Basta & Sons Limited v Compact Freight Systems Limited (Civil Suit 123 of 2013) [2025] KEHC 3821 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3821 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 123 OF 2013

DKN MAGARE, J

MARCH 26, 2025

BETWEEN

BASTA & SONS LIMITED ..... PLAINTIFF

AND

COMPACT FREIGHT SYSTEMS LIMITED ..... DEFENDANT

RULING

1. This is a ruling on an application dated 31.10.2024. The application is filed by the Defendant. The defendant sought to arrest the delivery of judgment and for this court to issue an order confirming that this suit and counterclaim stood dismissed with costs. The basis was that the matter had not been concluded by 26.2.2024 as ordered by the court hitherto.

2. The application is premised on the grounds on the face and the supporting affidavit of Gikandi Ngibuini, advocate, sworn on 31.10.2024. He averred that this court made directions on 31.10.2023 to the effect that if the hearing of the suit had not been concluded by 26.2.2024, the suit and counterclaim would have been dismissed. His view was that the suit had not been concluded by then.

3. The application was opposed by the Replying Affidavit of Sanjeev Khagram, advocate, sworn on 12.11.2024, on the following grounds:

    i. The application was an abuse of the court process.

    ii. The hearing of the suit commenced on 14.12.2023 and concluded when parties tendered their evidence.

    iii. The parties closed their respective cases, and the court issued directions for filing submissions by 15.1.2024, which both parties complied with.

    iv. Subsequently, the file could not be traced, causing delays in determining the matter.

4. Defendant submitted in support of the application that the term concluded per the Black's Law Dictionary which meant ended, determined, or estopped, so that matter ought to have been concluded by 26.2.2024 without failure. Reliance was placed inter alia on Kartar Singh Dhupar and Co Limited v Kaputei Villas Limited & another (Civil Appeal E244 of 2020) [2023] KEHC 21500 (KLR) (Civ) (28 July 2023) (Judgment) to submit that the dispute ought to have been resolved within the given timeframe.

5. It was further submitted that the court should consider itself bound by its decisions. The Defendant also cited Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR.

6. The Plaintiff replied that the suit was indeed heard within the time frame given by the court. It was submitted that substantive justice dictates that matter be determined on merits. The Plaintiff stated that the matter was concluded and that only the court's judgment was pending.

Submissions

7. Parties filed written submissions, which they highlighted at length for 2 days. The Applicant relied on the High Court decision of Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (Civil Appeal 129 of 2022) [2023]KEHC 2417 (KLR) (Commercial and Tax) (23 March 2023) (Judgment). In that case, the court stated as follows:

> While dealing with timelines in an election petition, it was argued in Supreme Court Petition 3 of 2019 Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019] eKLR, that the High Court proceedings that occurred after the lapse of Six (6) months were a nullity as well as the judgment delivered by that court. The Supreme Court held: "As already stated, all election petitions must be resolved within the provided timeframes without qualifications. In this case, we have noted that High Court determined the petition before it after lapse of the 6 months from the date of filing. That was an affront to *the Constitution* and enabling electoral laws. As such, we agree with the Court of Appeal that the said High Court proceedings were a nullity...we restate that upon lapse of time, the High Court had no jurisdiction to determine the petition... As such, no remedy was available to any party.

8. The Applicant continues that the Court in Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (supra) continued as follows:

> That was the reasoning by the three-judge bench in the Court of Appeal Civil Appeal Case No E039 of 2021 Aprim Consultant v Parliamentary Service Commission & 2 others (unreported). In that case the Judicial Review application was filed on June 2, 2020 and should have been determined on or before July 17, 2020. However, the judgment by Nyamweya J was delivered on January 18, 2021, which was 185 days outside and beyond the 45 days set by section 175 of the Public Procurement and Assets Disposal Act for the determination of the Judicial review application.
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> 38. The court held; "Our reading of the Act is that the High Court was under an express duty to make its determination within the time prescribed. During such time did its jurisdiction exist, but it was a time-bound jurisdiction that ran out and ceased by effluxion of time. The moment the 45 days ended, the jurisdiction also ended. Thus, any judgment returned outside time would be without jurisdiction and therefore a nullity, bereft of any force or effect in law.

> That legal conclusion remains irrespective of the avowed reasons, no matter how logical, sound, reasonable or persuasive they may be. No amount of policy, wisdom or practicality can invest a decision made without jurisdiction with any legal authority."

9. The Applicant continued that the directions were sacrosanct and could not be deviated from.

10. The Respondent filed a Replying Affidavit dated 12.11.2024 through his advocate, Sanjeev Khagram. He stated that the application was an abuse of the court process. He stated that the plaintiff has always prosecuted the suit. He stated that this court issued directions on 31.10.2023. The same was complied with, and the main suit was heard on 14.12.2023. Both parties were given a last adjournment on 31.10.2024, and each was to pay court adjournment fees.

11. The court gave directions on 14.12.2023 for the filing of submissions, which were to conclude on 21.2.2024 for filing of submissions. The matter was not listed on 21.2.2024 at the physical call over on the mentioned date. The file was traced after considerable efforts and placed before the court to write judgment. His view was that the invitation was a call to injustice.

12. Parties filed submissions on the main suit on 12.1.2024. The file was not seen again until 12.7.2024 when Caleb of Patel & Patel LLP took a date for directions before Justice Julius Ngarngar. The court subsequently fixed it for mention before this court. It was, however, fixed before the Deputy Registrar, who ordered the file to be placed before me for judgment writing.

13. As I was about to proceed with judgment writing, the current application was filed. The application was argued before me on 22.1.2025. The applicant maintained that the conclusion of hearing meant delivery of judgment. He equated conclusion to completion. He stated that the parties aggrieved ought to appeal.

14. The Respondent relied on the case of Stephen Musalia Mwenesi v Law Society of Kenya & 3 others [2016] KEHC 7390 (KLR) to posit that the court has no jurisdiction to do an injustice. He stated that submissions were filed, and only judgment remained. The Applicant had already filed two sets of submissions. They also filed their submissions. They wondered whether it was a coincidence that the disappearance of the file coincided with the date for highlighting submissions. The court went on transfer thereafter. There was no fault on the part of the plaintiff. Their case was that the Applicant was looking for an avenue not to make a decision. Finally, he stated that even if the matter had proceeded on 21.2.2024, the court had to reserve a judgment date.

15. Mr. Gikandi stated that an injustice cannot flow from following a court order. They sought to file more authorities. Mr. Kinyanjui argued the same. The court fixed the matter for ruling today.

Analysis

16. The court forwarded this file to me on 17.1.2025. I have endeavoured to read the file, problematize, conceptualize, and contextualize the dispute.

17. The issue is the interpretation of the orders given on 26.2.2024. The said orders were issued pursuant to the court's need to conclude a matter that had been in the courts since 2013 to enable the court determine the same. Hitherto, I had given suo moto, orders that the suit should proceed by noon otherwise, it was to stand dismissed. The parties got entangled into a tag of divergent understanding of the import of the directions of this court dated 31.10.2023. The aid directions were stated as follows:

    i. The order given on 28.9.2023 is hereby set aside.

ii. The defendant to file amended defence by 7.11.2023 to include counterclaim.

iii. The Defendant to respond and file defence to counterclaim within 7 days of service.

iv. The defendant to file compliance documents by 21.11.2023.

v. The plaintiff to file by 14.12.2023.

vi. Both sides have a last adjournment.

vii. Both the suit and counterclaim shall stand dismissed with costs if the matter is not concluded by 26.2.2024.

viii. The parties to pay adjournment fees of Ksh. 1,000/= each for today and 28.9.2023.

18. The effect of the conditional dismissal of the suit and counterclaim was to put the parties to pace as the court had noted laxity evidenced by the unjustified spells of dormancy and pacified unnecessary litigation in the file. Both parties were culpable. As the Plaintiff did not prosecute the case in a timely manner, so did the Defendant in the counterclaim. The conditional dismissal was to take effect after 26.2.2024, if the case remained not heard and concluded. Effectively, the court invoked the inherent jurisdiction to aid its machinery in dispelling the standstill to this old suit that had been in court since 2013. The inherent jurisdiction was also meant to curtail and guard against the eminent abuse of the court process. Kimaru, J in Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005 held that:

> " The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

19. The court had the duty to invoke the overriding objective under Section 1A (3) of the *Civil Procedure Act* when the parties were not determined to assist the court as required. Through the overriding objective under the Act, all parties to civil proceedings or advocates for such a party had the duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

20. It is not a disputed matter that both parties had presented witnesses for hearing and closed their cases before 26.2.2024. The application is, therefore, an attempt to drive the Plaintiff from the seat of justice through a back door.

21. I have perused a bulk of the cases cited by the Defendant and noted therein that the timelines had been framed by statute, and so the issue was whether the court would circumvent the time stipulated by statute for undertaking certain activities.

22. The decision of Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) (supra) was a specific finding related to the *Small Claims Court Act*. This court dealt with the interpretation of statute limitations on time extensively in the case of Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling), where I stated as doth:

> 7. The court in Kartar Singh Dhupar & Company Limited v ARM Cement PLC (In Liquidation) reviewed Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019] eKLR. In that decision, the Supreme Court reviewed the petition rules pursuant to *the Constitution*. The same gave a constitutional imperative. Those were election related matters where the time was cast in stone. There were other matters where time was cast in stone. Those were for example limitation of action in contract and recovery of land. In tort, though cast in stone, there was room for extension within strict strictures of the *Limitation of Actions Act*.
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> 8. The case turned on its own facts. There were several Court of Appeal decisions binding on the court that could be seen in three aspects: -
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> a. Timelines relating to the procedural aspects.
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> b. Timelines touching on the substance
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> c. Constitutional timelines
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> 9. The constitutional timelines were cast in stone. The decisions over time had crystalized that. The matter was mainly in election matters. The Supreme Court and Court of Appeal had dealt with various constitutional timelines and for good measure found their inflexibility. In effect, due to the special nature of election disputes, they were removed from the system within 6 months. Those timelines were strict.
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> 10. Given the fused nature of *the Constitution*, it provided both for strict timelines and protection under article 159. Under the substantive law, timelines went into the merit as they created rights. Under article 40 of *the Constitution*, rights including prescriptive rights were protected. Therefore, time bound limitations of such timelines entailed creation of a right. That was why adverse possession in the realm of land law was not anathema to property rights. The rights related to limitations were strict. The same applied to the procurement law. That was because at the end of the period, a tender would have property or not.
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> 11. Procedural timelines were borne by their mother, article 159 and fathered by article 50 of *the Constitution*. Article 159(2)(a), (b) and (d) appeared to be antagonistic. Sometimes, when delaying justice occurred, it was in order to do justice to all. Other times was to avoid procedure inadequacies that may result in having justice administered with undue regard to procedural technicalities. The Court of Appeal had settled the aspect of whether it was fatal to have a decision beyond 60 days required under the Civil Procedure Rules. In two occasions the court had found in undue delay including up to 5 years to be proper judgement in the circumstances. The provisions should be looked at purposively. The timelines did not create proprietary rights.

23. There are two aspects of the case that we need to deal with. The conclusion was an order directed to the parties. No party was directed to write a judgment. The parties were directed to do what they ought

to do. Submissions were filed 14 days before the date for fixing the matter for judgment. The case was concluded when parties closed their cases on 14.12.2023. All the other proceedings were geared towards the court. They had no other obligations after that. The Applicant was aware of this obligation when they filed submissions. The rest remained for the court. What was most important, was the prosecution of the matter. Each party closed their case. Definitely, after closure of the case, there was nothing they could have done.

24. Filing submissions was not even part of the prosecution. Submissions are not part of the evidence. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

25. Black's Law Dictionary, 11th edition describes conclusion as follows:

1. The final part of a speech or writing (such as a jury argument or a pleading).
2. A judgment arrived at by reasoning, an inferential statement;
3. The closing, settling, or final arranging of a treaty, contract, deal, etc. See
4. An act by which one estops oneself from doing anything inconsistent with the act.

26. Which of these meanings would the parties be directed to do? The matter was concluded at the time the last witness was heard, and the defense closed its case. The first meaning should be applicable. The most appropriate legal meaning is the final part of a speech or writing (such as a jury argument or a pleading). In this case, this is the closure of the respective cases.

27. This could have been enough to dispose of the matter, save that a procedural issue needs to be addressed, even without a finding. The file disappeared after the court fixed the same for highlighting. In the case of Gichamba v CFC Stanbic Bank Limited (Civil Case 150 of 2011) [2023] KEHC 19042 (KLR) (19 June 2023) (Ruling), where a dispute arose between the same advocates herein over the loss of a file, and I stated as follows:

> Though no outcome is listed on the report, for individual cases, the report is sufficient to show that the suit was dismissed. In this case, the court will ask itself a question, which had lingered in my mind for some time, who will benefit from the loss of file? This is crucial in view of the statement that the suit was already dismissed.
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> 12. I am the conspired view that only the plaintiff will benefit from loss of a file ready for dismissal of even dismissed. When the same issues arose on loss of the record, the Court of Appeal had this to say in the case of Justus Cheruiyot Chumba v Republic [2016] eKLR, Mumbi Ngugi, stated as followed: -"17.In Criminal Appeal No. 187 of 2002 Francis Ndungu Wanjau v Republic, the Court of Appeal was seized of an appeal emanating from the High Court in which it was alleged that the records of the lower court and the High Court were missing. The Court considered various decisions on the subject and noted

as follows:"On all the available authorities, the court has consistently held that there would be no automatic acquittal merely because all the records for the case have disappeared. Such was the situation in the case of Joseph Maina Kariuki v Republic, Cr. App. No. 53 & 105 of 2004 (UR) where it had been established that "the record of the trial magistrate and that of the High Court on first appeal have simply vanished into thin air and cannot be traced. The police file has also vanished in the same way. Nor can any record be traced in the office of the Attorney General. The appellant's own copies of the record of proceedings in both lower courts which had been supplied to him had also disappeared."

13. Cheruiyot Chumba v Republic [2016] eKLR, the court states as follows: -"18.In reaching the decision not to acquit the applicant as it had been urged to do, the Court observed as follows:

> "Faced with that kind of situation this Court remarked as follows in the case of John Karanja Wainaina v Republic, Criminal Appeal No. 61 of 1993 (unreported): -
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> > "In such a situation as this, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files" Is the appellant responsible" Should he benefit from his own mischief and illegality if he is"
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> In the final analysis, the paramount consideration must be whether the order proposed to be made in the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has disappeared. After all a person, like the appellant has lost the benefit of the presumption of innocence given to him by section 72 (2) (a) of *the Constitution*, he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered."

28. I will ask the same question again. Who will benefit from the loss of file, 4 days from the last day in which someone thought that the matter will stand dismissed in this case?

29. The matter had been concluded as directed by the court, and I do not see how it can be said that the suit herein stood dismissed after 26.2.2024 when the parties were heard and concluded their respective cases before then, thereby abiding by the discretionary order dated 31.10.2023.

30. The Court of Appeal stated as follows in Walter Osapiri Barasa v Cabinet Secretary Ministry of Interior & National Co-ordination & 6 others [2019] eKLR.

A decision or an order made at the stage of case management, similar to those made by the learned Judge in the form of directions, are discretionary in nature, and it is now established that whenever this Court is called upon to interfere with the exercise of judicial discretion, it ought to be guided by the principles well enunciated in a string of its own decisions. For example in Coffee Board of Kenya V. Thika Coffee Mills Limited & 2 Others, Civil Appeal No. 94 of 2003, it was reiterated that the Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in

some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and in the process occasioned injustice.

31. I dismiss the Defendant's reference to conclusion to mean determination by way of judgment. The application fails, and the matter shall proceed for delivery of judgment.

32. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

33. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

    It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

34. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

    > "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

35. The plaintiff is successful at the end of the day. They are entitled to costs as a successful party. Consequently, the application dated 31.10.2024 is dismissed with costs of 20,000/= to the plaintiff, payable within 30 days, in default execution do issue.

36. The court shall proceed to give a judgment date for the matter after the ruling.

Determination

37. In the circumstances, I make the following orders:

    a. The application dated 31.10.2024 is dismissed with costs of Kshs. 20,000/= to the Plaintiff, payable within 30 days, in default execution do issue.

    b. For the avoidance of doubt, the matter is still active and was not closed.

    c. The matter will proceed for the delivery of judgment on 26.05.2025.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF MARCH, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Plaintiff

Eliud Otieno for the Defendant

Court Assistant – Michael