



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki v Mutoko & 2 others (Civil Suit 143 of 2011)
[2024] KEHC 822 (KLR) (Civ) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 143 OF 2011

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

HON. BISHOP MARGARET WANJIRU KARIUKI PLAINTIFF

AND

CAROLINE MUTOKO 1ST DEFENDANT

FELIX ODUOR ALIAS MZEE JALANG'O 2ND DEFENDANT

RADIO AFRICA LIMITED T/A KISS FM 3RD DEFENDANT

RULING

1. The Notice of Motion dated 10th May, 2023 (the Motion) was brought by Hon. Bishop Margaret Wanjiru Kariuki (hereafter the Applicant). It is premised upon the grounds set out on the face thereof and the affidavit of the Applicant's advocate, Beatrice Kwamboka. The Applicant key prayer seeks that the dismissal order made on 10th May, 2023 be varied/and or set aside and the suit reinstated for hearing, and upon the granting of the said prayer, an order to enlarge the time within which the suit can be prosecuted, on priority basis.
2. The gist of the supporting affidavit is that on 10th May, 2023 when the matter was listed, the court observed that earlier orders extending the timelines for prosecuting the suit were not extended when the matter was last in court on 5th October, 2022, and hence suit stood dismissed for want of prosecution. That this occurred due to inadvertence on the part of the Applicant's previous counsel and that the Applicant who remains keen on prosecuting the suit, ought not to be punished.
3. The Motion was opposed by Caroline Mutoko, Felix Oduor alias Mzee Jalang'o and Radio Africa Limited T/A Kiss FM (hereafter the 1st, 2nd and 3rd Respondents) vide the replying affidavit sworn by their advocate, Ronald Wakhisi Makokha on 23rd June, 2023. Therein, he averred that the motion is



without merit, given that the suit has been in existence since the year 2011 and that the Applicant had failed to prosecute it to its conclusion even after being previously granted several opportunities by the court. The advocate further averred that the suit stood automatically dismissed for want of prosecution on three (3) separate previous occasions and that the last time an extension of time was granted for its prosecution was on 10th March, 2021. Consequently, the suit last stood automatically dismissed on or about 8th July, 2021.

4. It was the advocate's assertion that the delay on the part of the Applicant, in prosecuting the suit, is prolonged and inexcusable, and that if the Motion is allowed, the Respondents stand to suffer grave prejudice owing to the likelihood that their witness may be unable to recall key details of her witness statement. The advocate's position is that in the absence of any proper reasons, the suit should not be reinstated.
5. The parties canvassed the Motion by filing and exchanging written submissions. Counsel for the Applicant anchored her submissions on the decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR on the principles for the extension of time. Counsel reiterated the earlier averments that the failure to seek an extension of time for prosecution of the suit was through no fault of the Applicant; rather, it was the direct result of mistake on the part of her erstwhile counsel. Here, reference was made to the decision rendered in *Harrison Wanjobi Wambugu v Felista Wairimu Chege & another* [2013] eKLR. The Applicant's counsel therefore urged the court to exercise its discretion in her favour, by allowing the Motion.
6. In response thereto, counsel for the Respondents cited inter alia, the decisions in *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2021] eKLR and *Unilever Tea (K) Limited v Richard Ombati Kiboma* [2021] eKLR on the applicable principles. Counsel argued that no proper grounds have been brought forth by the Applicant to satisfy the threshold for review. Concerning reinstatement of the suit, asserted it was a matter for the discretion of the court, as demonstrated by the decision in *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR. Pointing out further that in order for a suit to be reinstated, an applicant ought to demonstrate that there has been no inordinate delay, observed in the case of *Ivita v Kyumbu* (1984) KLR 441 where the court considered and applied the test of what constitutes inordinate delay.
7. Counsel for the Respondents reiterated his earlier averments that in the present instance, there has been inordinate and inexcusable delay by the Applicant in prosecuting the suit, and that there are no unique circumstances present justifying the reinstatement of the suit. Counsel further urged that in the absence of any good reasons demonstrated, the court should not exercise its discretionary power in enlarging the time required for the Applicant to prosecute her case. In so submitting, counsel relied on the decisions in *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti* [2018] eKLR and *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR. On those grounds, the court was urged to dismiss the Motion, with costs.
8. The court has considered the rival affidavit material and the contending submissions alongside the authorities cited. It is clear that the orders sought in the instant Motion are for the varying and/or setting aside of the dismissal order of 10th May, 2023, the reinstatement of the suit and consequently, the enlargement of time within which the suit can be prosecuted. As the three (3) prayers are interrelated, the court will address them contemporaneously.
9. However, before delving into the merits thereof, the court observed that among the Respondents' argument was the contention that the Motion does not meet the threshold for a prayer for review and hence the Applicant is not deserving. Nothing in the Motion and related material suggests that review



as contemplated in order 45 Rule 1 of the Civil Procedure Rules was sought by the Applicant, in respect of the order made on 10th May, 2023, in order to justify the invocation of the relevant principles here.

10. Turning to the merits of the Motion, Section 3A of the Civil Procedure Act being one of the key statutory provisions applicable here and which was among those cited in the Motion, 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.”

11. The Supreme Court went a step further in Board of Governors, Moi High School Kabarak and another v Malcolm Bell [2013] eKLR, to reason as follows:

“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. It is clear from the foregoing that the grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the 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 & another [1967] E.A 116:

“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 events resulting in the dismissal order of 10th May, 2023 are pertinent and deserve recounting, as follows. The Applicant filed the present suit on 18th April, 2011 against the Respondents and seeking various reliefs arising out of the tort of defamation. The pleadings closed by May 2011 and the parties had filed their documentation in 2012. The record shows that around 2013 the file was reported missing by the registry, but it was not until 2016 that a motion was filed by the Applicant for the reconstruction of the file. The motion was allowed in April 2016, but no steps were taken subsequently in the matter for a year, leading to the Notice To Show Cause (NTSC) why the suit should not be dismissed for want of prosecution, heard on 27.04.2017 when counsel for the Applicant attributed the non-action to the earlier fact that the file had been missing.



14. The suit was sustained and subsequently mentioned severally before Njuguna J, culminating in the one on 10th November, 2017 when, the original file which had since been traced, and reconstructed file were merged. The court further directed that the suit be prosecuted within four months or dismissed. These orders were not complied with, and the default clause took effect, the suit thereby standing dismissed. However, the said dismissal order was set aside on 14th March, 2019 by Njuguna J, again on the condition that the suit be prosecuted within a period of 120 days, failing which it would stand dismissed. Going by the record, the suit was soon thereafter set down for hearing, with the Applicant's case proceeding on 12th July, 2019. On the said date, the parties recorded a consent to extend the timelines within which the suit could be prosecuted, to a further six (6) months from the aforesaid date.
15. The record shows that on the said date, the Respondents' advocate had raised an objection regarding the production of certain documents by the Applicant. Njuguna J vide the ruling delivered on 7th November, 2019 partially allowed the objection. Subsequently, when the parties attended court on 20th January, 2020 the Applicant was granted a further extension of time for the prosecution of the suit, to last until and including 17th February, 2020. On the said date, the Applicant continued with her testimony, but was cut short leading to a further extension of time until 5th March, 2020 and thereafter until 19th March, 2020, followed by a further extension to last up to 1st October, 2020.
16. When the parties attended court on 1st October 2020 it was noted that Njuguna J was on transfer and hence the matter was stood over to 8th December, 2020 and therefore time was extended until then. The record further shows that on 8th December 2020 the matter was listed before the Chitembwe J (as he then was). The hearing was then scheduled for 22nd and 23rd February, 2021 and extension of time granted to last until such time. On the scheduled date, the matter had been taken out of the cause list and was consequently given a mention date for 10th March, 2021 and time accordingly extended. When the parties attended court on the said 10th March, 2021 the suit was set for hearing on 29th April, 2021 by consent and yet a further extension of time allowed.
17. According to the record, however, the further hearing did not take place on the scheduled date, rather, it took place on 26th October, 2021. However, an objection was raised by the Respondents' counsel on the admissibility of certain documents presented by the Applicant. The said objection resulted in a ruling which was delivered by Serگون J on 5th October, 2022. The matter was subsequently placed before the court on 10th May, 2023, and the court noting that from the record the last extension of time had expired on 29th April, 2021, marked the suit as standing dismissed by operation of the last extension orders.
18. From the court's assessment of the foregoing sequence of events, it is not in doubt that several extensions were given to the Applicant for the prosecution of her suit from time to time and for various reasons, some of which it would appear, were beyond the control of the Applicant. Be that as it may, the court is of the view that the responsibility fell on the Applicant's advocate to seek further extension of time from 29th April, 2021 but he did not. And that the Applicants' advocate was oblivious of this fact and dismissal of the suit while setting it down for hearing.
19. The court notes that the Applicants' erstwhile advocate has not sworn an affidavit in that regard. However, given the chronology of events relating to earlier extensions of time, it may well be that the failure by the said counsel to seek extension on 29th April 2021 was inadvertent. And the Applicant should not be made to suffer for the inadvertence of her counsel, especially in view of her spirited efforts after 2019 to present her case through a trial.



19. The general legal principle, as reaffirmed by the court in *Belinda Murai & others v Amos Wainaina* [1978] KLR 2782 and quoted with approval by the Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR is that:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

20. In *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 where the court famously held that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

21. While the Applicant must take her share of blame for the languid prosecution of her case after 2012 and until the NTSC in April 2017, the subsequent delay in the suit does not seem to stem from her own deliberate dilatory conduct, but rather resulted from a combination of factors beyond her control. As stated in *Shah v Mbogo* (supra) the discretion to vary or set aside a court’s order was intended to obviate injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. The question to be answered is whether despite the delay in this suit which has pended for over 12 years, a fair trial can still be held, and the likelihood of prejudice upon the Respondents. The Respondents have stated that they will suffer prejudice if the suit is reinstated as their witness may not be available to give evidence, but without elaborating.

22. The words of Chesoni J (as he then was) in the case of *Ivita v Kyumbu* (1984) KLR 441 albeit made in respect to an application for dismissal of a suit for want of prosecution are pertinent here: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and 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 disappearance of human memory resulting from lapse of time. The Defendant must however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



23. The above decision must be read through the prism of the overriding objective introduced more recently in Sections 1A and 1B of the *Civil Procedure Act*. The instant matter is partly heard. Further trial dates can be scheduled without undue delay if the Applicants are so minded, so as to give meaning to the parties' undoubted right to a fair trial. See *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR. Any prejudice to the Respondents arising from further delay can be mitigated through appropriate directions as to the expeditious prosecution of the case, as well as an award of costs. The court here reiterates that at a time when courts are deluged with heavy caseloads, they cannot allow any party to litigate at leisure, and must firmly discharge their duty under the overriding objective.

24. In that regard, the Court of Appeal stated in *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 that: -

“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”.

See *Osbo Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR.

25. Consequently, the court is persuaded that the justice of the matter lies in allowing, on condition, the Notice of Motion dated 10th May, 2023. Hence, the order of 10th May, 2023 formally marking the suit as dismissed, is hereby set aside and the suit is reinstated. This order is made subject to the condition that the Applicant shall prosecute her suit to conclusion by the 31st May 2024, failing which the suit shall stand automatically dismissed for want of prosecution, with costs to the Respondents. To expedite the matter, the parties will immediately hereafter schedule a hearing date on a priority basis. The costs of the motion are awarded to the Respondents in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Mugo h/b for Ms. Kaguri

For the Respondents: Mr. Wakhisi

C/A: Carol

