Sadi v Kenya Ports Authority (Civil Suit 5 of 2004)
[2023] KEHC 19925 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19925 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 5 OF 2004

DKN MAGARE, J

JUNE 22, 2023

BETWEEN

EDMUND JILAN SADI ..... PLAINTIFF

AND

KENYA PORTS AUTHORITY ..... DEFENDANT

RULING

1. This matter is for an application dated 8/6/2022. The same is for reinstatement of a suit which was dismissed way back on 9/4/2014. This is essentially an application for review of the orders hitherto given by this court dismissing the suit for want of prosecution

2. The Application is opposed. Even if it were not opposed, the Application is for dismissal. The Plaintiff's advocate was present in court those many years ago in 2014, when the suit was dismissed. The plaintiff was unavailable to testify.

3. The parties filed detailed submissions. If for any reason I do not refer to the authorities, it is not for lack of industry but due to economy of space. I have considered the submissions fully.

4. The plaintiff filed suit claiming terminal benefits of Ksh 98,625,298/20. For the last 19 years, he has been away from the Courts. The Laws of the country changed about 12 years ago. He did not bother to come and deal with the matter. He has now come, fresh from his sojourns and want to vex the defendant with a stale suit.

5. The matter was dismissed inter partes. It was not dismissed in the absence of Counsel. A Ruling was given on 9/4/2014 by Hon Justice Mary Kasango detailing the customs of this case. In the case of

Magunandu Company Ltd v Joyce Wairumu Ngugi & another [2020] eKLR, justice O Chepkwony, stated as doth: -

> " I have considered the grounds in support of the application and the grounds in opposition thereto. It is the discretion of the court to reinstate the hearing of a suit that has been dismissed. However, such discretion has to be exercised judiciously. In the case of *Alex Wainana t/a John Commercial Agencies vs Janson Mwangi Wanjihia* (2015) eKLR, the Court of Appeal set out the principles governing the exercise of discretion and held that:-
>
> "The principles governing the exercise of judicial discretion were set out by Ringera JA (as he then was) in the case of *Gathiaka vs Nduriri* (2004) 2KLR 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it."

6. *Black's Law Dictionary* (Tenth Edition) defines judicial discretion as doth:

> " The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

7. This is an application where the applicant is seeking discretion of the court. This is not based on any crystalized right but the principles of law and fairness. In this case, the plaintiff left when we were weeding. Food has grown, harvested, winnowed eaten and finally it is part of Mombasa water and sanitation system. He wants, nay demands a piece of pie.

8. By Madan JA (as he then was) in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] EA:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

9. In this case, it is even not an appeal. It is the Plaintiff asking that the court to sit on appeal from the decision of Justice Kasango as then she was. He is not even asking for a review of a recent decision but a decision made 10 years ago. At the time it was made, the case had been in court for 10 other years. After this decision he will come back 10 years from now. He must be stopped.

10. The Court made findings of Law based on the decisions of *Ivita vs Kyumbo* (1984) KLR 441 and *Reggentine vs Becholme Bakeries* (1961) III sol JO 216., the Court was horrified that the suit was in Court for 6 years. Since the matter was last in Court. In the case of *Ivita V Kyumba* [1984] KLR 441 the court was of the considered position that:

> " The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied

with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

11. In the case of *John Gaita v Seafforth Shipping Kenya Limited & another* [2015] eKLR, the court stated as follows: -

> 11. There is no doubt that the plaintiff has failed to assist this court to attain the overriding objective. It is not an answer to that failure for the plaintiff to state that the defendants had equally failed to fix this case for hearing. The plaintiff is solely obligated to get on with his case. After all he is the one who filed this case, the defendants do not have a counter claim. In arguing as the plaintiff's learned counsel argue it showed his ignorance of a often quoted case. *Fitz Patrick v Batger & co Ltd* (1967)2 ALL ER 657 where Lord Denning, citing his decision in *Reggentine vs Beecholme Bakeries Ltd* (1967) 111 sol Jo 216, said as follows-
>
> 'it is the duty of the plaintiff's advisers to get on with the case. Public policy demands that the business of the courts should be conducted with expedition ... the delay is far beyond anything we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

12. The decision in *Reggentine vs Beecholme Bakeries Ltd* (1967) 111 sol Jo 216, was also considered in the ruling by the court. This means if there was an error, then it could only be appeal from. An error in exercise of discretion is a question of law. The remedy does not lie in review for setting aside but in appeal.

13. The court then was satisfied that the delay was not only unjustified but also was causing inconvenience to the respondent.

14. This was 10 years since the suit was filed. The plaintiff bid his time and has come 9 years later. He is complaining of the right to be heard. Under Article 25 of the *Constitution* the right to be heard is non derrogable. The plaintiff was indeed heard. The court was available to hear him. He went mute. The Court was ready to hear him. He kept quiet. For 19 years, he has refused to speak. We have also heard him today.

15. We have not refused to hear him. Upon being heard, it is not his duty to direct the Court what to say. Back in 2014, the plaintiff left the case to Court. The Court did the needful. It was exercise of discretion. The overriding objectives are also against him. He had a duty to assist the court. In *John Gaita v Seafforth Shipping Kenya Limited & another* [2015] eKLR, the court stated as doth: -

> 10. The overriding objective in Section 1A of the *Civil Procedure Act* came into force in the year 2010. That objective under subsection (3) requires parties to assist the court to further the overriding objective that is to facilitate the just, expeditious proportionate and affordable resolution of civil disputes. The court of appeal had an opportunity to discuss the overriding objective popularly referred to as double 'O' Principle in the case *Mradula Suresh Kantaria And Surech Nanillal Kaptaria* Civil Appeal No 277 Of 29005. (unreported) where the court observed as follows-
>
> "In this regard, we believe one of the principal purposes of the double "OO" principle is to enable the court to take case management principles to the centre of the court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap."

16. In *KD Shah v Prakash Vrajlal Malkan & another* [1994] eKLR, the court of appeal stated as doth: -

> "It was for the appellants to satisfy us on these points and in their case, the matter is made even more complex by the fact that though the order of the judge appealed from was made in an interlocutory application, nevertheless, the judge before exercising his discretion in favour of the respondents, heard *viva voce* evidence and it would be a very strong thing for this Court to interfere with the exercise of his discretion under those circumstances. Indeed, as Mr Gatonye rightly pointed out to us, even if we thought that if we had been in the judge's shoes, we would have given a contrary decision, that alone would not entitle us to interfere, for that would simply mean our substituting the judge's discretion with ours. We are not entitled to do that. We did not understand Mr Gautama for the appellants to challenge those simple and well settled propositions of law."

17. If the Appellate court cannot interfere with discretion, how can this court do so? The applicant has not in any case laid before this court, any material to justify this court to exercise discretion. The exercise of discretion is governed by among other things, the length of delay.

18. The court stated as doth in respect of extension of time in the case of *Daniel Muchinji Ndungu v Salim Juma Dzishanga* [2016] eKLR: -

> "In consideration a court of law takes into account on an application for enlargement of time are now well settled. They are that the court must look at the length of delay, the reasons for delay, chances of the appeal succeeding, if leave is granted, and lastly the decree of prejudice the respondent may be exposed to if leave is granted. In considering those issues the court exercises a judicial discretion which must be exercised judiciously with the sole aim of meeting the ends of justice in each case. See *Keya Shall Ltd vs Kobil Petroleum Ltd* [2006] 2 EA 132.

19. The same test applies for setting aside. The length of delay is inordinate, the prejudice is enormous, witnesses could have retired. It is a strong thing to interfere with discretion. If there was an error in exercise of discretion, then only an Appeal could have sufficed. This was not an ex parte dismissal or dismissal for nonattendance. It was am merit based ruling on the issue of want of prosecution.

20. The plaintiff was absent and has been away for the last 10 years. The matter is real dead on arrival. The plaintiff was and is guilty of laches. He did not prosecute his case on time. He did not file this application on time. He is truly indolent. In the Court of Appeal decision in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, Mohammed, JA, stated as follows: -

> "Appellants' action was lodged on October 2, 2012. The appellants have not given any explanation at all for the delay in bringing their action. As was stated by this Court in *Wellington Nzioka Kioko vs Attorney General* [2018] eKLR, although there is no time limit in respect of constitutional petitions, and such a petition would ordinarily not be defeated by the doctrine of laches. However, an unexplained delay of almost 30 years in bringing the action, makes it impracticable for the court to properly administer justice and renders the action an abuse of the court process. For this reason, I would uphold the dismissal of the appellants' suit."

21. I Have said enough to show that this application is simply a waste of Judicial time to consider this application.

22. In the circumstances, I dismiss the entire application dated 8/6/2022 for lack merit. For engaging the Respondent in a wild goose chase game, the Applicant shall to pay costs of Ksh 30,000/= to the Defendant/ Respondent. The same should be paid within 30 days, in default execution to issue.

Determination

23. The application dated 8/6/2022 is hereby dismissed as bereft of merit: -

    a. Costs of Ksh 30,000/= is the Defendant/Respondent payable within 30 days in default execution do issue.

    b. The file be closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF JUNE, 2023.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mango for the Defendant

No appearance for the plaintiff

Court Assistant - Brian