Ndambuki v Nairobi City County (Civil Suit 13 of 2011)
[2024] KEHC 15177 (KLR) (Civ) (2 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15177 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 13 OF 2011

CW MEOLI, J

DECEMBER 2, 2024

BETWEEN

JOSEPH MAKAU NDAMBUKI ..... PLAINTIFF

AND

NAIROBI CITY COUNTY ..... DEFENDANT

RULING

1. For determination is the motion dated 23.04.2024 by Joseph Makau Ndambuki, the Plaintiff, seeking inter alia that the Court be pleased to reinstate the Plaintiff's suit for hearing and determination, and to grant a hearing date on priority basis. The motion is expressed to be brought pursuant to Order 17 Rule 2 of the Civil Procedure Rules (CPR) and Section 1A & 1B of the *Civil Procedure Act* (CPA) among others and is premised on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Plaintiff.

2. The gist of the affidavit is that the Plaintiff was shocked to learn that the suit stood dismissed by dint of orders issued by this Court on 07.12.2022 and that he was not notified of the said order by erstwhile counsel on record despite the matter having been set down for hearing on 08.04.2024. That prior to withdrawing instructions from erstwhile counsel, the latter had informed him that he had written to the Deputy Registrar (DR) to grant him a date for pre-trial directions so that a hearing date could be fixed; that not having received any communication from erstwhile counsel he proceeded to instruct his present counsel on record who also wrote to the DR requesting for a hearing date on priority basis; and that requests for a hearing date went unanswered prompting counsel to fix a hearing date at the registry.

3. He further asserts that the only available hearing date was 08.04.2024and that he has not been complacent or indolent in prosecuting the matter. That failure to obtain a hearing date within the twelve (12) months granted was purely due to failure by the Court to issue him with a hearing date despite his several requests. In conclusion, he urged the Court to allow the motion as lodged.

4. Nairobi City County, the Defendant, despite being served failed to file a response. Despite the court's express directions to determine the Applicant's motion on the basis of affidavit material. Nevertheless, the Defendant's failure to file a response does not accord the Plaintiff free reign and the Court will proceed to consider the merits of the motion on the basis of the affidavit material and applicable principles.

5. I find it apposite to begin by revisiting the pertinent events in this matter, which are well documented. The suit was filed on 14.01.2011 in respect of a cause of action allegedly arising in 2010 and the plaint amended on 06.03.2017. It appears that despite being served with summons to enter appearance the Defendant failed to file a defence and judgment in default of appearance and defence was entered against it on 07.01.2015. However, on 18.11.2020, the same was set aside by consent, but on conditions.

6. The earliest attempts at prosecution of the suit by the Plaintiff since its filing was on 13.04.2016. However, on the said date the matter was adjourned at the behest of the Plaintiff. The suit thereafter came up for hearing on 18.08.2016, 18.01.2017 and 28.06.2017 when hearing was adjourned, predominantly at the instance of the Plaintiff. Further adjournments at behest of the Plaintiff are recorded on 19.10.2017, 07.12.2017, 15.03.2018 and 28.06.2018, on such two (2) occasions due to alleged indisposition of the Plaintiff or counsel. In respect of attendances on 11.10.2018, 29.10.2018, 06.11.2018, 04.02.2019, 29.07.2019, 11.11.2019, 27.07.2020 and 02.11.2020, the suit was adjourned by Defendant due to delay in prosecution of its pending application to file a defence out of time and alleged ongoing negotiations to compromise the matter.

7. Eventually, the Defendant's motion was compromised on 18.11.2020. The suit was thereafter listed before the Deputy Registrar (DR) for pre-trial purposes on 24.02.2021 and 20.04.2021 when the Plaintiff and or counsel were absent, on 11.05.2021, 24.08.2021, 30.09.2021, 30.11.2021 and 22.03.2022 when all the parties were absent and eventually on 24.05.2022 when the Plaintiff sought a mention date before a Judge.

8. The Plaintiff thereafter filed a motion dated 20.07.2022 primarily seeking leave to file a further amended plaint. The above motion came up before this Court on 07.12.2022 and upon hearing representations by counsel appearing, the Court ordered as follows: -

> " By consent the Plaintiff is granted leave to file a further amended plaint in 14 days with corresponding leave to the Defendant to amend defence.
>
> This is an old suit which has never been heard yet there has been several amendments of pleadings by the Plaintiff. The Court orders that upon amending the plaint, the Plaintiff shall take all necessary steps to prosecute his suit fully within 12 months of today's date failing which the suit will stand automatically dismissed for want of prosecution." (sic)

9. There was no compliance with the final direction, and when two years later the suit was listed before me on 08.04.2024, the Court observed as follows: -

> " Pursuant to orders given on 07.12.2022, the suit herein stands dismissed for want of prosecution"

10. The present motion, prompted by the above orders, inappropriately invokes Order 17 Rule 2 of the CPR which encompasses "Prosecution of Suits". What the Applicant is essentially seeking is the reinstatement of his suit dismissed pursuant to orders issued on 07.12.2022 during proceedings on the amendment motion, and an opportunity to prosecute. Therefore, the appropriate applicable

provisions to my mind would be Section 3A as read with section 95 of the CPA, and order 50 Rule 6 of the CPR. The former 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 latter provisions allow the enlargement of time for doing any act or taking any proceedings under the Rules.

11. The import of Section 3A CPA was spelt out 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)

12. While the discretion of the Court to set aside an order generally or 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 v Mbogo & Anor [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."

13. 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 measure in this matter. The time granted by the court for the prosecution of the case on 07.12.2022 lapsed on 07.12.2023, resulting in the automatic dismissal of the suit for want of prosecution.

14. The Plaintiff's attempts at an explanation is three pronged: - that he was not informed by erstwhile counsel of the orders issued by the court on 07.12.2022 ; that the counsel kept him in the dark after informing him of efforts to secure a date by writing to the DR; that the Deputy Registrar and by

extension the court failed to respond to letters requesting for a date, prompting the fixing of a hearing date on 08.04.2024 by which date the suit already stood dismissed.

15. First, the Plaintiff has not tendered any material in demonstrating alleged failure on the part of counsel to notify him of this Court's orders, or his follow up on the case in the one-year period since the said orders. Secondly, the orders that gave rise to the dismissal of the suit were issued on 07.12.2022 when the firm of M/s Gitonga Mureithi & Co. Advocates was on record for the Plaintiff. A review of the physical record and Case Tracking System (CTS) reveals that the said firm of advocates proceeded to file the further amended plaint on 03.02.2023, well past the fourteen (14) days granted from 07.12.2022 for the amendment. The said firm further only lodged a request for a mention date on 28.04.2023 (Annexure JM-2a). There was no further action initiated by the said counsel prior to the letter dated 11.09.2023 (Annexure JM-4), this time by the firm of Kipyator Kibet & Associates Advocates purporting to have been instructed by the Plaintiff and thus requesting for a hearing date on priority basis. I say "purporting", because from the record, there is no indication that by that date the said firm of advocates had complied with the requirements of Order 9 of the CPR by filing a notice of change, a purported copy of which is now proffered by the Plaintiff as Annexure JM-3. It was not until 28.03.2024 that the present counsel properly came on record.

16. In shoring up his alleged attempts to progress this matter, the Plaintiff has exhibited in his affidavit some letters supposedly written by the firm of Kipyator Kibet & Associates Advocates, (Annexure JM-5), whose copies do not appear on the CTS and said counsel never duly came on record in the matter as purported by the Plaintiff. The said material by the Plaintiff appears false and a desperate attempt to mislead the Court to believe that requests were made for a hearing date, and that the Court registry failed to honor the requests. Here, the only verifiable and genuine attempt to progress the matter pursuant to the order of 7.12.2022 was the request by the firm of M/s Gitonga Mureithi & Co. Advocates who had come on record on 28.03.2024, seeking a mention date, and lodged on 28.04.2024 vide Annexure JM-2a. By that date, the suit stood dismissed.

17. Therefore, concerning alleged actions taken within the twelve (12) month window the annexures to the supporting affidavit tell a very different story when compared with the actual court record. As stated, there is no evidence of the annexures marked JM-5 on the physical record herein or in the CTS to corroborate the Plaintiff's claims. Undoubtedly, the total delay in this matter and in applying is inordinate and unexplained in any event. A party seeking to vary, set aside an order and or reinstate a suit must show candour, rather than attempt to hood wink the court by the use of evidently fabricated material, as done here. Good and sufficient cause must be shown, and any delay satisfactorily explained. The total delay here is almost 24 years, and no good cause, beyond blaming his counsel has been shown by the Plaintiff.

18. 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....."

19. By his application, the Plaintiff has heaped all the blame on his erstwhile counsel and this Court. I have already dealt with the allegations that the court failed the Plaintiff. Regarding the allegations against his erstwhile advocate, it is 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 their failure to take steps to progress the suit. The legal principle that the mistake of an advocate should not be visited upon the client, has

no blanket application; it is the litigant's duty to pursue or otherwise take active and effective steps to ensure the timely prosecution of his or her claim.

20. It is worth noting here that from the record, the Plaintiff since filing suit changed counsel on eight (8) separate occasions including a brief spell when he acted in person. There is no explanation for the changes or the steps the Plaintiff took notwithstanding to ensure the progress of his case in those years. Obviously, the constant changing of advocates by the Plaintiff stalled the timely prosecution of the suit and is difficult to understand given the age of the matter. Despite the Plaintiff's undisputed right to appoint counsel of his choice, the frequent change of counsel in this case could only serve to sabotage the speedy prosecution of his case. He is responsible for those actions and cannot be heard to blame others for his current fate; his own injudicious actions have brought about his misfortune. As held in Shah vs Mbogo & Anor. (supra) , the jurisdiction to vary or set aside an order of the court 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. Moreover, in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR the Court held that: -

> " 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

22. And 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."

23. The cause of action in this case allegedly arose in 2010 and given the nature of the claim as disclosed in the pleadings, it is doubtful that witnesses and documents can be readily assembled on both sides to facilitate the mounting of a fair and speedy trial. Thus, portending likely prejudice. See Rajesh Rughani v Fifty Investments Limited & Another [2016] eKLR. Although the Plaintiff's right to be heard is constitutionally guaranteed, it is not absolute and must be balanced against the corresponding right of the party who has been dragged to court to have the dispute expeditiously determined. At a time when Courts are deluged with heavy caseloads, it is not available to any party to prosecute his case at leisure, in total disregard of the overriding objection encapsulated in Section 1A and 1B of the CPA by which parties and counsel are duty bound to co-operate with the Court in furthering the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes.

24. Regarding the above provisions, 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."

25. The court having considered all the foregoing is not persuaded that the Plaintiff has made a case warranting the reinstatement of his suit. It would be a travesty of justice to reinstate this suit to continue limping along unresolved, as appears likely, for another decade. The Court is of the firm view that the justice of the matter lies in dismissing the Plaintiff's motion dated 23.04.2024 with no order as to costs.

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

C. MEOLI

JUDGE

In the presence of

Mr. Karwanda for the Plaintiff:

N/A for the Defendant:

C/A: Erick