



**Miguna v Outa & 3 others (Civil Suit 83 of 2012)  
[2024] KEHC 13647 (KLR) (Civ) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13647 (KLR)

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

**CIVIL**

**CIVIL SUIT 83 OF 2012**

**CW MEOLI, J**

**NOVEMBER 7, 2024**

**BETWEEN**

**MIGUNA MIGUNA ..... PLAINTIFF**

**AND**

**FREDRICK OTIENO OUTA ..... 1<sup>ST</sup> DEFENDANT**

**RADIO AFRICA GROUP ..... 2<sup>ND</sup> DEFENDANT**

**JUSTUS OCHIENG ..... 3<sup>RD</sup> DEFENDANT**

**CATHERINE GICHERU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The subject of this ruling is the Notice of Motion (the Motion) dated 3.05.2024 brought by Miguna Miguna (hereafter the Applicant). Seeking that the court be pleased to vary and/or set aside its order made on 24.02.2022 dismissing the suit for want of prosecution and consequently, that the suit be reinstated. The Motion is expressed to be brought under Article 159(2) of the *Constitution*, Sections 1A, 1B & 3A of the *Civil Procedure Act* (CPA) and Order 12, Rule 7 and Order 51, Rule 1 of the Civil Procedure Rules (CPR).
2. The Motion is premised on the grounds set out on its face and amplified in the supporting affidavit sworn by the Applicant’s advocate, John Diro, who stated that on 24.02.2022 the matter came up for hearing of the notice to show cause why the suit should not be dismissed for want of prosecution (NTSC), as a consequence of which the suit was dismissed for want of prosecution. The deponent asserted that the delay in prosecuting the suit was occasioned by various factors beyond the control of the Applicant including his unlawful arrest and subsequent detention at the Inland Container Depot Police Station, followed by his forceful and illegal removal out of the country and this court’s jurisdiction on 5.02.2018.



3. The advocate averred that notwithstanding the existence of a valid court order made on 26.02.2018 declaring the removal both illegal and unconstitutional, the Applicant was denied access and/or entry into the country on 26.03.2018 and thereafter, for a period exceeding five (5) years. That during the intervening period, the government had imposed red alerts and issued travel bans against the Applicant, thereby preventing him from boarding any flights to Kenya. And that it was not until there was a change of government in the year 2022 that the Applicant managed to return into the country on 20.10.2022. These events alleged hindered the Applicant from prosecuting the his suit.
4. The advocate further stated that unless the orders sought are granted, the Applicant will suffer grave prejudice through the denial of opportunity and right to prosecute his claim to conclusion. The advocate pointing out that the matter is partly heard, and it would be in the interest of justice for the dismissal order to be set aside, and for the suit to be reinstated for prosecution.
5. Fredrick Otieno Outa (hereafter the 1<sup>st</sup> Respondent) swore a replying affidavit on 8.07.2024 to oppose the Motion. Therein, he stated inter alia, that while the matter is part heard, the Applicant took no active steps in further prosecuting it since the year 2015 and that the explanation for the delay as set out in the Motion are irrelevant since the Applicant was in any event removed from the country on 5.02.2018 being three (3) years since the suit was last in court. The 1<sup>st</sup> Respondent also stated that even upon his return into the country in the year 2022 the Applicant took no active steps timeously moving the court for reinstatement.
6. Radio Africa Group, Justus Ochieng and Catherine Gicheru (hereafter the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents) also resisted the Motion by way of the replying affidavit sworn by the 2<sup>nd</sup> Respondent's Group Head of Legal, Grace Wambui Mwangi, on 6.08.2024. To the effect that despite having been served with a NTSC prior to the dismissal order being made, the Applicant made no efforts to attend court on 16.03.2022 and he therefore viewed the Motion as an abuse of the court process. In addition, the deponent stated that there has been an inordinate delay of over four (4) years on the part of the Applicant, in prosecuting the suit since the year 2017 when it was last recorded as being active in court prior to issuance of the NTSC.
7. The deponent took issue with the reasons advanced for the delay, citing the fact that court sessions are now conducted virtually and the Applicant had an opportunity to prosecute the suit virtually even while outside the court's jurisdiction. He took pointed out that the Motion for reinstatement was filed two (2) years after the Applicant's return to the country. Hence took the position that no sufficient grounds had been demonstrated to warrant the exercise of the court's discretion in favour of the Applicant.
8. The Applicant rejoined by swearing a supplementary affidavit on 7.08.2024 by and large reiterating the averments made in the supporting affidavit sworn by his advocate, save to add that the suit was dismissed on 24.02.2022 and not 16.03.2022 as stated in the supporting affidavit of his advocate. Regarding the delay on his part in prosecuting the suit prior to its dismissal, it is the Applicant's assertion that the matter was active in court at all material times and was in fact part heard with the Applicant and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents having presented their respective cases. Further that, he had previously lodged complaints with the then Presiding Judge of the Civil Division, Mbogholi, J (as he then was) as well as the then Chief Justice, Dr. Willy Mutunga, regarding the inordinate delay in the conclusion of the suit. Consequently, the delay in the matter is through no fault on his part and that prior to the dismissal of the suit, he did not receive the NTSC and besides, he could not have been personally served as he was not in the country. That he therefore had no prior way of knowing that the suit had been dismissed, a fact he discovered when upon his return to the country in October



2022 perused the file and thereafter instructed his advocate to lodge the instant Motion. That in the circumstances, the Motion was filed without inordinate delay.

9. The Applicant swore a second supplementary affidavit on 8.08.2024 reiterating his earlier averments regarding non-service of the NTSC and asserting that the Respondents have not tendered any evidence to the contrary. The Applicant equally reiterated his earlier averments on earlier steps in progressing the suit, his forceful removal from the country and being barred from receiving email notifications and access to online government services including the Judiciary portal between February 2018 and October, 2022.
10. Parties were directed to file and exchange written submissions. In support of the Motion, counsel for the Applicant anchored his submissions on the decision in *Bilha Ngonyo Isaac v Kembu Farm Ltd & Attorney General* [2018] KEHC 4729 (KLR) and Order 12, Rule 7 of the CPR on the discretionary power of the court in setting aside a judgment and/or order. On the subject of delay, counsel whilst citing the decisions rendered in *Ivita v Kyumbu* [1975] KEHC 4 (KLR) and *Thathini Development Company Limited v Mombasa Water & Sewerage Company & Mombasa Water Service Board* [2022] KEELC 689 (KLR) reiterated that the delay in prosecuting the suit was unintentional and excusable, as earlier set out. Counsel submitting that in any event, the Applicant made efforts to address the concerns of delay in the matter, to no avail.
11. It is equally counsel's submission that the NTSC which preceded the dismissal order was not and could not have been served upon the Applicant who at the time was outside the country and the court's jurisdiction and without access to his email accounts and/or the Judiciary portal. Counsel therefore urged the court to exercise its discretion in favour of the Applicant.
12. Counsel for the 1<sup>st</sup> Respondent on his part argued that the Applicant is guilty of inordinate and inexcusable delay of over seven (7) years, in prosecuting the suit, echoing the affidavit evidence of the 1<sup>st</sup> Respondent. That the reasons set out in the Motion to explain the delay do not meet the threshold of 'sufficient reasons,' as discussed in the cases of *Mwangi S. Kimenyi v Attorney General & Kenya Institute for Public Policy Search and Analysis (KIPRA)* [2014] KEHC 4220 (KLR) and *Nzoia Sugar Company Limited v West Kenya Sugar Limited* [2020] KEHC 976 (KLR). In addition, counsel argued that the reinstatement of the suit would be prejudicial to the Respondents as they will be forced to incur additional expenses and face challenges in procuring some of their witnesses to give evidence. Consequently, the court was urged to dismiss the Motion with costs.
13. On his part, counsel for the 2<sup>nd</sup> to 4<sup>th</sup> Respondents by and large echoed the sentiments by his counterpart. Counsel contended that the discretion donated by Section 3A of the CPA ought to be exercised judiciously, as restated by the court in the case of *Shah v Mbogo* [1979] E.A 116. On the question of delay, counsel contended that after institution in the year 2012 the suit was prosecuted consistently until the year 2015. And that notwithstanding the Applicant's alleged deportation out of the country back in, 2017 the Applicant has not demonstrated any attempts at prosecuting his suit during the intervening period of two (2) years. That the Applicant ought to have brought sufficient material to support the averment that he was completely unable to prosecute the suit, but he did not. Moreover, having returned to the country in 2022, the Applicant utterly failed to explain the delay in filing the application for reinstatement of the suit. According to counsel, the Applicant is solely to blame for the delay in the matter owing to his laxity and indifference, here citing the decisions in *Ronald Mackenzie v Damaris Kiarie* [2021] KEHC 7123 (KLR) and *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2002] KEHC 1185 (KLR).
14. Counsel additionally argued that if the order seeking reinstatement is granted, the Respondents will suffer grave prejudice arising not only from the age of the suit, but from the unlikely availability of



their witnesses coupled with difficulties in recollection of critical evidence. Counsel relying on the case of *Salkas Contractors Limited v Kenya Petroleum Refineries Limited* [2004] KECA 121 (KLR). The court was urged to dismiss the Motion with costs, and to uphold the dismissal order.

15. The court has considered the rival affidavit material and submissions in respect of the Motion. The Motion essentially seeks the setting aside of the dismissal order made on 16.03.2022 (and not the date of 24.02.2022 erroneously cited in the Motion) and reinstatement of the suit. The Motion invoked Article 159(2) of the *Constitution*, Sections 1A, 1B & 3A of the CPA and Order 12, Rule 7 and Order 51, Rule 1 of the CPR. While Sections 1A, 1B and 3A provide for the overriding objectives of the Act, Order 51, Rule 1 of the CPR merely makes provision for situations where no specific procedure for applying is provided in the CPR. Articles 159 of the *Constitution* inter alia commands the courts to dispense substantive justice without undue regard to procedural technicalities, respectively. Order 12 Rule 7 of the CPR relates to hearing of suits primarily and, like the foregoing provisions has no immediate application here.
16. Section 3A (supra) which to the court's mind appears more pertinent 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 Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated thus:

"Also cited was Section 3A of the *Civil Procedure Act* which enshrines 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. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the *Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

17. The Supreme Court further elucidated in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, that:

"Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

18. Based on the above provision and related authorities cited by the parties, the grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo and Another* [1967] E.A 116:

"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.”

19. A brief background into the events leading up to the dismissal order issued of 16.03.2022 are as follows. The Applicant filed the suit by way of the plaint dated 20.02.2015 and amended on 26.11.2015 seeking damages for defamation. The record shows that the Respondents subsequently filed their respective statements of defence denying the averments in the plaint and liability. Upon close of pleadings, the matter was certified ready for hearing and proceeded to hearing of the Applicant’s case before Aburili, J. Subsequently, directions were given for the file to be placed before the then Presiding Judge of the Civil Division Mbogholi, J. (as he then was) for further directions.
20. Thereafter, when the parties appeared before the Deputy Registrar on 10.10.2017 new hearing dates were set for 27.03.2018 and 28.03.2018 before any Judge of the Civil Division. Nevertheless, it is apparent from the record that no further progressive action took place in the suit, culminating in issuance of the NTSC on 17.01.2022 requiring the parties to attend court to show cause as to why the suit should not to be dismissed for want of prosecution. When the matter eventually came up for the NTSC on 16.03.2022, none of the parties were in attendance, resulting in the dismissal of the suit. The said dismissal order prompted the present Motion.
21. Upon considering the explanation by the Applicant’s counsel regarding the Applicant’s forceful removal from the country and the court’s jurisdiction sometime in the year 2018 largely for political reasons and the subsequent denial of his access to the country for a period of close to four (4) years thereafter, the court acknowledges that the said events were matters in the public domain and of which the court can take judicial notice. However, the court further noting that virtual court proceedings commenced in earnest around 2020 does not agree that the physical presence of the Applicant was necessary, in the circumstances of this case, for the conclusion of the already part-heard case. Besides, despite his return to the country, the Applicant delayed for an extended period before filing this application. Be that as it may, the court will admit the Applicant’s barely plausible explanation, mainly because of the likely chaos suffered in his personal affairs following his forceful removal out of the country and inability to return.
22. Regarding service of the NTSC, from a glimpse of the record, it is apparent that the Applicant was acting in person/through his firm, at all material times. It is therefore more plausible than not that the Applicant while out of the country and the court’s jurisdiction at the time of service, had no notice that the matter had been listed for the NTSC, hence his failure to respond or attend the proceedings of 16.03.2022.
23. That said, and while the Applicant was entitled to be heard on the merits of his case, the right cannot be stretched to the detriment of the parties he dragged to court. It is now 12 years since the suit was filed. The words of the Court of Appeal in *Rajesh Rughani v Fifty Investments Limited & Another* [2016] eKLR though primarily addressing an application for the dismissal of a case for want of prosecution, equally speak to the present situation.
24. The Court of Appeal stated that: -

“The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita -v- Kyumbu* (1984) KLR 441). The test was expressed as follows:

The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance



of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.”

25. As observed in Ivita’s case above, 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. Notwithstanding the delay herein, considering the advanced stage of proceedings it appears feasible that the trial can be concluded without further undue delay, and orders can be made to curtail such eventuality. The onus of progressing the suit to conclusion rests with the Applicant, despite the matter being partly heard.
26. The Respondents’ assertion that some of their witnesses may be difficult to procure was not presented with any specificity through depositions in their affidavits, and while it is indeed possible that certain witnesses may be difficult to procure given the delay, or that their memories may have faded, it does seem that in this case, a fair trial can still be held, and with the necessary dispatch. Thus, minimizing prejudice to the Respondents, in addition to compensating them for the inconvenience of further proceedings by an award of costs.
27. In the result, the court is persuaded that the justice of the matter lies in granting the Notice of Motion dated 3.05.2024. On condition that the Applicant shall prosecute the reinstated suit to conclusion by 28.02.2025, failing which the suit will stand automatically dismissed for want of prosecution, with costs to the Respondents. The Respondents are awarded the costs of the Motion, in any event.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 7<sup>th</sup> DAY OF NOVEMBER 2024.**

**C. MEOLI**

**JUDGE**

**In the presence of:-**

Messrs Moriasi and Divo for the Applicant.

Ms Tabut holding brief for Ms Masese for the 1st Defendant/Respondent.

Ms Ogunyio for the 2nd, 3rd and 4th Respondents.

C/A: Erick

