



**Makokha v Standard Group Limited & 2 others (Civil Suit  
32 of 2016) [2023] KEHC 19215 (KLR) (Civ) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19215 (KLR)

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

**CIVIL**

**CIVIL SUIT 32 OF 2016**

**CW MEOLI, J**

**JUNE 22, 2023**

**BETWEEN**

**MICHAEL NYONGESA MAKOKHA ..... PLAINTIFF**

**AND**

**THE STANDARD GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NATION MEDIA GROUP LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**ERIC AHOLI, CHARLES APPLETON, BRIAN DESOUZA, ANIS PRINGLE,  
JOSEPH KARIUKI, BENSON NDUNG’U & JOHN NDUNYU T/A KPMG**

**KENYA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The events leading up to the motion dated 28.10.2019 are as follows. Michael Nyongesa Makokha, the Plaintiff filed this suit on 09.02.2016 against The Standard Group Limited, the 1<sup>st</sup> Defendant, Nation Media Group Limited, the 2<sup>nd</sup> Defendant and Eric Aholi, Charles Appleton, Brian Desouza, Anis Pringle, Josephat Mwaura, Jacob Gathecha, Joseph Kariuki, Benson Ndung’u & John Ndunyu t/a KPMG Kenya, the 3<sup>rd</sup> Defendant seeking judgment by way of general damages, aggravated damages, for defamation and injunctive reliefs. The 1<sup>st</sup> Defendant thereafter filed a motion dated 23.01.2019 seeking inter alia that the suit against it be dismissed for want of prosecution. On 07.03.2019 Njuguna, J. delivered her ruling in respect of the 1<sup>st</sup> Defendant’s motion which had the consequential effect of dismissing the Plaintiff’s suit against the Defendants with costs.
2. The Plaintiff has now moved the court vide the instant motion dated 28.10.2019 seeking inter alia that the court be pleased to review, vary and or set aside its orders of 07.03.2019 dismissing the suit herein for want of prosecution and reinstate the suit for hearing on merit. The motion is expressed to be brought under Order 17 Rule 2 (1) & (2) of the *Civil Procedure Rules* and Section 1A, & 3A



of the Civil Procedure Act among others. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Plaintiff.

3. To the effect that he has now appointed the firm of Iyapa Odeo & Co. Advocates to act on his behalf in the matter. That he has been keen on having the case prosecuted to its logical conclusion and that his previous counsel on record had informed him that the case would proceed for hearing on 03.04.2018. However, when the two attended court on the said date, he learned that the court was on vacation and that counsel would fix another date and duly inform him. He goes on to assert that since the said date, the previous counsel on record never communicated that there was a motion to dismiss his suit for want of prosecution due for hearing on 27.02.2019.
4. That he only came to learn later that previous counsel on record failed to file a response to the foregoing motion or attend the hearing and or the ruling in respect of the motion. He further learnt about the dismissal when he was served with a motion by previous counsel seeking to cease acting. That in the intervening period he was faced with financial difficulties and was thus unable to immediately appoint another counsel to come on record. He further asserts that his previous counsel on record never communicated about the application for dismissal therefore his mistake ought not to be visited upon him. In conclusion, he avows being keen on prosecuting the instant case urging that the motion be allowed.
5. The 1<sup>st</sup> Defendant opposes the motion by way of grounds of opposition dated 13.06.2022. The 1<sup>st</sup> Defendant's grounds primarily restate the history of the suit in demonstrating that the delay herein was prolonged and unreasonable and that the Plaintiff has failed to prosecute the case diligently and hence the suit was properly dismissed. That no basis has been laid by the Plaintiff to warrant the exercise of this court's discretion in his favour; and that in any event a suit stands automatically dismissed after two years pursuant to Order 17 Rule 2(5) of the Civil Procedure Rules where no steps have been undertaken by a plaintiff.
6. The 3<sup>rd</sup> Defendant equally opposes the motion by way of grounds of opposition dated 24.01.2020. The 3<sup>rd</sup> Defendant takes issues with the motion on grounds inter alia that under the Section 4(2) of the Limitation of Actions Act the limitation period for claims for defamation is 12 months indicating the need for such claims to be brought and prosecuted diligently. The grounds repeat most of the grounds in the grounds of opposition by the 1<sup>st</sup> Defendant concerning the history of this matter.
7. The motion was canvassed by way of written submissions. Counsel for the Plaintiff began by reiterating the contents of the Plaintiff's affidavit material and the events leading hereto. Concerning delay in prosecution of the instant motion counsel argued that when the same came up for hearing on 27.01.2020 the Plaintiff was ready to proceed however the 1<sup>st</sup> Defendant delayed the hearing of the matter having not filed its grounds of opposition with the court directing that a date be fixed at the registry. That delay was further compounded by the Covid-19 Pandemic and transition to the e-filing system hence it was only in March of 2022 that the Plaintiff was able to obtain a date for the motion.
8. Counsel submits that delay in promptly prosecuting the motion was beyond his control. It was further submitted that lack of communication with previous counsel led to the dismissal of the matter whereas on 03.04.2018 when the matter was last in court, the Plaintiff but the court was not sitting. Counsel cited the decision in Barnabas Maritim v Manywele Korgoren & Anor [2016] eKLR to contend that the court should exercise its discretion for the ends of justice based on the reasons advanced in the motion. The court was thus urged to allow the motion as prayed.
9. On behalf of the 1<sup>st</sup> Defendant, counsel anchored his submissions on the principles espoused in the oft-cited decision of Ivita v Kyumbu [1984] KLR to contend that the decision on whether or not a



suit ought to be reinstated for trial is a matter of judicial discretion and is dependent on the facts of each case. Addressing the court on delay counsel rehearsed the 1<sup>st</sup> Defendant's grounds of opposition to submit that the Plaintiff cannot seek to reinstate the suit by blaming previous counsel. That it is the primary duty of the Plaintiff to take steps to progress his case as the cases belong to the litigants. That it is apparent that if the Plaintiff had been a diligent litigant, he would have been keen to present and prosecute the motion at the earliest opportune time.

10. Concerning whether justice can still be done despite delay, he asserted that parties are entitled to equality before the law and the Plaintiff having dragged the Defendants to court ought to have expedited the prosecution of the suit. It was further submitted that delay in prosecution of the suit militates against the interest of justice as evidence may dissipate over time. While calling to aid the decision in *Tirth Construction Ltd v Orion Hotels Ltd* [2020] eKLR, counsel argued that justice is a doubled edged sword and in the instant matter it ought to fall on the Plaintiff even if he has an arguable case. In summation, it was contended that the Plaintiff has not sufficiently established grounds to warrant the exercise of the court's discretion in his favour therefore the motion ought to be dismissed with costs.
11. Counsel for the 3<sup>rd</sup> Defendant anchored his submissions on the decision in *Patel v E.A Cargo Handling Services* [1974] EA 75 to submit that the principles pronounced therein equally apply to the instant matter. And that in exercising its discretion as to whether it should reinstate the suit, the court ought to consider the arguability of the Plaintiff's case and the explanation offered by the Plaintiff. Further restating the grounds advanced in opposition to the motion counsel submitted that the Plaintiff has not prosecuted the suit diligently and to the contrary has demonstrate delay in prosecution of the matter at every step.
12. That the suit was properly dismissed and the conduct of the Plaintiff since should act dissuade the court from exercising any discretion in his favour. It was further submitted that the Plaintiff has failed to give any satisfactory explanation for delay in prosecuting the matter between 06.04.2016 and 11.05.2022. The court was therefore urged to dismiss the motion.
13. The 2<sup>nd</sup> Respondent has never participated in the entirety of the proceedings.
14. 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 Plaintiff's affidavit material. Interestingly, both the 1<sup>st</sup> & 3<sup>rd</sup> Defendant opted to file grounds of opposition and eschewed deposing affidavit material in respect of the factual issues canvassed in their respective grounds of opposition.
15. The consequence of the 1<sup>st</sup> & 3<sup>rd</sup> Defendant's election is envisaged in Order 51 rule 14 (1) of the *Civil Procedure Rules* which prescribes the manner for opposing a motion presented before the High Court as follows;-
  - “(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
    - (a) a notice preliminary objection: and/or;
    - (b) replying affidavit; and/or
    - (c) a statement of grounds of opposition;”



16. Recently the Court of Appeal in *Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited* (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) addressed the effect of filing only grounds of opposition in response to a motion by stating that;-

“Be that as may, it is notable that a statement of Grounds of Opposition is provided for in Order 51 Rule 14 of the Civil Procedure Rules as a recognized pleading opposing an application in the High Court, but is not expressly provided for in the Court of Appeal Rules.

What then is the import of filing Grounds of Opposition in response to an application filed in the Court of Appeal? A “ground” is in this regard defined in Black’s Law Dictionary, Ninth Edition at page 772 as “the reason or point that something, (as a legal claim or argument), relies on for validity”. An affidavit on the other hand is defined at page 66 as “a voluntary declaration of facts written down and sworn to by a declarant before an officer authorized to administer oaths”. Therefore, any facts sought to be introduced in an application before this Court can only be done by way of an affidavit, and cannot be by way of Grounds of Opposition, and any attempt to do so through the Respondent’s Ground of Opposition will be incompetent. In essence, the Respondent is therefore restricted to only raising issues of law and to making legal arguments in this application.” (sic)

17. In effect, the 1<sup>st</sup> & 3<sup>rd</sup> Defendant were well within their right to file grounds of opposition in response to the Plaintiff’s motion but by doing so they confined themselves to issues of law. Nonetheless, the setting aside of a dismissal order involves judicial discretion fettered by certain legal conditionalities thus the absence of a replying affidavit by the adverse party does not necessarily give free rein to the Plaintiff.
18. Here, it is undisputed that the Plaintiff’s suit was dismissed for want of prosecution by virtue of a ruling delivered on 07.03.2019 pursuant to a motion brought under Order 17 Rule 2 (3) of the Civil Procedure Rules. It is not clear why counsel for the Plaintiff while preparing the instant motion, would present the trouble-inviting grouping of words “review.....vary and set aside” knowing all too well the purport of the specific words in relation to the reliefs sought before this court, and the pertinent events.
19. That said, the Plaintiff’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 on its part provides 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.”

20. It would appear that this court’s jurisdiction is invoked by dint of Order 17 Rule 2(6) otherwise it would be sitting on appeal on its own order given the ruling delivered on 07.03.2019. 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 –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-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.”

21. The principles enunciated in *Shah –vs- Mbogo* (supra) were further amplified further by Platt JA in *Boucharde International (Services) Ltd vs. M’Mwereria* [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein apply with equal force in this matter. Indeed, the ruling issued on 07.03.2019 conclusively determined the suit by way of a dismissal order.

22. From the Plaintiff’s affidavit material, delay in prosecuting the suit leading to the ruling on 07.03.2019 appears to be attributed first to the fact that counsel previously on record never communicated that there was motion to dismiss the suit for want of prosecution that came up for hearing on 27.02.2019. Secondly, that the Plaintiff only learned about the dismissal order when he was served by previous counsel with the motion seeking to cease from acting. Thirdly, in the intervening period he was faced with financial difficulties and was thus unable to immediately appoint another counsel to come on record. Fourthly, other grounds were canvassed in his submissions pertaining to Covid-19 and court migration to the e-filing system which were not particularly raised in the Plaintiff’s affidavit material.

23. As earlier noted the Defendants eschewed filing replying affidavit material to challenge the factual issues raised in the Plaintiff’s motion.

24. Nevertheless, the court has taken the liberty of perusing the ruling delivered on 07.03.2019 and the record before it. The reason that has been predominantly advanced is mistake of counsel which it is asserted, should not be visited on the innocent Plaintiff. As at dismissal of the suit herein the Plaintiff was represented by the firm of Ataka, Kimori & Okoth Advocates, whose motion to cease from acting was allowed on 23.03.2019.

25. The Plaintiff asserts that the suit was dismissed due to failure by the previous counsel on record to inform him of the motion to dismiss the suit and to attend the hearing of the same. The duration between dismissal of the suit, previous counsel ceasing from acting and the filing of the instant motion is approximately eight (8) months. The duration between filing of the instant motion and prosecution of the same is approximately three years. No reasonable explanation has been proffered in the Plaintiff’s affidavit material for the latter delay. No material has been tendered by the Plaintiff to show his earlier attempts to follow up the matter with previous counsel as to the obtaining position of his suit. The blanket accusation against previous counsel does not explain the Plaintiff’s inaction, as the litigant in progressing the suit.

26. Considering that the suit had been filed in 2016 regarding alleged defamatory articles published on or about February of 2015, the Plaintiff’s explanation for his delay is unsupported by any material. It is silent on what actions he took upon being served with the with previous counsel’s motion to cease



from acting even though as of 23.03.2019 the record bears evidence that he was aware that his suit had been dismissed for want of prosecution. In this situation, it is not enough to heap blame on his own erstwhile counsel; the Plaintiff is ultimately responsible for the progression of his case. Besides, even after instructing a different counsel, based on dissatisfaction of his erstwhile counsel delay in prosecution of the instant motion has equally been prolonged.

27. 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.”

28. Undisputedly, the Plaintiff is entitled to be heard on the merits of his case. However, that right cannot be stretched to the detriment of the parties he dragged to court. It is now 8 years since the cause of action arose, 7 years since the suit was filed and well over 4 years since dismissal of the suit. The explanations offered by the Plaintiff are not satisfactory. Additionally, the Court agrees with the Defendants’ submissions that re-opening the matter will be prejudicial as it is doubtful whether a fair trial can be held after such a long hiatus, considering the nature of the suit.

29. 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 Plaintiff’s suit in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*. 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”.

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

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF JUNE 2023.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Plaintiff: Mrs Odeo

For the 1<sup>st</sup> Defendant: Ms. Yala h/b for Mr. Kivuva

For the 3<sup>rd</sup> Defendant: Ms.Alosa h/b for Mr. Fraser

C/A: Carol

