Oyatsi v Wangui & another (Civil Case E102 of 2021)
[2024] KEHC 876 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 876 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E102 OF 2021

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

DONALD OYATSI ..... PLAINTIFF

AND

JOSEPH WANGUI ..... 1ST DEFENDANT

NATION MEDIA GROUP LTD ..... 2ND DEFENDANT

RULING

1. This ruling relates to the Notice of Motion (the Motion) dated 27th April, 2023 brought by Dr. Donald Oyatsi (hereafter the Applicant). The prayers in the motion seek the setting aside the order of 25th April, 2023 dismissing the suit for want of prosecution and reinstatement of the suit. The Motion is expressed to be brought inter alia, under Section 3A of the *Civil Procedure Act* (CPA) and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR).

2. The Motion is premised on the grounds on its face as amplified in the supporting affidavit sworn by the Applicant's advocate, Desterio Oyatsi. He swore that he was out of office during the Easter vacation when the Notice To Show Cause (NTSC) was served upon his firm on 12th April, 2023 and that the said notice was received at the reception rather than by an advocate or clerk at his firm. This allegedly led to failure to diarize the date and that by the time the said notice was brought to his attention, the suit had already been dismissed.

3. The advocate further explained that the delay in prosecuting the suit was mainly occasioned by the fact that his firm had opted to prioritize an appeal lodged against an interlocutory ruling which was delivered in the suit on 14th October, 2021 by which this Court declined to grant temporary injunctive orders in favour of the Applicant. He pleaded genuine error in the circumstance.

4. Joseph Wangui and Nation Media Group Ltd (hereafter the 1st and 2nd Respondents) resisted the Motion by filing the Grounds of Opposition dated 23rd June, 2023 to the following effect:

    1. "The plaintiff has not established sufficient cause for setting aside the order dismissing the suit for want of prosecution.

    2. The delay in prosecuting the suit was inordinate, unexplained and inexcusable, thereby leading to the dismissal of the suit.

    3. The appeal against the ruling of the court on 14th October 2021 by which the plaintiff's application for injunction was dismissed is distinct from the suit. There is no valid reason why the plaintiff could not prosecute the suit.

    4. The plaintiff's advocates were served with the notice to show cause why the suit should not be dismissed for want of prosecution. There is no reasonable explanation as to why they did not attend court.

    5. A case belongs to the client and not the advocate. It is the duty of the client to follow up which his advocate to ensure that the case is prosecuted without delay.

    6. The failure to take steps to prosecute the suit and the failure to attend court on the notice to show cause is an indication of indolence in the conduct of this matter by the plaintiff.

    7. The defendants stand to suffer immense prejudice if the suit is reinstated. Such prejudice cannot be compensated by an award of costs.

    8. Other grounds are set out in the replying affidavit of Sekou Owino to be filed herein".

5. The Respondents also filed a replying affidavit sworn by Sekou Owino, the 2nd Respondent's Head of Legal and Training, on 26th June, 2023. The deponent's averments by and large echoed the Grounds of Opposition, save to point out that from since effecting service of summons upon the Respondents, the Applicant had not taken any further steps in the suit prior to its dismissal. The deponent also cited the prejudice likely to be visited upon the Respondents if the Motion is allowed, and asserted that the Respondents had deemed the matter as closed and proceeded to settle their financial and related obligations concerning the matter. That it would be difficult to reverse the steps already taken.

6. The Motion was canvassed by way of written submissions. To support the Motion, counsel for the Applicant anchored his submissions on the decisions rendered in *Shah v Mbogo* (1967) EA 166 and *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at page 76 regarding the object of the discretionary power of the courts in setting aside a judgment and/or order, namely, doing justice to the parties. Counsel reiterated that the delay in prosecuting the suit was unintentional and excusable, as explained.

7. Counsel further submitted that given the nature of the suit, it would be in the interest of justice for the Applicant to be granted an opportunity to pursue his claim against the Respondents, that is aimed at protecting his personal and professional reputation. Here citing the decision in *Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others* [2010] eKLR where the Court of Appeal emphasised the importance of a person's reputation and dignity.

8. On his part, counsel for the Respondents while relying on the decision in *James Yanga Yeswa v Bob Morgan Services Limited* [2019] eKLR asserted the need for suits to be determined in an expeditious manner and that in this case, the Applicant is guilty of inordinate delay. Counsel additionally argued that the threshold for reinstatement has not been met in this case where there has been prolonged and

inexcusable delay, as considered in *Ivita v Kyumbu* (1984) KLR 441. Counsel emphasized that the Respondents stand to suffer great inconvenience if the suit is reinstated. Consequently, the court was urged to dismiss the Motion with costs, and to uphold the dismissal order.

9. The Applicant's advocate in rejoinder submissions essentially argued that the Respondents ought to have taken cognizance of the Applicant's Notice of Appeal, evincing his intention to challenge the interlocutory ruling herein in the Court of Appeal. Counsel further dismissed the Respondents' claims of possible prejudice as untenable and asserted that the consideration cannot outweigh the prejudice likely to be visited upon the Applicant if the suit is not reinstated.

10. The court has considered the rival affidavit material, the Grounds of Opposition and submissions alongside authorities cited therein in respect of the Motion.

11. The Motion was brought under Section 3A of the CPA and Order 51, Rule 1 of the CPR. While Section 3A as read with Sections 1A and 1B provide for the overriding objective of the Act, Order 51, Rule 1 merely provides the procedure of bringing an application in respect of which no specific provision prescribes the procedure to be used.

12. Section 3A of the *Civil Procedure Act* 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
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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."

13. The Supreme Court in *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, stated:

> " 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)

14. 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 and Another* [1967] EA 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."

15. The events leading to the dismissal order of 25th April, 2023 are as follows. The Applicant filed the suit sometime on or about 29th April, 2021, seeking various reliefs arising out of the tort of defamation, against the Respondents herein. The record shows that the plaint was accompanied by an application of like date, wherein the Applicant sought various injunctive orders pending the hearing and determination of the suit. Upon hearing the said application, Thuranira J found no merit therein and proceeded to dismiss it with costs on 14th October 2021.

16. The record shows that no further steps were taken in progressing the suit, resulting in issuance of the NTSC on 5th April, 2023, and which required the parties to attend court on 25th April, 2023. When the matter was called out on that date, only the Respondents' advocate was in attendance. In the absence of any cause being shown by the Applicant, an order dismissing the suit was issued, prompting the present Motion two days later.

17. The Applicant's advocate admitted due service of the NTSC upon his office. He, however, explained that the date of the NTSC was not diarized in the office diary and hence his absence on the hearing date. He also cited his advice to the Applicant to prioritize the appeal against the interlocutory ruling as further reason for delay in progressing this suit.

18. The latter explanation, coming from a rather seasoned advocate of this Court, is surprising, especially as no evidence showing the alleged pursuit or progress relating to the appeal was tendered before this court. Nevertheless, it could well be true. Concerning the former explanation, it is equally plausible that indeed, given the timing of the NTSCin the year, the Applicant's advocate's firm was in furlough mode; that the NTSC thus fell into the hands of a worker in the office of the Applicant's advocate who was not accustomed to handling legal process, or who for whatever reason failed to diarize the date of the NTSC; and that was the reason for the absence of the Applicant's counsel at the hearing of the NTSC.

19. As held in the case of *Belinda Murai & others v Amos Wainaina* [1978] LLR 2782, quoted with approval by the Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR:-

> "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. A similar observation was famously made by Appaloo JA (as he then was) in *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103:

> "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. The Respondents' assertions concerning likely prejudice do not seem to address the core consideration whether justice could still be done in this matter despite the delay here, which is slightly over two years now. For instance, it was not demonstrated that the delay will render the procurement of witnesses or documentation difficult for the Respondents. The words of Chesoni J (as he then was) in the case of *Ivita v Kyumbu* (1984) KLR 441 albeit made in respect of 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."

22. I hasten to add that 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 relatively fresh, and parties can proceed to perfect it for hearing in reasonable time. Further, trial dates can be scheduled without undue delay if the Applicant is so minded, so as to give effect to the parties' undoubted right to a fair trial. See *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* (2020) eKLR.

23. Any likely prejudice to the Respondents arising from any 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 sounding the caveat that at present, courts are deluged with heavy caseloads and hence cannot allow any party to litigate at their leisure. This means that the courts must firmly discharge their duty under the overriding objective. In that regard, the Court of Appeal stated in *Karuturi Networks Ltd & Anor. v 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".
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> See Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki [2018] eKLR.

24. In the result, the court is persuaded that the justice of the matter lies in exercising its discretion in favour of the Applicant by allowing the Notice of Motion dated 27th April, 2023. Consequently, the dismissal order of 25th April, 2023 is hereby set aside and the suit is reinstated. These orders are granted upon the conditions that the Applicant shall complete all the preliminary compliances under the Civil Procedure Rules within 45 (forty-five) days of this ruling, and thereafter prosecute the suit to conclusion by 31st

October 2024. In default of any of these conditions, the suit will stand automatically stand dismissed with costs to the Respondents, for want of prosecution. 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: Ms. Oloo h/b for Mr. Oyatsi

For the Respondents: N/A

C/A: Carol