Muhoro v Abdulahi (Civil Suit 91 of 2016)
[2023] KEHC 23204 (KLR) (Civ) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23204 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 91 OF 2016

CW MEOLI, J

OCTOBER 5, 2023

BETWEEN

SAMUEL NDEGWA MUHORO ..... APPLICANT

AND

AHMEDNASSIR M ABDULAHI ..... RESPONDENT

RULING

1. The motion dated 10.11.2022 is by the Plaintiff herein, Francis Ndegwa Muhoro (hereafter the Applicant) seeking inter alia that the court be pleased to review, vary and or set aside its order made on 14.10.2022 dismissing the Applicant's suit for want of prosecution and that the said suit herein be reinstated and expeditiously heard. The motion is expressed to be brought under Sections 1A, 1B, 3A & 80 of the *Civil Procedure Act*, Order 17 Rule 2, Order 45 Rule 2, and Order 51 Rule 1 of the *Civil Procedure Rules*, among others, and premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Kevin Mwenda Gitari, counsel on record for the Applicant.

2. The gist of his depositions is that the suit herein was dismissed for want of prosecution on 14.10.2022, but the notice to show cause (NTSC), had not been served upon the Applicant and or counsel and by sheer chance, counsel came across the matter while attending to other court matters. He avows that there is a pending appeal from this court to the Court of Appeal preferred by the Defendant Ahmednassir Abdulahi SC (hereafter the Respondent).Hence in the absence of directions by the court, prosecuting the suit while there is a pending appeal would be construed as sharp practice or an abuse of court process.

3. Counsel deposed that this is a fit case for exercise of judicial discretion to set aside the dismissal order and expressing readiness to expedite the hearing. He states that no undue prejudice will be occasioned to the Respondent if the orders sought are granted, pointing out that the motion has been filed without delay and the court has jurisdiction to grant the orders sought.

4. The Respondent opposes the motion through his replying affidavit dated 20.03.2023. He deposes that the Applicant has not demonstrated sufficient cause to warrant reinstatement of the suit. That pursuant to the ruling delivered by Mbogholi, J. (as he then was) he proceeded to file his statement of defence but the Applicant has made no attempt to set down the suit for hearing and or take steps to prosecute the suit as directed. He asserts that his filing of a notice of appeal to the Court of Appeal did not prevent the Applicant from taking steps to prosecute the suit or compromise proceedings before this court. There being no order staying proceedings pending hearing and determination of the appeal to the Court of Appeal.

5. That from the record, a ruling was delivered on 23.03.2021and a period of one year and seven months had lapsed since delivery of the ruling and no explanation has been offered by the Applicant for the inordinate delay especially considering the earlier motion that was the subject of the ruling delivered on 23.03.2021. He contends that the Applicant has been indolent in prosecuting his allegedly frivolous case, pointing out that prior to the said motion, two (2) years had lapsed without any step by the Applicant. In conclusion, he deposes that no justifiable cause or reasonable explanation has been offered for the Applicant's failure to prosecute the suit and therefore the motion ought to be dismissed with costs.

6. The motion was canvassed by way of written submissions. Counsel for the Applicant while rehashing the affidavit material in support of the motion emphasizing that the court record was incomplete as concerns the last date of activity in the matter, proceedings having been taken and leading to the ruling that was delivered on 23.03.2021. He asserted that there was an error on the face of the record in that regard. The decisions in *Nyamogo & Nyamogo v Kago* [2009] EA 174 and K*iiru Mwang v Gibson Kimani Mwangi & Another* [2021] eKLR were called.

7. It was further asserted that the Respondent does not deny non- service of notice to show cause and that his conduct in the proceedings has derailed prosecution of the suit. In conclusion, it was submitted that no prejudice will be occasioned to the Respondent if the suit is heard on its merits and therefore the court ought to exercise its discretion to reinstate the suit by allowing the motion as prayed.

8. On behalf of the Respondent, counsel anchored his submissions on the provisions of Order 17 Rule 2 & 3 of the *Civil Procedure Rules* and the decision in *Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Ltd & 10 Others* [2014] eKLR on the applicable guiding principles. Addressing the issue of delay counsel relied on the decision in Anthony Kaburi Kario (*supra*) to submit that Applicant has been indolent in prosecuting his case for a period of one year seven months since delivery of the ruling of Mbogholi, J (as he then was) and the court should not aid such indolence.

9. Citing the decisions in *Republic v Medical Practitioners & Dentist Board & Another* [2021] eKLR and *Ali Issa Ali v Attorney General* [2022] eKLR, counsel contended that the Applicant's affidavit material is factually misleading and incorrect as the filing of the notice of appeal or address did not hinder the Applicant from progressing the suit upon the Respondent filing of his statement of defence. Hence there was no error apparent on the face of the record as alleged by the Applicant. That prior to filing the motion that was the subject of the ruling of Mbogholi, J (as he then was), a period of three (3) years had already lapsed since any steps were taken by the Applicant to prosecute his suit.

10. As to the question of prejudice, it was argued that the Applicant's conduct in the suit clearly violates the provisions of Article 159(2)(b) of the *Constitution* as the pendency of the suit continues to cause the Respondent unnecessary anxiety. And placing reliance on the decision in *Rose Makokha Mteka v Oserian Development Co. Limited* [2022] eKLR, counsel submitted that the court ought to balance the scales of justice in respect of both parties. It was contended, in conclusion that the Applicant has

not established sufficient cause to warrant reinstatement of the suit. The court was urged to dismiss the motion with costs.

11. The court has perused the entire 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. The Applicant's suit was dismissed for want of prosecution pursuant to a short ruling delivered on 14.10.2020 pursuant to a Notice to Show Cause (NTSC) issued under Order 17 Rule 2 of the *Civil Procedure Rules*.

12. The motion invokes both the provisions of Order 17 Rule 2 and Order 45 Rule 2 of the *Civil Procedure Rules* alongside 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". Order 17 Rule 2 of the *Civil Procedure Rules* provides that :-

> "
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> "(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.
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> (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.
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> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
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> (4) The court may dismiss the suit for non-compliance with any direction given under
> this Order.
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> (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."

13. Before addressing the purport of the above provision, it would be apt to address the application, if any, of the provisions of Order 45 Rule 2 of the *Civil Procedure Rules* as invoked in the instant motion. The Applicant has adamantly maintained in his affidavit material and submissions that there was an error apparent on the face of the record leading to the dismissal of the suit on 14.10.2022. Order 45 (1) of the *Civil Procedure Rules* which provides that: -

> "(1) Any person considering himself aggrieved— (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."

14. The related grounds advanced in respect of error apparent on the face of the record are as follows. Firstly, that there were court proceedings after 01.10.2020, including the delivery of the ruling of

Mbogholi J on 23.03.2021; secondly, that the Respondent having been dissatisfied with foregoing ruling filed a notice of appeal dated 25.03.2021 while simultaneously applying for court proceedings so as to prefer an appeal to the Court of Appeal; and thirdly, on 07.05.2022 the Applicant filed his notice of address of service. The grounds must be reviewed together with the proceedings of the of 14.10.2022 when the NTSC came up for hearing. Appearing for the Applicant was one Mr. Gitari who held brief for Mr. Mbigi but there was no appearance on behalf of the Respondent. The court record reproduced herein verbatim, is as follows; -

> "Mr. Gitari: Matter last in court in 2020 for hearing of the Defendant's application. Subsequently, the Plaintiff's submissions could not be traced. Ruling never delivered. We have been waiting.
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> Court: No good cause shown. Suit dismissed for want of prosecution." (sic)

15. In *Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited* [2020] eKLR the Court of Appeal stated that an application for review involves exercise of judicial discretion. There is a long line of authorities on the principles that govern a motion brought under Order 45 (1) of the *Civil Procedure Rules*. Okwengu JA in *Associated Insurance Brokers v Kenindia Assurance Co. Ltd* [2018] eKLR, the Court of Appeal pronounced itself as follows:

> "It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
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> > "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Emphasis added)
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> In Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:
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> > "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though

another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

16. Further, in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the Court of Appeal held that:

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:
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> > " The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous with the expression "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

17. Consequently, the question to be answered is whether the Applicant has demonstrated an error or mistake apparent on the face of the record? However, it would be important to note that pursuant to the NTSC, the Applicant was expected to place before the court detailed and cogent reasons explaining their delay and why the court should sustain the suit. A good practice that has developed over time is that a plaintiff (as is in this case) or an Appellant (in an appeal) served with a NTSC usually files an affidavit in response. The Applicant herein opted to orally address the court in deflecting the NTSC rather than file such affidavit. Counsel, however, has claimed that it by coincidence that he noted the matter while attending to other court matters, an issue this court will address in due course.

18. Be that as it may, the Applicant was afforded opportunity to be heard in their bid to salvage the suit and in the court's brief ruling, it found the reasons advanced by the Applicant to be unsatisfactory. Hence, it is evident that this court considered the Applicant's oral but factually incorrect explanation when it pronounced itself after hearing the Applicant's counsel. No assertion, resembling what is contended in the instant motion was made before the court at the time. The NTSC issued over a year since the last proceeding and the existence of an appeal in the Court of Appeal does not bar the court in the absence of an order of stay from issuing a NTSC in a dormant suit. In the court's view, the assertion of an error on the record is unsustainable and an afterthought. Hence the invocation of the provisions of Order 45 Rule 1 of the *Civil Procedure Rules* does not aid the Applicant's cause.

19. That said, by dint of Order 17 Rule 2(6), a party may approach the court in respect of a dismissal order made under Order 17 Rule 2 of the CPR. The suit having been dismissed pursuant to a NTSC issued under Order 17 Rule 2, the Applicant ought to have invoked the provisions of Order 17 Rule 2(6) in

their motion. Nonetheless, failure to do so is not fatal as the court is enjoined to administer substantive justice without undue regard to procedural technicalities.

20. Order 17 Rule 2(6) grants the court jurisdiction to entertain an application of this. 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-part 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 *Bouchard International (Services) Ltd vs. 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.

22. The Applicants' affidavit material attributes delay in prosecuting the suit and dismissal of the suit, to non-service of the NTSC the pending appeal in respect of the ruling delivered on 23.03.2021. These averments are vehemently disputed in the Respondent's material.

23. The record reveals that the NTSC which was for hearing on 14.10.2022 and dated 03.08.2022 was duly served via the postal mail to the respective counsel on 24.08.2022. An affidavit of service dated 22.09.2022 by the court bailiff was filed in proof of service of the NTSC. The Applicant has not disputed the correctness of the postal address used to effect service of the NTSC. Thus, the argument that there was no notice of the NTSC and that it was by sheer coincidence that counsel came across the matter while attending to other court matters is unconvincing.

24. Concerning the pending appeal against the ruling delivered by Mbogholi, J. (as he then was), a review of the court record and the court's Case Tracking System (CTS), the Respondent lodged a notice of appeal in respect of said ruling on 31.03.2021. And as rightly argued by the Respondent, no order to stay proceedings was in existence in that regard, and hence the Applicant was not barred from prosecuting his suit. The Applicant was at all material times at liberty to prosecute his suit notwithstanding the Respondent's notice of appeal. The Applicant's argument concerning the existing appeal is more an excuse than a solid ground; it does not hold water.

25. Further, the record shows that prior to the ruling by Mbogholi, J. (as he then was) on 23.03.2021 the Applicant was relatively active but thereafter went into slumber. Moreover, counsel appearing for the Applicant at the hearing of the NTSC, gave factually incorrect information on the status of the matter. Consequently, no proper explanation was offered for the Applicant's indolence for the one year and seven months after delivery of the ruling and dismissal of the suit.

26. At a time when courts are deluged with heavy caseloads, it is not enough for any party caught up with dismissal of his case to blame peripheral factors without acknowledging the role he or she played leading to the dismissal of the suit. 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*. Prolonged delay in the prosecution of claims defeats the overriding objective and may well result in unjust outcomes

for the innocent party. The suit herein is now over eight years old. I agree with the Respondent that the Applicant's explanation for the delay appears specious and is barely convincing.

27. That said, the fundamental question to be considered, however, is whether justice can still be done between the parties. Moreover, denying a party the right to be heard should be a matter of last resort for a court. See *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR. In that case, the Court of Appeal while asserting that the discretion of the court to set aside is wide and unfettered also outlined relevant considerations in an application of this nature to include, the nature of the action, whether it is just and reasonable to grant the prayer for setting aside, the prejudice on the respondent and whether he can reasonably be compensated by costs for any delay occasioned .

28. In emphasizing the right of hearing, the Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR stated the following:

> "Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; for the holding inter alia that:
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> (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
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> (ii) the right to be heard is a valued right; and
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> (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice..."
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> See also *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR

29. This suit is founded on defamation. Despite the evident apathy on the part of the Applicant in prosecuting the case since inception, it appears just and reasonable to allow reinstatement on strict terms. The Respondent can be compensated for the delay by way of costs. And reviewing all the pertinent matters, the justice of the matter lies in facilitating the Applicant's right to a hearing. Once there is compliance and pre-trial directions are taken, there would be no plausible reason for further delay in hearing the case to conclusion. For these reasons, the court reluctantly allows the motion on condition that the suit be fully prosecuted within 6 (six) months of today's date failing which it will stand automatically dismissed with costs, for want of prosecution. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE