



Jared Isoe Okemwa t/a Sraky Ventures Company Limited v Charles Ng'ang'a Muturi & Cecilia Wangui Muturi t/a Sunshine Occasions Limited (Civil Case E253 of 2022) [2024] KEHC 15199 (KLR) (Civ) (2 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15199 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE E253 OF 2022
CW MEOLI, J
DECEMBER 2, 2024

BETWEEN

JARED ISOE OKEMWA T/A SRAKY VENTURES COMPANY LIMITED PLAINTIFF

AND

CHARLES NG'ANG'A MUTURI & CECILIA WANGUI MUTURI T/A SUNSHINE OCCASIONS LIMITED DEFENDANT

RULING

1. The subject of this ruling is the Notice of Motion dated 9.07.2024 (the Motion) brought by Jared Isoe Okemwa T/A Sraky Ventures Company Limited (hereafter the Applicant) seeking that the court be pleased to set aside the order made on 4.07.2024 dismissing the suit for want of prosecution and consequently, that the suit be reinstated for hearing. The Motion is expressed to be brought under Articles 48 and 159 of *the Constitution* of Kenya, 2010; Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* (CPA) and Order 12, Rules 3 and 7, Order 45, Rule 1 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 of the Applicant, who stated that the dismissal order resulted from material confusion in the matter, as the presiding court did not sit on 13.06.2024 being the date on which the suit was scheduled to come up for hearing.
3. The Applicant further stated that on the said date, he attended court ready to proceed with the hearing of the suit, but that the Judge who had conduct of the matter at the time, indicated that she was both bereaved and on transfer, and hence unable to take up any fresh matters. That although the matter was thereafter listed for 18.06.2024 for purposes of taking directions, a notice by the Judiciary



- thereby declaring the day as a day of mourning following the unfortunate death of Hon. Magistrate MK scuttled the schedule.
4. The Applicant averred that he did not attend court on the above date and was therefore unaware of the eventual dismissal of the suit. He further averred that his failure to prosecute the suit was occasioned by internet connection hitches and was unintentional. It is his averment that the dismissal order is prejudicial to him and that unless the same is set aside, he stands to suffer irreparable loss and damage. That it would serve the interest of justice, therefore, if the court were to allow the Motion as prayed.
 5. Charles Ng'ang'a Muturi (hereafter the 1st Respondent) swore a replying affidavit on 11.10.2024 on his behalf and on behalf of Cecilia Wangui Muturi (hereafter the 2nd Respondent) in opposition to the Motion. Therein, he stated inter alia, that the Motion is frivolous and constitutes an abuse of the court process, for the reasons that the matter came up in court severally on previous occasions, but that the Applicant was absent; including 15.04.2024 when the court directed that the suit be heard on 13.06.2024, when the Judge indicating that she would be proceeding on transfer advised that she would not be taking up any new matters.
 6. The 1st Respondent stated that when the matter subsequently came up on 18.06.2024 the court dismissed it for want of prosecution and in the absence of the Applicant. He went on to state that it is clear from the history that the delay in prosecution of the suit was occasioned by the multiple incidences of non-attendances on the part of the Applicant and hence no sufficient reasons have been given to warrant setting aside of the dismissal order.
 7. The 1st Respondent further faulted the Applicant for failing to serve the Respondents' advocate with a copy of the present Motion, adding that the said advocates only came to learn of the existence of the Motion upon accessing the Case Tracking System (CTS) portal, where they discovered that the Motion had been scheduled for hearing on 14.10.2024. The 1st Respondent therefore deposed that the Applicant is undeserving of the court's discretion, adding that the Respondents herein stand to suffer prejudice if the order for reinstatement sought is granted. For those reasons, he urged the court to dismiss the Motion with costs.
 8. When the Motion came up in court on 14.10.2024 the parties agreed that it be determined on the basis of the affidavit evidence on record.
 9. Thus, the court has considered the rival affidavit material supporting and resisting the Motion. The prayers in the Motion seek the setting aside of the dismissal order made on 4.07.2024 and consequently, the reinstatement of the present suit.
 10. As referenced earlier stated, the Motion invokes Articles 48 and 159 of *the Constitution* of Kenya, 2010; Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* (CPA) and Order 12, Rules 3 and 7, Order 45, Rule 1 and Order 51, Rule 1 of the Civil Procedure Rules (CPR). While Sections 1A, 1B and 3A relate to the overriding objectives of the Act, Section 80 of the CPA as read with Order 45, Rule 1 of the CPR deal with the subject of review. Order 12, Rule 7 sets out the discretionary power of the court to set aside a judgment or order arising from non-attendance by a party or parties. Order 51, Rule 1 applies where no specific provisions exist setting out the procedure for applying. Articles 48 and 159 of *the Constitution* on their part make provision for access to justice and the exercise of substantive justice without undue regard to procedural technicalities, respectively.
 11. Section 3A (supra), also invoked here, 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.”

12. The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another v Malcolm 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)

13. It is settled that the court’s power to grant or refuse an application to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, such 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.”

14. The court has taken the liberty of perusing the physical and CTS record and more particularly, the events leading up to the dismissal order issued on 4.07.2024 and notes the following. The Applicant filed the suit by way of the plaint dated 15.12.2022 seeking various reliefs including general damages and damages for loss of user, against the Respondents herein, arising from the alleged illegal seizure and detention of the Applicant’s goods and/or equipment by the Respondents. The record shows that the Respondents subsequently filed their joint statement of defence dated 9.02.2023 denying the averments in the plaint and liability.

15. Subsequently, the matter was slated to come up for pre-trial directions. However, the Respondents filed a Chamber Summons dated 31.3.2023 seeking to have their names struck out of the suit. Upon attending court on 28.02.2024, Ongeri, J. directed that the matter be listed on 15.04.2024 for purposes of taking directions. The learned Judge equally directed the Respondent’s counsel to serve the Applicant with a mention notice to that effect. From the record, when the matter subsequently came up on the aforesaid 15.04.2024 for pre-trial directions, the Applicant was absent. Consequently, Ongeri, J. ordered that the hearing proceeds on 13.06.2024 and further ordered that the Respondents do serve upon the Applicant the hearing notice to that effect. Lastly, the court equally directed that if



the Applicant failed to attend court on the scheduled date, it would result in the automatic dismissal of the suit for want of prosecution.

16. When eventually the matter came up as scheduled on 13.06.2024, both the CTS and physical record show that none of the parties were in attendance, prompting the court to schedule mentions on 18.06.2024 and 4.07.2024 with directions for service of a mention notice upon them. It is apparent that on the subsequent dates, the parties were equally absent. Nevertheless, Onger, J. upon referring to her earlier order made on 15.04.2024 rendered the suit automatically dismissed for want of prosecution in default of compliance with the said order, and ordered that the file be closed. The said order gave rise to the instant Motion.
17. The Applicant's explanation for failing to prosecute the suit in good time is that there was a confusion with regards to the dates on which the matter was scheduled to come up in court; that though he was present in court and ready to proceed with the hearing on 13.06.2024 in particular, the court indicated its inability to proceed, for the reasons earlier set out. That thereafter, other intervening factors hindered the progress of the suit. Naturally, the 1st Respondent on his own behalf and on behalf of the 2nd Respondent, refuted the above allegations and solely faulted the Applicant for the delay in prosecution of the suit.
18. Upon consideration of the record, the court observed that contrary to the averments by the Applicant, the CTS record clearly shows that when the matter came up in court on 13.06.2024 the parties herein were absent, which would explain the directions made by Onger, J. rescheduling the matter to 18.06.2024 and later to 4.07.2024 for mention and directing that the parties' respective advocates be served with mention notices in that respect. The Applicant did not tender any credible evidence or material to support the averment that he was present on 13.06.2024 but his attempts at participating in and prosecuting the suit hampered by internet connection challenges.
19. From an overall perusal and consideration of the record, it is apparent that the Applicant is not being truthful with the court and is essentially misleading the court as to the true position on record. It is a glaring fact that the reasons being offered by the Applicant to explain the delay in prosecuting the suit are unsupported and constitute a stark contrast to the facts on record.
20. Further, it is apparent reviewing the entire record that from inception of the suit, the Applicant was anything but consistent in his court attendances whether by himself or through his advocate and the proceedings prior to dismissal indicate a lackluster attitude in progressing his case. He cannot hope to latch on to the unfortunate demise of Hon. MK to support allegations that confusion ensued therefrom regarding the hearing date of 13.06.2024, which is the day news broke out concerning the demise, or subsequent dates which in any event were mention dates. While claiming in the same breath to have been in court on the former date, an assertion clearly contradicted by the CTS and physical record herein. What was the confusion about?
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 demonstrate laxity and indifference in following up and prosecuting their cases. In the present instance, the court is of the view that no reasonable or satisfactory explanation has been offered in the Applicant's affidavit material for the inordinate delay in prosecution of the suit for the past two (2) years since it was filed. In the court's view, to allow the reinstatement of the present suit in view of the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*.



22. The Court of Appeal stated the following in *Karuturi Networks Ltd & Anor v 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.”

23. Consequently, the court finds the Notice of Motion dated 9.07.2024 to be devoid of merit. The Motion is hereby dismissed, with costs to the 1st and 2nd Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

N/A for the Applicant:

Mr. Mureithi holding brief for Mr. Kingori for the 1st & 2nd Respondent:

C/A: Erick

