



REPUBLIC OF KENYA



**Sifuna v Waihenya & 2 others (Civil Case 454 of 2011)
[2023] KEHC 20318 (KLR) (Civ) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20318 (KLR)

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

CIVIL

CIVIL CASE 454 OF 2011

CW MEOLI, J

JULY 14, 2023

BETWEEN

ELYNAH WANYIKA SIFUNA PLAINTIFF

AND

CHARLES WATHAKA WAIHENYA 1ST RESPONDENT

DAVID WAKABA WAWERU 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. At the onset, Elynah Wanyika Sifuna (hereafter the Applicant) filed the present suit on October 21, 2011 against Charles Wathaka Waihenya, David Wakaba Waweru and Hon Attorney General (hereafter the 1st, 2nd and 3rd Respondents) seeking inter alia, general and damages, for malicious prosecution, defamation, unlawful arrest and confinement. The Respondent filed their respective statements of defence on separate dates denying the key averments made in the plaint. The matter lay unprosecuted until a notice to show cause (NTSC) why the suit should not be dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules was issued by the court.
2. When the matter came up on March 16, 2022 for hearing of the NTSC the court upon finding that no good cause had been shown by the Applicant, dismissed the suit against the Respondents for want of prosecution, with costs.
3. The Applicant has now moved the court by way of the instant Notice of Motion dated April 6, 2022 seeking that the court be pleased to review the order dismissing the suit herein for want of prosecution. The Motion is expressed to be brought inter alia under Order 45, Rule 1 and Order 51, Rules 1 and 8 of the Civil Procedure Rules and Section 1A, 1B, 3, 3A, 63 and 80 of the Civil Procedure Act. The



grounds on the face of the Motion are amplified in the supporting affidavit sworn by the Applicant, averring that the delay in prosecuting the suit was through no fault of her own but that even after filing a notice of change of advocates on February 9, 2017, all correspondences including the NTSC were served upon her former advocates.

4. She also averred that prior to the Covid-19 pandemic, the court file relating to the suit could not be traced in the registry which further delayed the matter, in addition to the fact of the Respondents' failure to attend court. The Applicant therefore stated that there was a clear error apparent on the face of the record as well as sufficient reason(s) to warrant the review order sought.
5. The 2nd Respondent opposed the Motion by way of grounds of opposition dated November 21, 2022 featuring the following grounds:
 1. 'THAT the said notice of motion is fatally defective, bad in law and an abuse of the court process.
 2. THAT there is nothing stay before the court and there is no suit before the court on the basis of which the current suit can be filed.
 3. THAT the notice of motion as drawn is unintelligible and the orders sought are incapable of being issued.
 4. THAT the plaintiff /applicant has admitted under paragraph 7 of the supporting affidavit that she was made aware of the notice to show cause by her former advocate. As such no prejudice was suffered by her as she was notified either way.
 5. THAT in the notice of motion dated April 6, 2022 ought to be dismissed or struck out with costs'.
 6. The 3rd Respondent equally opposed the Motion through the replying affidavit sworn by its Principal State Counsel, Joseph Ngumbi, on June 29, 2022. Therein, the deponent swore that the Applicant is guilty of inordinate delay in prosecuting her suit; that the delay has prejudiced the 3rd Respondent in that it may not be able to trace its witnesses owing to the passage of time; and that the question of service of the NTSC is irrelevant since the Applicant's current counsel attended court for hearing of the notice to show cause. That owing to the lack of diligence on the part of the Applicant, the suit ought to stand dismissed and the instant Motion ought to be dismissed with costs.
 7. The motion was canvassed by way of written submissions. However, at the time of writing this ruling, it is noted that the submissions by the 2nd Respondent had not been filed.
 8. Counsel for the Applicant submitted while citing the decision in *Mwangi S Kimenyi v Attorney General & another [2014] eKLR* to argue that the dismissal order will result in prejudice to the Applicant who is still interested in prosecuting the suit. Counsel further cited *Ivita v Kyumbu [1984] KLR 441* to argue that the delay in prosecuting the suit is unintentional and excusable. That the Respondents do not stand to be prejudiced if the suit is reinstated but that the Applicant stands to suffer substantial loss. It was submitted that the Applicant is keen on prosecuting the suit expeditiously and the court was urged to exercise its discretion in her favour and in the interest of justice. Counsel citing the decisions in *Philip Keipto Chemwolo And Mumias Sugar Co Ltd v Augustine Kubende (1982-1988)1 KAR 1036* and *Augusto Arduini v Saraf Co Ltd [2020] eKLR* among others.



9. On behalf of the 3rd Respondent, counsel by way of his brief submissions urged the court to uphold the dismissal order while reiterating the prejudice that the 3rd Respondent stands to suffer if the suit is reinstated. In summation, counsel asserted that the Applicant is guilty of laches and that no proper reasons have been given to warrant the order for review sought. He therefore urged the court to dismiss the Motion with costs.
10. The record shows that the 1st Respondent did not participate in the hearing of the Motion.
11. The court has considered the material canvassed in respect of the Motion. The events leading up to the instant Motion have in part been captured by the Applicant's affidavit material and are set out above. The setting aside of a dismissal order involves judicial discretion fettered by certain legal conditions.
12. The Applicant's suit was dismissed for want of prosecution by the court pursuant to Order 17, Rule 2 of the Civil Procedure Rules vide the order of March 16, 2022 following the NTSC issued on January 17, 2022. In the premises, it remains unclear why the Applicant's counsel opted to invoke Order 45 of the Civil Procedure Rules which provides for a review and yet the apparent intention of the Applicant is to have the dismissal order set aside and the suit reinstated. Be that as it may, motion also invokes 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'.
13. 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.'
14. Whereas the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to adduce credible material upon which the court should exercise its discretion in his or her 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.'

15. The principles enunciated in *Shah v Mbogo* (supra) were further amplified by the court in *Boucharad International (Services) Ltd v 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.
16. According to the Applicant's affidavit material, the delay in prosecuting the suit preceding the dismissal order made on March 16, 2022 was attributed firstly, to the fact that the NTSC and other correspondence were served upon her erstwhile advocates; secondly, that the file could not be traced in the registry and thirdly, that the Respondents did not attend court as and when required.
17. The 3rd Respondent by way of the replying affidavit sworn by its employee faulted the Applicant for inordinate delay and laxity in the suit and further stated that the Applicant was represented during the hearing of the NTSC which resulted in the dismissal order, thereby putting to rest the issue of service of the notice to show cause. The 2nd Respondent on his part did not tender any affidavit evidence to challenge the facts raised in the Motion and supporting affidavit, but chose to rely on the grounds of opposition which is limited to points of law.
18. Nevertheless, the court has taken the liberty of perusing the dismissal order and relevant the record before it. The Applicant annexed a copy of the notice of change of advocates dated February 5, 2017 to show her appointment of the firm of Suyianka Lempaa & Co Advocates to take over conduct of the suit from the firm of Nyabena Nyakundi & Co Advocates.
19. It is apparent from the record that the NTSC cause issued on January 17, 2022 and which triggered the dismissal order was served upon the former advocates as opposed to the current advocates. That notwithstanding, the record shows that when the parties attended court on March 19, 2022 in obedience to the NTSC, the Applicant was ably represented by his current advocates which goes to show that the said Advocates one way or another had learned of the notice. No affidavit in response to the notice had been filed and on finding that no good cause had been shown as to why no action had been taken in the suit since the year 2019, the court dismissed the suit for want of prosecution.
20. In addition, the record shows that on that date, the Applicant's counsel claimed that the file had gone missing albeit furnishing no proof, but this matter was taken into consideration prior to the dismissal order. On the other hand, the court did find factual support of the claims by the Applicant that the Respondents were at fault for further delaying the suit through their non-attendance.
21. It is not in doubt that a plaintiff is entitled to be heard on the merits of his or her case. However, that right cannot be extended to accommodate parties who are lax in prosecuting their cases and even so, without any reasonable explanation. In the present instance, the suit was filed in the year 2011, that is 12 years ago. Ultimately, the court is of the view that no reasonable or satisfactory explanation has been offered in the Applicant's affidavit material for the delay of close to two (2) years in prosecuting her suit since 2019 to dismissal. Not to mention the previous self-evident lack of expedition on the part of the Applicant.
22. Additionally, the court concurs with the sentiments by the 3rd Respondent that re-opening the matter will be prejudicial given the nature of the suit and the passage of time. This important consideration was emphasized in *Ivita v Kyumbu* [1984] KLR 441, namely, that 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.

23. In the court's view, to allow 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*. At a time when courts are deluged with heavy caseloads, they cannot allow plaintiffs to prosecute their cases at their leisure and at the expense of the parties they dragged to court.
24. As the Court of Appeal stated in *Karuturi Networks Ltd & Anor Vs Daly & Figgis Advocates, Civil Appl NAI 293/09*:

' 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.'
25. The upshot therefore is that the Notice of Motion dated April 6, 2022 is without merit, and is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Nekoye h/b for Mr. Lempaa

For the 1st Respondent: Mr. Ngatia h/b for Mr. Ngatia

For the 2nd Respondent: Mr. Muchiri

For the 3rd Respondent: Mr. Ngumbi

C/A: Carol

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