memories of the remaining witnesses may be compromised thereby exposing the respondents to prejudice were the suit which is now fifteen years old to be reinstated. Further, counsel on record has been unable to trace his file thus compounding the likely prejudice likely to be visited on the respondents in the event that the suit is reinstated. He concludes by pointing out that that applicant has deliberately failed to state when the suit was dismissed and the court ought to decline to exercise its discretion in favour of the applicants by dismissing their motion with costs.
 6. The motion was canvassed by way of written submissions. Counsel for the applicant while rehashing the nature of suit proceeded to anchor his submissions on the provisions of section 1A, 1B & 3A of the Civil Procedure Rules, the decision in *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR and *Mina Achedid v National Bank of Kenya Limited* [2020] eKLR concerning the principles to be considered in a motion of this nature. Calling to aid the cases of *Esther Wamaittha Njibia & 2 others v Safaricom Limited* [2014] eKLR and *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR counsel submitted that the court ought to consider the nature of the suit and weigh the consideration whether the respondents can be reasonably compensated by an award of costs against denying a litigant the right to be heard. The provisions of article 48 & 50 of the *Constitution* and decision in *Njeri Kirugumo v Langata Development Co. Ltd & another* [2016] eKLR were cited. In summation, the court was urged to find that the lesser injustice would be to allow the motion.
 7. On behalf of the respondents, counsel began by asserting that reinstatement of a dismissed suit is at the discretion of the court, which discretion ought to be exercised in a just manner. While relying on the decisions in *Unga Limited v Magina Limited* [2014] eKLR, *Safina Limited v Jamnadas (K) Ltd* [2006] eKLR, *Bilba Ngunyo Isaac v Kembu Farm Ltd & another* [2018] eKLR, *Fran Investments Limited* (*supra*) and *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR counsel argued that the applicants have not offered sufficient or plausible explanation for the delay in prosecuting their suit for 14 years. That it is trite, the applicants were obligated to take steps to progress their suit to its logical conclusion and if they failed on that duty the consequences should follow as a



matter of course. Counsel urged the court to dismiss the applicants motion with costs asserting that article 159(2)(d) as the same is not a panacea for all procedural ills.

8. The court has taken the liberty of perusing the entirety of the court record and considered the material canvassed in respect of the motion. The events leading to the present motion have in part been captured by the parties in their respective affidavit material outlined above. What this court gathers therefrom is that the suit herein was dismissed for want of prosecution pursuant to Order 17 Rule 2 of the Civil Procedure Rules.
9. The applicant's motion invokes both the provisions of Order 17 Rule 2 of the Civil Procedure Rules and the provisions of section 3A of the Civil Procedure Act, the latter 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". The former provision states that;-
 - "(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
 - (5) A suit stands dismissed after two years where no step has been undertaken.
 - (6) A party may apply to court after dismissal of a suit under this Order."
10. 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 of *Shah v Mbogo and another* [1967] EA 116 the rationale for the discretion was spelt out as follows:-

"The discretion to set aside an ex-parte 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."
11. The principles enunciated in *Shah -vs- Mbogo* (supra) were further amplified further by Platt JA in *Bouchard International (Services) Ltd v M'Mwereria* [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal force in this matter. Indeed, the dismissal order issued herein is equivalent to a judgment as it determined the suit by way of dismissal.
12. From the applicants' affidavit material, delay in prosecuting the suit appears to be attributed first to the fact that the file could not be traced, prompting counsel to seek reconstruction of the court file. Secondly, that there was no service of the dismissal notice to either counsel or the applicants. Counsel went on to argue that the delay was further compounded by the fact that the Covid-19 Pandemic further delayed retrieval of the file from the archives and subsequently had to be mapped in the e-filing system. The respondents on their part vehemently challenged these matters.



13. The record presently before court, in respect of the instant suit appears to be extremely limited and particularly regarding the period between filing of the suit and filing of the instant motion. It can be deduced from the scanty record that the suit herein was filed on September 25, 2007 by a plaintiff later amended on January 29, 2008. It is also apparent that the applicants' last action prior to dismissal of the suit for want of prosecution was the filing of their list of documents on April 7, 2010. However, as to the date when the suit was dismissed for want of prosecution, the record is of no help. While admitting the fact of dismissal for want of prosecution, none of the parties could give the date of the said dismissal. The record contains an undated dismissal order.
14. As rightly contended by the respondent the purported attempts in locating or reconstructing the file are not supported by material proof. Not even a copy of the motion for reconstruction was tendered before the court. Moreover, it is discernible from the record that since filing of the suit in 2007 the applicants' last action in the matter was in 2010. Even assuming that the file went missing in that year, the instant motion has come almost 11 years later. Where is the correspondence by the applicant to the Court registry in pursuit of the file? The annexures "MSB 1 & MSB 2" being letters addressed to the Deputy Registrar of the High Court in April and August of 2016 respectively do little to persuade this court that the file was missing as purported. The said letters are neither stamped as received by the court or copied to the respondent's counsel in any event.
15. The applicant's affidavit material is however silent on the duration between 2010 to 2016 and 2016 to 2021. Beyond the two doubtful annexures, no other evidence was placed before the court to demonstrate the steps taken by the applicants themselves in the long hiatus since 2010. While it is true that a plaintiff is entitled to be heard on the merits of their case, that right cannot be stretched to the detriment of the parties they dragged to court. It is now 16 years since the suit was filed. The explanations offered by the applicants are unsatisfactory.
16. Additionally, the court agrees with the respondent that re-opening the matter will be prejudicial to them as it is doubtful whether a fair trial could still be held after such a long delay. As observed in *Ivita v Kyumbu* (1984) KLR 444, 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 this case the respondents have contended that their key witness has since passed on and counsel on record faces difficulty in tracing his file. The potential for prejudice against the respondents appears real, therefore.
17. Further, in the court's opinion, allowing the reinstatement of the applicants' suit in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*. The explanation by counsel for failing to prosecute the suit is barely plausible. At a time when courts are deluged with heavy caseloads, it is not enough for any party caught up with dismissal of their case to merely blame the court. Parties and counsel are duty bound to co-operate with the court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with section 1A and 1B of the *Civil Procedure Act*.
18. The Court of Appeal stated in *Karuturi Networks Ltd & anor v 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”.

19. Consequently, the court is of the considered opinion that the applicants’ motion is devoid of merit, and it is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the applicants: N/A

For the respondents: Mr. Manyara

C/A: Carol

