



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3620 of 1987

CATHERINE WANJIKU NDWATI..... PLAINTIFF

Versus

JOANNE BAKERY & ANOTHER..... DEFENDANT

RULING

This is an application, by Notice of Motion, dated 20th August, 1999 brought under section 3 A of the Civil Procedure Act, Order 44 Rules (1) and

(6) And Order 16 Rule 6 of the Civil Procedure Rules praying:

"2. THAT Orders made on 10th July 1997 dismissing suit for want of prosecution be set aside and the suit be restored.

3. THAT an appropriate date be set for the approval and recording of the full and final settlement of the matter."

Section 3 A makes provisions for the inherent powers of the court. Order 16 Rule 6 of the Civil Procedure Rules makes provisions for a suit to be dismissed if no step taken for three years and allows the filing of a fresh suit. It states:

"In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit the court may order the suit to be dismissed; and in such case, the plaintiff may, subject to the law of limitation, bring a fresh suit."

Although Rules (1) and (6) of order 44 have both been mentioned, the most important one is Rule (1) which states as follows:

"(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."

It is my view that since order 44 Rule (1) and order 16 Rule (6) are specific and clear, I have no good reason to revert to section 3 A of the Civil Procedure Act.

This Civil Suit was filed in this court on 11th September 1987. By the time the case file was listed before me for dismissal under order 16 Rule 6, no step had been taken to proceed with the suit for a period more than three years. It was 10 years if taken from the date 28th September 1987. It was nine years, almost 10, if taken from the date 8th January 1988 or 13th January 1988. There is a record of change of Defendant's advocate dated 28th October 1993 and 1st November 1993. But it has not been disputed that the suit, at the time of its dismissal on 10th July 1997, did fall within the arm-pits of order 16 rule 6 of the Civil Procedure Rules.

It is apparent the first page of the record, or memo, in use when this court case file was brought to me for dismissal is missing. The memo dated 28th September 1987 from which the period of 10 years was reckoned is therefore missing. Instead there are three memos of later dates each one having the effect of reducing the 10 year period that was reckoned. I am sure that if those three memos were there on 10th July 1997, it could not have been said that the last step had been taken on 28th September 1987 and that therefore there had been a delay of 10 years. It appears something is wrong somewhere at the High Court Civil Case Registry. I suspect Registry staff together with the Advocates handling or who have handled this suit. This is the third case I have noticed having this problem. Just before this case, I had HCCC No. 3785 of 1989 where the inordinate delay period of 8 years reckoned from the memo dated 5th October 1989 as at 12th November 1997 was reduced to a paltry six months by a memo made in 1993 thereby forcing me to allow the Application to set aside the dismissal of the suit entered on 10th July 1997. The page with the memo dated 5th October 1989 was nowhere to be seen. And the page with the memo made in 1993 disguised as page one

These type of applications have started coming up two years after the dismissal of the cases affected. Perhaps the culprits have been planning their strategies. The head of the High Court Civil Registry and the Deputy Registrars handling cases there should take steps to arrest that bad trend. Otherwise many more problematic applications similar to this one are likely to come up as I dismissed many cases under Order 16 Rule 6 of the Civil Procedure Rules.

It should be understood that before 10th July 1997; I personally did not know the existence of this suit in this court. But I was aware, like everybody else, that there was a general public complaint that cases are taking long to get finalized in our courts of law. Those who complain always and squarely blame courts for the delays.

The then Chief Justice was concerned about those complaints and one of the steps he took to try and reduce the number of cases pending in this court, because of delays, was to advise the dismissal of those cases that fell within the arm-pits of Order 16 Rule 6. He picked on me and specifically assigned me the duty of fixing for hearing and hearing pre-1990 Civil Cases in this Court with strict instructions to avoid further delays in the cases so handled. That included civil cases in which parties were sleeping and were covered by Order 16 Rule 6 of the Civil Procedure Rules.

I had a very hard time moving the cases in which parties appeared before me. Contrary to expectation that such parties would come to court anxious to move a head to complete their pending cases, virtually almost all came to court with intent to cause further delays and therefore the cases I heard and completed, I did so because of forcing the parties, at least one of them would be unwilling, to move a head and have the cases heard to completion. I had to encounter and endure the wrath of many an advocate. A number may have appealed against my decisions.

For the sleeping parties where I had to handle their cases under Order 16 Rule 6, although that rule does not require the giving of notice to the sleeping parties, I decided, on my own, to give notice to the parties. I was giving two weeks notice not only attached to the court cause list but also posted on the Notice

Boards in the court corridors. On the date each group of files was due for dismissal, I would not dismiss any without appearance until after lunch. That was in my effort to allow as much time as possible for parties who did not want their cases dismissed to appear and prevent the dismissals. Advocates were well aware of this as it is an exercise I undertook for quite a while.

In the instant case, no body appeared and I went ahead to dismiss the case on that 10th July 1997 as had been specified in the notice.

It is therefore very wrong, as it is misleading, for the Applicant's counsel to tell the court that his client's case was dismissed without notice having been given. Counsel could say that but could not say whether his client was, under the rules, entitled to such a notice. Even if I had not given any notice therefore, his client in my view was not entitled to use failure to give the notice as a ground for this application.

Back to what happened, the suit was dismissed on 10th July 1997. The Plaintiff/Applicant, who by then had an advocate Mr. Kihara Mutu, went on sleeping for a further full year up to 31st August 1998 when she filed her first application, a Chamber Summons, seeking to set aside the order made on 10th July 1997 dismissing her suit.

I heard that application and dismissed it on 18th September 1998. There was no appeal against my ruling and perhaps the same advocate did not want to re-appear before me in the instant application. There was change of advocates whereby Mr. Ogoti Nyangena took over the case. He found no problem coming to me with this second application by the Plaintiff. This time it is a Notice of Motion supported by an affidavit by Mr. Ogoti Nyangena who filed his notice of appointment on 20th August 1999 together with the Notice of Motion of same date.

Surprisingly Mr. Nyangena omits to mention certain things he should have mentioned in his affidavit, while he mentions some things without disclosing his source of information. He talks of the loss of this court's case file in this matter but has not obtained an affidavit to that effect from the concerned officers in the High Court Civil Registry. He mentions Messrs Kihara Mutu Advocate, SS. Danji Advocate and K. Mwaura & Company Advocates in connection with certain activities without bothering to obtain affidavits from them. He does not disclose that he was Mr. Kihara Mutu's assistant in this matter. He does not disclose when he left the firm of Messrs Kihara Mutu & Company Advocates. He talks of an application made on 18th September 1998 by the Plaintiff's advocate to set aside the dismissal of the suit and adds that the judge who heard the application erroneously ruled that he had no jurisdiction to restore the suit. He does not mention the Judge and the date that Judge made the erroneous ruling.

I have checked through the case file. I do not find the said application made on the 18th September 1998. Moreover if there had been such an application referred to in paragraphs 13 and 14 of his affidavit dated 20th August 1999, I wonder what will have been the purpose of the Chamber Summons the Plaintiff filed on 31st August 1998 dated that same day. I have said I heard the application dated 31st August 1998 and dismissed it on 18th September 1998 and there has been no appeal against my ruling. If that is the ruling counsel for the Applicant is referring to, it does not have lack of jurisdiction as the ground for dismissing it (the Chamber Summons). But even if it did, and it were found that that was an error, such an error in a ruling on 18th September, 1998 cannot be used as a ground to set aside a judgment or a dismissal of a suit dated 10th July 1997. It can and should only be used as a ground to set aside the ruling dated 18th September 1998. But that ruling is not being challenged in the Notice of Motion before me to-day. See prayer (2) in the Notice of Motion.

How then can I set aside the judgment dismissing the suit on 10th July 1997 when an application to set aside that judgment was dismissed on 18th September 1998 and that dismissal of 18th September 1998 still subsists and does so unchallenged.

I have said that under order 16 Rule 6, of the Civil Procedure Rules, no notice is required although, contrary to what the learned counsel says in paragraph 16 of his affidavit, I actually gave notice. Not only was it unnecessary but also cumbersome to file a copy in each case file as I was dealing with about 100 case files on each occasion a part from my daily load of case files for inter partes hearing, applications and

main suit hearings.

I should add that under order 16 Rule 6, no arguments are required as well as knowledge of the parties and that a dismissal of a suit entered should be a perfected order needing nothing else more to perfect it, unless there are amendments to that rule not yet brought to my attention. A mere administrative procedure failure to extract a formal order from a judgment does not, in my view, depreciate the relevant court judgment or order dismissing a suit. Otherwise the perfection of court orders must be at the mercy of parties including parties, like in this suit, unwilling to extract formal orders thereby making the court orders affected to remain imperfect indefinitely. I hear Courts submit to that. I would not like it.

In the same light I should now comment on prayer (3) in the Notice of Motion. Not only is that prayer superfluous but also misconceived as no such an order is necessary, in an application like this one, to fix a date for the approval and recording of a settlement. Dates are taken as a matter of course at the court Registry where case files are kept.

With regard to prayer (2), the Application is for review under order 44 Rule 1. But the application says completely nothing about review. Instead it is talking about the setting aside. "Review" and "setting aside" are two different things. That is why "review" is handled under Order 44 Rule 6 while "setting aside" is handled under Order IXB Rule 8 of the Civil Procedure Rules. Counsel must therefore be too smart to come to court under Order 44 Rule (1) when all he wants is relief under Order IXB Rule 8 which he has not cited for the application.

Furthermore, a look at order 44 Rule (1) which I have already set out above clearly reveals that there are specific grounds upon which a notice of motion brought under those provisions must be based. That is basically why it is insisted that such ground or grounds must be specifically stated in the body of the Notice of Motion. If not so stated, the Notice of Motion becomes incompetent. Those grounds are:

- (1) The discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made.
- (2) Some error or mistake apparent on the face of the record.
- (3) Any other sufficient reason.

And any other sufficient reason must be a reason related to the grounds in (1) and (2) above.

But looking at the five reasons given in the body of the Notice of Motion before me, I do not think any of them falls within the three categories stated above. Reminding me in grounds (a) and (b) of the Notice of Motion that I have inherent powers and jurisdiction and going on to repeat to me what I was told on 18th September 1998 that the parties endeavoured to settle the matter out of court and that they now wish to have their settlement approved and recorded and adding that if the case is restored, the Defendant/Respondent will not be deprived of any defence they originally pleaded; all do not satisfy any of the requirements of order 44 Rule..

I said above I should not use section 3 A of the Civil Procedure Act when there are specific provisions of the rules properly governing the issues in question. Section 3 A is properly used where there are no specific provisions governing the issue to be solved. If on the other hand that section is applied to defeat or by-pass specific provisions of the law, including rules under the Civil Procedure Rules, then the tendency would be to create chaos in the law. People will not be knowing what they are doing although they will be deceiving themselves thinking they know what they are doing.

That leads me to Order 16 Rule 6 of the Civil Procedure Rules. It was enacted in the rules after section 3 A of the Act had been enacted. Even if Section 3 A came later as a result of an amendment, it was enacted with the full knowledge that Order 16 Rule 6 existed. The two, that is the section and the rule, were left to co-exist and both have been in operation for years. Each had a purpose to serve. Order 16 Rule 6 was

intended to deal with parties who file cases in courts and thereafter go to sleep. The Legislature had the intention of limiting time so that those cases do not have to remain pending in our courts indefinitely resulting into backlogs. A limited period of three years was fixed and this, to my mind, is a very good piece of legislation if we are really concerned with the backlog of cases resulting from delays in our courts.

I have the impression that this area of problems in the administration of justice in our courts does not bother parties and their advocates because always when a finger is pointed out as to who is responsible for the backlog of cases or for delays in the administration of justice in our courts, that finger is never directed at the parties and their advocates. It is always directed at Courts, Judges and Magistrates. In those circumstances, parties and their advocates can go to courts. File their cases. Thereafter go to sleep soundly as possible and as long as they wish, without a bother because it is the court and the judge or magistrate to blame for any delay that may be resulting from that sound and deep sleeping of the parties and advocates. But when the Chief Justice or the court one day wakes up and tries to reduce the backlog using Order 16 Rule 6, for example, the court is told by the same parties who have been sleeping that the court is causing injustice to the parties and that section 3 A of the Civil Procedure Act be applied to defeat Order 16 Rule 6 of the Civil Procedure Rules.

Defendants/Respondents like Joanne E. Bakery and Phillip Kiplagat Changwony in this suit can therefore afford to keep away from an application like this Notice of Motion, although they are fully aware of it, thereby giving the Plaintiff's counsel a field day to tell and show the court anything including the alleged settlement which I found out, on the 18th September 1998, to be contained in a letter dated 28th July 1998 being one year after I had dismissed this suit on 10th July 1997. An alleged settlement after the suit had been dismissed and the dismissal had woken up the slumbering parties. Tactics to defeat what the court has done thereby, not only inconveniencing the court, but also adding more and unnecessary work, hearing one application after another and may be the main suit so that Order 16 Rule 6 of the Civil Procedure Rules is rendered useless.

In that rule, consideration of the problem of limitation was done. That is why that problem is specifically referred to in the rule which also has a minimum fixed period of three years after which a pending suit may be dismissed for want of prosecution. I think the rule was intended to have the parties who sleep be caught up by the law of limitation so that they do not have the opportunity to come back to court to start sleeping a fresh or to keep padding to the already existing backlog of cases.

To say therefore that this suit should be revived because the Plaintiff will be barred by the law of limitation Act from bringing a fresh suit is to say that Order 16 Rule 6 should be rendered useless. Why that should be done by the court I see no good reason for the court doing so especially in the circumstances of this case which I find distinguishable from the case of *Rawal v The Mombasa Hardware Ltd.* (1968) E.A. 392 where it was held that the remedy provided for in order 16 Rule 6 (that is of bringing a fresh suit) was not intended to be exhaustive and the inherent jurisdiction vested in the court by Section 97 of the Civil Procedure Act (Similar to our Section 3 A) was for that reason not excluded.

It is better to note that the decision in the case of *Rawal* by the Court of Appeal did not restore the main suit. The appeal was against a ruling dismissing an interlocutory application to restore the main suit. The Court of

Appeal did not therefore apply the inherent power under Section 97 to restore that suit as there was no appeal for restoration of the suit before it. The decision of the court merely advised the judge in the re-trial, ordered in the High Court, to use section 97. The Court of Appeal said as per Law J. A. who wrote the leading judgment with which all the other three judges agreed:

"I would allow this appeal and order the application for the re-institution of the suit be returned to a judge of the High Court for consideration as to whether, in the exercise of the court's inherent jurisdiction and of his general discretion a case has been made out so as to justify the re-institution of this particular suit and the setting aside of the order for its dismissal." As to whether that was done during the re-trial, counsel for the Plaintiff/Applicant in the instant Notice of Motion has not brought to my attention. I would have been

interested to know what happened.

From the judgment of the Court of Appeal alone therefore, it is not proper to conclude that section 97 of the Civil Procedure Act was applied to restore the main suit.

But assuming that section 97 was subsequently applied by the High Court, there are a few peculiarities in the Notice of Motion before me which make the case of Rawal distinguishable from the instant case.

First, the application to restore the suit in Rawal's case was brought under section 97 of the Civil Procedure Act only. Before me the Applicant relied on Section 3 A of the Civil Procedure Act as well as Order 44 Rule 1 and Order 16 Rule 6 of the Civil Procedure Rules. The problems raised before me as a result of the Applicant having included the Civil Procedure Rules did not therefore arise in the case of Rawal. One may ask. If the Applicant wanted to rely on Section 3 A of the Civil Procedure Act, why did she at the same time say was relying on Order 44 Rule 1 and Order 16 Rule 6, especially Order 16 Rule 6 which provides own remedy?

The second peculiarity in the instant Notice of Motion becomes apparent when it is realised that the use of inherent powers under section 3 A, especially in circumstances where there are other specific provisions like Order 16 Rule 6 governing the matter in question, is discretionary depending on the circumstances of each case. The background in the case of Rawal is not apparent and I do not know it.

In the Notice of Motion before me, I know its court background as I am the trial judge and I have already outlined it above. A bad picture is painted from that background, especially looking at the Plaintiff/Applicant and her advocates. There was too much and too long sleeping, and the fact that the then Chief Justice specifically assigned me the hearing and disposal of pre 1990 Civil cases because of public complaints about delays and backlog of cases in this court, brings out circumstances not found in the case of Rawal where the Court of Appeal thought it was the High Court's Order which was going to cause injustice to the Appellant.

In the instant suit the parties have already caused injustice to themselves by leaving it here unprosecuted for 10 or so years unless justice delayed is not justice denied. They now talk of a settlement to record but as I have pointed out, they never had one by the time I was dismissing the suit on 10th July 1997 and it was not until one year later that they came up with something framed on 28th July 1998 to hoodwink this court into granting the Plaintiff's first application dated 31st August 1998. I dismissed that application. These are parties who could still go back to sleep if their suit is restored.

Moreover by adding to the backlog of pending cases in this court and insisting that their case remains, the parties will be extending the injustice they have caused to themselves to parties in other cases in this court whose time for hearing will be encroached upon by this case thereby causing delay. It may not be appreciated, but here I am handling this suit for the third time on same issue of dismissal of the suit. Subsequent to 10th July 1997 when the court has been handling this suit on the same issue of dismissal, the court would have been handling other cases, - cases properly deserving to be handled on those dates. They were not handled because of this case. That is delay to those cases yet justice delayed is justice denied. It is injustice.

Of course everybody else will say that the injustice is being caused by the court. The parties before me are not therefore bothered, because delays and resulting injustice caused by parties to a suit are deemed to be delays and injustice caused by the court. However in those circumstances I would not be prepared to exercise my discretion, under section 3 A in favour of the Plaintiff/Applicant.

Be that as it may, the third peculiarity I find in this Notice of Motion before me as I have already pointed out elsewhere, is that Order 44 Rule 1 of the Civil Procedure Rules for review is being relied upon yet no review is asked for. Instead it is the setting aside of the dismissal that is being asked for. As a result, the provision of Order 44 Rule 1 were not complied with. These constitute fatal defects, which were not found in the case of Rawal.

Fourthly, and as I have also pointed out elsewhere, the error apparent on the face of the record which the Applicant tried to identify was alleged to be in the ruling dated 18th September 1998. The Applicant tried to identify that error, improperly, in the supporting affidavit - paragraphs 13 and 14. An error which is not actually on the face of that record. But assuming that it is there and that the way it is brought is acceptable, I have ruled that an error apparent on the face of a ruling dated 18th September 1998 dismissing an interlocutory application to restore the main suit cannot form a ground for reviewing the dismissal of the main suit dated 10th July 1997. This type of situation was not in the case of Rawal, and reveals the incompetency of this application which should therefore fail.

Fifthly, since my ruling dated 18th September 1998 dismissing the Plaintiff's first application to restore the main suit herein by setting aside the dismissal of the suit dated 10th July 1997 still subsists, albeit unchallenged, the Notice of Motion dated 20th August 1999 now before me is misconceived as it is irregular, if not res judicata, and is therefore not properly before me and ought to be dismissed. This situation was not in the case of Rawal where the appeal was from the ruling dismissing the Plaintiff's first application to restore the main suit.

In conclusion therefore the above five peculiarities in this matter constitute five grounds each one, in my view, of them sufficient to have the Plaintiff's Notice of Motion dated 20th August 1999 dismissed. The five grounds put together, therefore, the Notice of Motion must be dismissed and it is hereby so dismissed.

There will be no order for costs of the application as the Defendant/Respondent never bothered to say anything or to appear.

Dated this 4th day of November 1999.

J.M. KHAMONI

JUDGE