Waweru v Mwangi (Civil Suit 1279 of 2006)
[2024] KEHC 13719 (KLR) (Civ) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13719 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 1279 OF 2006

CW MEOLI, J

NOVEMBER 7, 2024

BETWEEN

BONIFACE KARIUKI WAWERU .... PLAINTIFF

AND

JOHN IRUNGU MWANGI .... DEFENDANT

RULING

1. For determination is the motion dated 27.10.2023 brought by Boniface Kariuki Waweru the Plaintiff (hereafter the Applicant) seeking inter alia that the Court be pleased to vary or set aside its order of 02.10.2023 dismissing the Applicant's suit and reinstate the suit in addition to making orders for the expeditious hearing of the reinstated suit. The motion is expressed to be brought pursuant to Article 48 and 159(2)(d) of *the Constitution*, Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 12 Rule 6(1) & 7 of the Civil Procedure Rules (CPR) among others.

2. The motion is premised on grounds on its face, as amplified in the supporting affidavit sworn by Applicant. The gist of the affidavit is that on 21.06.2023 the Court directed that the suit be fully prosecuted by 30.09.2023 failing which it would stand automatically dismissed ; that having earlier unsuccessfully tried to persuade his erstwhile counsel to prosecute the matter, the Applicant instructed his present counsel who came on record on 28.11.2022 ; and that with the prosecution deadline approaching, the new counsel had unsuccessfully sought a hearing date prior to the August recess via letters to the Deputy Registrar (DR), culminating with a mention before the DR on 02.10.2023.

3. That counsel filed an application dated 11.09.2023 seeking inter alia that the directions issued on 21.06.2023 be set aside and for the extension of time to 31.12.2023 for prosecuting the matter. He states that his present and erstwhile advocates' inadvertent failure to timeously prosecute the suit as ordered by the Court has adversely impacted upon his right to have the matter heard and determined on merit. Asserting that the cause of action giving rise to the suit was an accident, he stated that he

has health challenges and has repeatedly undergone corrective surgery, with more anticipated for the remainder of his life while he is financially strapped. In conclusion, he deposes that he has a meritorious claim and should not be driven off the seat of justice for mistakes of erstwhile counsel, and hence it is in the interest of justice that the orders sought herein be granted.

4. Despite personal service of the motion upon John Irungu Mwangi the Defendant (hereafter the Respondent) he failed to respond thereto. Nevertheless, directions were taken that the Applicant's motion be determined on the basis of his affidavit material on record, which the Court has duly considered against the governing principles.

5. The events leading up to the instant motion have in part been captured in the Applicant's affidavit material. The Applicant's motion invokes Order 12 of the CPR which provides for the hearing of suits and consequences of non-attendance. What the Applicant essentially seeks is the reinstatement of this suit that was dismissed pursuant to orders issued on 21.06.2023. Therefore, the provisions of Order 12 of the CPR have no relevance here. The appropriate provision to my mind would be Section 3A of the CPA, equally invoked by the Applicant, 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".

6. The purport of the above provision was discussed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR, wherein it was observed that: -

> " 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 v West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that:
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> "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."

The Supreme Court went further in Board of Governors, Moi High School Kabarak & Anor v Malolm Bell [2013] eKLR, to add the following: -

> " 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)

7. While the discretion of the Court to set aside an order generally or a dismissal order particularly 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 v Mbogo & Anor [1967] E.A 116 the rationale for the widen 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."

8. The principles enunciated in Shah v Mbogo (supra) were amplified further by Platt JA in Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein would apply in equal degree in this matter, in light of the fact that the orders issued by this Court on 21.06.2023 ultimately led to dismissal of the Plaintiff's suit as affirmed on 02.10.2023.

9. At this juncture it would be apt to revisit the history of this matter, which is well documented. The suit was filed on 04.12.2006, later amended on 17.04.2008 and further amended on 03.07.2019, in respect of a cause of action allegedly arising on 2005. The Defendant on his part filed a defence to the Plaintiff's the claim. The earliest attempts at prosecution of the suit by the Plaintiff since its filing was on 16.02.2009 however on the said date the matter was adjourned at the behest of the Defendant's counsel pursuant to an order staying proceedings in this matter, and issued in Nairobi Milimani HCCC No. 318 of 2008. The second attempt at hearing of the matter was on 14.03.2022, but the matter was adjourned at the behest of erstwhile counsel for the Plaintiff. No further progressive or substantial steps were taken, and eventually, parties appeared before the Deputy Register (DR) on 23.05.2023, who directed that the matter be mentioned before this Court on 21.06.2023. On the latter date, the parties were absent, and the Court directed as follows: -

> " This date taken in the presence of both parties who are absent today. The suit was filed in 2006 and has not proceeded to hearing. The Court directs that the suit be fully prosecuted by 30.09.2023 or stand dismissed for want of prosecution."

10. The Plaintiff thereafter moved the Court vide a motion dated 11.09.2023 seeking among other orders that this honorable Court be pleased to set aside the directions issued on the 21.06.2023 and other consequential orders made thereto by extending the deadline of prosecuting this matter to 31.12.2023; that pursuant to the forestated the honorable Court be pleased to order the hearing of this matter to proceed on 02.10.2023 and allocate a Judge to hear and determine the same to enable the expedited disposal of the matter; and that in the alternative to the above the honorable Court be pleased to assign the matter to a Judge and order for the hearing of the same prior to the set deadline of 30.09.2023 and for the parties to file their submissions prior to the set deadline. The said motion came up for hearing on 25.09.2023 but was stood over to 02.11.2023 for non-service upon the Defendant. Meanwhile in the intervening period, the Plaintiff filed the instant motion that is presently for consideration. When counsel for the Plaintiff appeared before me on 02.11.2023, he addressed the Court as follows: -

> " I pray to withdraw application dated 11.09.2023 and proceed with application dated 27.10.2023".

11. Having set out the above, it is equally apposite to note that from the record, since filing suit the Plaintiff changed counsel on four (4) separate occasions. Counsel who was acting for the Defendant ceased to do so sometime in 2015. Since then, the said Defendant has not participated in any way in the matter. That said, as earlier observed, setting aside a dismissal order involves exercise of discretion of which is "intended to avoid injustice or hardship resulting from accident, inadvertency 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."

12. In contemporaneously addressing both the setting aside of dismissal order and reinstatement of the suit, the court notes that on 21.06.2023 this Court explicitly directed that the suit be prosecuted on or

before 30.09.2023. From the record, there was no compliance, the Applicant opting a few days to the lapse of the time granted for prosecution of his suit, to file the withdrawn application. Consequently, due to obvious non-compliance with this Court's directive issued on 21.06.2023, the suit automatically stood dismissed as at 30.09.2023.

13. Evidently, there was prolonged delay in the prosecution of the suit since its institution in 2006, culminating in the order granting of 21.06.2023 granting 101-day window, for the Plaintiff to prosecute the suit. The Plaintiff's explanation for the delay is that his erstwhile advocate failed to heed his instructions to prosecute the suit, forcing the appointment of the present counsel who came on record on 28.11.2022; and that the present counsel's attempts to procure a hearing date ahead of the deadline failed.

14. Firstly, a perfunctory review of the physical record and Judiciary Case Tracking System (CTS) does not reveal the alleged attempts by the Plaintiff's present counsel to request a hearing date as purported in the annexure marked BKW3 exhibited in the supporting affidavit. No such document was lodged. Secondly, the alleged instructions to erstwhile counsel to prosecute the matter has equally not been demonstrated through evidence. Besides, based on the Applicant's annexure BKW2, as of 30.11.2022 (See CTS records), erstwhile counsel was no longer on record for the Plaintiff and the onus of progression of the suit lay with Messrs. Triple N. W. Co. Advocates and the Plaintiff. Thirdly, the record before this Court and CTS does not capture any proceedings before the DR on 02.10.2023, as purported in the Applicant's affidavit and annexure marked BKW1. This annexure merely captures a summary of activities in the matter resting with an administrative action on 2.10.2023 by the DR and no Court proceedings for the date are reflected on the physical file.

15. Contrary to the Plaintiff's explanations on the actions taken within the 101 days window through the annexure marked BKW3, the record itself tells a different story. There is no evidence of the above annexures on record or CTS to corroborate the Applicant's claims. No doubt these annexures were created in a bid to mislead the court.

16. A party seeking to vary, set aside an order and or reinstate suit must not be seen to presume on the Court's discretion. Good and sufficient cause is what would unlock the said discretion. The Court of Appeal in Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others [2019] eKLR addressed the question of delay as follows; -

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable......"

17. It is equally trite that cases belong to the litigants who lodge them in Court, and in this instance, it is not available to the Plaintiff to blame counsel for failure to take steps to progress the suit. The legal principle that the mistake of an advocate should not be visited upon the client, does not enjoy a blanket application. At the risk of repetition, an action before a Court of law ultimately belongs to the litigant and not the advocate. Thus, it is the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim. This position was fortified by the Court of Appeal in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR when it held thus:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized

that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

See also Daqare Transporters Limited v Chevron Kenya Limited [2020] eKLR

18. Moreover, the Court of Appeal in the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR held that:

> " While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

19. At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute their cases at leisure. It is almost twenty (20) years since the suit was filed, and the Plaintiff cannot be heard to heap blame on his erstwhile counsel and the Court when he himself literally went into slumber after filing the suit , and not just within the 101 last days of the suit's subsistence. Attempts made by the Plaintiff to prosecute the suit are scant and illustrative of a lethargic and indolent litigant. Such cynical disregard for urgency towards disposal of matters must be frowned upon.

20. True, the Applicant was entitled to be heard on the merits of their case, but the right cannot be stretched to the detriment of the parties they dragged to court. It is now almost 20 years since the cause of action arose and the suit filed. Additionally, re-opening the matter will be prejudicial as it is doubtful that a fair trial can be held after such a long hiatus.

21. 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. 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:
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> 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."

22. As observed in Ivita 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 fact that the suit herein had in the past twice gone to the hearing stage, it is the court's considered opinion that allowing the reinstatement of the Plaintiffs' suit in the present circumstances would run afoul of the overriding objective in Section 1A and 1B of the CPA, in addition to working prejudice against the Defendant.

23. Under these provisions, 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 CPA. It is equally not lost on the Court that the right of the Plaintiff to be heard on the merits of his case is a constitutional right that ought to be safe guarded as much as possible. Corollary to that, however, is the Defendant's right to have the suit into which he has been dragged, determined expeditiously. See: - Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR.

24. So that while this Court is not without sympathy towards the Plaintiff's pleaded cause, it cannot turn a blind eye to his prolonged indolence in the prosecution of the matter as manifested in the record. Thus, considering all the foregoing, the Court is of the view that the justice of the matter lies in dismissing the Plaintiff's motion dated 27.10.2023 with no order as to costs. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 7th DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Ms Mwaluko holding brief for Mr. Ndegwa for the Applicant.

N/A for the Respondent:

C/A: Erick