Karah & 13 others v Kimitu & 2 others (Sued as officials of Barclays Bank Sports Club) (Civil Case 400 of 2015) [2023] KEHC 21355 (KLR) (Civ) (3 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 400 OF 2015

CW MEOLI, J

AUGUST 3, 2023

BETWEEN

MAINA KARAH ..... 1ST PLAINTIFF

BONIFACE NGUIRI ..... 2ND PLAINTIFF

MICHAEL MBURU ..... 3RD PLAINTIFF

HERMAN KIGO ..... 4TH PLAINTIFF

JOSEPH KARIUKI ..... 5TH PLAINTIFF

EDWARD MWANGI ..... 6TH PLAINTIFF

MORGAN MACHARIA ..... 7TH PLAINTIFF

STEPHEN KARIUKI ..... 8TH PLAINTIFF

JOHN WARUI ..... 9TH PLAINTIFF

MOSES KAGO ..... 10TH PLAINTIFF

GEORGE GITHINJI ..... 11TH PLAINTIFF

MARTIN MWANGI ..... 12TH PLAINTIFF

FREDRICK OCHOLA ..... 13TH PLAINTIFF

EJIDIO MAINA ..... 14TH PLAINTIFF

AND

MATHEW KIMITU ..... 1ST DEFENDANT

DENNIS KINOTI ..... 2ND DEFENDANT

ANTONY ONYANGO ..... 3RD DEFENDANT

SUED AS OFFICIALS OF BARCLAYS BANK SPORTS CLUB

RULING

1. For determination is the Notice of Motion dated October 19, 2022 by Maina Karah and 13 others (hereafter the applicants) and. The substantive prayers therein seek review and or varying of the orders earlier issued by the court on April 20, 2022 and for the enlargement of the time by a further 45 days within which the applicants can prosecute their suit. The application is expressed to be brought under Order 50, Rule 6 and Order 45, Rule 1 of the *Civil Procedure Rules*, inter alia.

2. The Motion is supported by the affidavit of Njugi Gachogu, the applicants' advocate , who stated that on April 20, 2022 the court gave directions that the suit be prosecuted within a period of 60 days which was set to lapse on October 21, 2022; that upon his request to the Deputy Registrar, the advocate was assigned the September 21, 2022 for hearing ; and that on the aforesaid date, a notice was issued to the effect that the court was away on leave of absence and parties directed to take fresh dates from the registry.

3. He further stated that the advocate was issued with a fresh hearing date for October 19, 2022 but unfortunately, he subsequently received a notice requiring him to attend a separate case before the Court of Appeal; that in view of the foregoing circumstances, it was not possible for him to comply with the timelines set by the court for prosecuting the suit; and that unless the earlier orders are reviewed and/or extended, the applicants stand to suffer prejudice.

4. The respondents, namely, Antony Onyango, Mathew Kimitu and Dennis Kinoti (hereafter the respondents) do not appear to have filed a response to the Motion. Nevertheless, the applicants' advocate proceeded to swear a supplementary affidavit on March 19, 2023 in further support of the Motion, wherein, he averred inter alia, that the delay in prosecuting the suit was unintentional and was occasioned both by the notices issued by this court and by the Court of Appeal, and by inadvertence on the part of the applicant's advocate.

5. The court directed the parties to file written submissions on the Motion. Counsel for the applicants anchored his submissions on section 95 of the *Civil Procedure Act* (CPA) which donates discretionary power to courts to enlarge the time required for the performance of an action, where such time is fixed. Counsel echoed the averments made in support of the Motion and further urged the court to consider the overriding objective of the *Civil Procedure Rules*, citing the decision in *Stephen Boro Gitiha v Family Finance Building Society & 3 others*, Court of Appeal Nairobi C.A No.263/2009.

6. It was further submitted that a party should not be made to suffer the consequences of his or her advocate's inadvertence/mistake, and the court was therefore urged to consider the interest of the applicants irrespective of the lapses of their advocate. In that respect, reliance was placed on the above principles as echoed in *Lee G Muthoga v Habib Zurich Finance (K) Ltd & another*, Civil Application No. Nai 236 of 2009 and *Gideon Mose Onchwati v Kenya Oil Co. Ltd & another* (2017) eKLR.

7. Counsel contended that the respondents herein will not be prejudiced if the timelines for prosecuting the suit are enlarged, and on the contrary, that justice will be served if the orders sought are granted. Counsel cited the decisions rendered in *Richard Ncharpi leiyagu v IEBC & 2 others* CA 18/2013; *Wachira Karani v Bildad Wachira* Civil Suit No. 101 of 2011 (2016) eKLR; and *R v Vice Chancellor JKUAT* Misc. Appl. No. 30 of 2007 on the principles of natural justice and the constitutional right of a party to be heard.

8. In reply, the respondents' counsel by way of the submissions dated April 20, 2023argued that the prayer seeking the enlargement of time was not available to the applicants in view of the lapse of the extended timelines granted to the applicants, which resulted in the suit standing dismissed on November 4, 2022. Counsel anchored his submissions on the decisions in *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR and *Nancy Musili v Joyce Mbete Katisi* [2019] eKLR to argue that justice delayed is justice denied and that the courts ought to do justice in preventing an abuse of the court process by a party.

9. That in the present instance, the applicants have not demonstrated the diligence applied in ensuring the expedient prosecution of their suit even when the requisite timelines were extended. Counsel further pointing to the prolonged delay on the part of the applicants in progressing their case. The court was urged not to exercise its discretion in favour of the applicants, but to dismiss the Motion with costs.

10. The court has considered the respective material on record and the rival submissions in respect of the Motion together with the authorities cited. It is clear that the orders sought in the instant Motion are for the review and/or varying of the order made onApril 20, 2022and consequently, for the enlargement of time for prosecution of the suit. The court will address the prayers contemporaneously.

11. The principles that guide a court in deciding whether to review its orders are encapsulated insection 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. The latter provision states:

> " Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

12. Hence the instances in which a court can review its decision are where a party demonstrates:

    a. the discovery of new and important matter or evidence, or

    b. some mistake or error apparent on the face of the record, or

    c. any other sufficient reason.

13. The applicants did not clearly set out which of the above grounds their Motion was premised on. Be that as it may, from its perusal of the record, the court notes that when the parties attended court on April 20, 2022, the court noting the age of the suit granted adjournment and a period of 60 days within which the applicants were to prosecute their case, failing which it would automatically stand dismissed for want of prosecution. This came after an application for adjournment based on alleged withdrawal of instructions by the applicants from their counsel, which was apparently subsequently reinstated before any formal changes were made on the record.

14. The record further reveals that upon being granted a hearing date, the applicants' counsel attended court on October 19, 2022and indicated that he was not ready to proceed with the case as he had a

matter scheduled before the Court of Appeal on the same day and therefore sought an adjournment, which request was not opposed by counsel for the respondents. However, upon being dissatisfied with the reasons given for adjournment and upon taking into account the nature of the case, the court declined to grant the adjournment and consequently directed that the orders of April 20, 2022would run their course, and which eventually resulted in the suit standing dismissed for want of prosecution. In view of all the foregoing, the court is of the view that the applicants have not demonstrated sufficient reason or proper grounds to warrant the review sought.

15. Concerning the prayer for enlargement of time, under the provisions of section 95 of the CPA and Order 50, Rule 6 of the *Civil Procedure Rules*, courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired. See *Rawal v The Mombasa Hardware Limited* (1968) E.A 392.

16. The discretionary nature of the court's power was affirmed by the Court of Appeal in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. NAI 255 of 1997 (unreported) when it held that:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are first the length of the delay secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted."

17. While in the above case, the Court of Appeal was faced with an application seeking the extension of time for filing an appeal, the court is of the view that the general principle regarding the discretionary power of the courts to extend time applies to the instant case. Hence, a party such as the applicants herein ought to provide sufficient reasons to warrant the exercise of the court's discretion in their favour.

18. In the present instance, the court having considered the reasons given by the applicants' advocate in his two affidavits and the record herein is of the view that these in no way explain the delay in complying with the timelines given for prosecuting the suit even after sufficient time was granted to the applicants. Not to mention that this suit was filed in 2015 and the applicants themselves who own the suit have not even found it necessary to swear affidavits to explain their own efforts in the past seven years at progressing their case.

19. It is true that the mistake/inadvertence of counsel which, I dare say is not demonstrated here, should not be visited on a party, as Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo and & anor. v Augustine Kubede* (1986) eKLR:-

> "I think a distinguished equity judge has said:
>
> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merit."
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

20. However, where the party himself appears to show scarce interest in his case, he cannot expect the discretion of the court to flow in his favour. In *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR, the court though considering a slightly different issue, observed 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."

21. At a time when courts are deluged with heavy caseloads, they cannot allow parties

to litigate at leisure. As held in *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR the court bears the duty imposed by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in section 1 of the *Civil Procedure Act*. In *Karuturi Networks Ltd & Anor. vs. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal stated concerning this duty 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."

22. While a plaintiff is entitled to be heard on the merits of his or her case, a party can by his own conduct disentitle himself, especially through indolence, laxity, and inordinate delay in prosecuting his case. It did not avail much for the applicants to rehash in their motion the self-same explanations previously presented, considered, and determined by the court prior to dismissal of the suit. The prayer for enlargement of time is denied. In view of the above, the court finds no merit in the notice of motion dated October 19, 2022which is hereby dismissed with costs to the respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the applicants: Mr. Njugi

For the respondents: Mr. Mwangi

C/A: Carol