



Fazakerley v Okundi t/a Okundi & Company Advocates (Miscellaneous Application 324 of 2015) [2024] KEHC 1932 (KLR) (Civ) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1932 (KLR)

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

CIVIL

MISCELLANEOUS APPLICATION 324 OF 2015

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

KEN FAZAKERLEY PLAINTIFF

AND

**TOM AYIEKO OKUNDI T/A OKUNDI & COMPANY
ADVOCATES DEFENDANT**

RULING

1. The subject of this ruling is the Notice of Motion (the Motion) dated 25th April, 2023 brought by Ken Fazakerley (hereafter the Applicant) seeking primarily the reinstatement of the suit, following dismissal on 13th October, 2022 for want of prosecution. The Motion is expressed to be brought under Section 3 of the *Employment and Labour Relations Act* and Article 159 (2) (d) of the *Constitution*, 2010.
2. The Motion is premised on the grounds featured on its face and amplified in the supporting affidavit sworn by the Applicant's advocate, Deogratus Omondi Ochieng. Stating that the notice to show cause (NTSC) which preceded the dismissal order was not served upon the Applicant, to enable them attend thereto; that the delay in prosecuting the suit was occasioned by various factors, including the court file being missing from the registry, hence reconstruction in the year 2019, the Applicant's prolonged illness; and that having sufficiently recovered, his willingness to prosecute the matter.
3. Tom Ayieko Okundi T/A Okundi & Company Advocates (hereafter the Respondent) resisted the Motion by his replying affidavit sworn on 21st June, 2023. Therein, he averred that contrary to the averments made in support of the Motion, the NTSC was properly served upon the Applicant's advocates but they neglected and/or failed to attend court or to respond to it. And pointing to the inordinate delay in the matter, which was inactive for over four (4) years before dismissal, he asserted that the Applicant is not deserving of the orders sought in the Motion.



4. The Motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the provisions of Section 3A of the *Civil Procedure Act* (CPA) on the discretionary power of the courts in setting aside a judgment and/or order, with the aim of doing justice to the parties; and Orders 12, Rule 7 and Order 51, Rule 15 of the *Civil Procedure Rules* (CPR) on the setting aside of orders. Relying on the decision in *Teleposta Pension Scheme Registered Trustee v Vicky Khadaka Liyai and 2 others* (2020) eKLR, counsel reiterated that non-service of the NTSC.
5. Counsel further stating that the delay in prosecuting the matter was unintentional and excusable, and that in any case, the Respondent has not demonstrated that he stands to suffer prejudice so grave that an award of damages would not be deemed adequate compensation. Counsel here citing the cases of *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR and *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR. Consequently, the court was urged to allow the Motion as prayed.
6. For his part, counsel for the Respondent citing the decision in *Ivita v Kyumbu* (1984) KLR 441 asserted the need for suits to be heard expeditiously. Reiterating the events leading up to the dismissal order, he stated that the delay in the prosecution of the matter was prolonged, inexcusable and disentitles the Applicant from a grant of the orders sought. As such, the court was urged to dismiss the Motion with costs, and to uphold the dismissal order.
7. The court has considered the rival affidavit material and submissions in respect of the Motion seeking the setting aside of the dismissal order and reinstatement of the suit.
8. The Motion erroneously invokes Section 3 of the Employment and Labour Relations Act and Article 159 (2) (d) of the *Constitution*, which provisions have no relevance here. The Applicant's advocate having noted the anomaly invoked the appropriate provisions in his submissions. The suit was dismissed pursuant to Order 17, Rule 2 of the *Civil Procedure Rules* which provides as follows:
 - “(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
 - (5) A suit stands dismissed after two years where no step has been undertaken.
 - (6) A party may apply to court after dismissal of a suit under this Order.”
9. The Applicant therefore ought to have invoked the provisions of sub-Rule 6 above, in his motion. Be that as it may, the motion ought not to be defeated on that account alone, and the court will proceed to consider the motion as brought under the correct provisions. Section 3A of the *CPA*, 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.”



10. The Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated 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 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. In the *Board of Governors, Moi High School Kabarak and another v Malcolm Bell* [2013] eKLR, the Supreme Court said of the inherent power of the court that:

“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.”

12. It is trite 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, discretion must be exercised judicially on established legal principles. 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] 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 leading up to the dismissal order of 13th October, 2022 are as follows. The cause was filed on 17th September 2015 by way of an Originating Summons (OS), seeking various reliefs against the Respondent herein, including an order for the release of the sum of USD 220,000/- allegedly held by the latter on behalf of the former. The OS was opposed by the Respondent, who swore a replying affidavit on 20th September 2015. The record shows that when the parties attended court on 10th October 2016 it was agreed by consent that the OS would proceed by way of written submissions and which submissions were later highlighted in court on 20th April, 2017. However, the court subsequently directed the parties to present their respective witnesses for the taking of viva voce evidence, to enable the court to obtain adequate material on the issues in dispute. As a result, the matter was scheduled for hearing on 14th March 2018.

14. The record shows that upon attending court on the said date, the Applicant's advocates sought an adjournment, on the grounds that they had recently been instructed on 7th March 2018 to come on record for the Applicant, in place of his previous advocates. There being no objection by the



Respondent's advocates, the court allowed the adjournment and directed the parties to obtain a fresh hearing date from the registry.

15. It is apparent from the record that no further progressive step had been taken in the matter by the time of the issuance of the NTSC dated 3rd August, 2022. The NTSC required the parties to attend court on 13th October, 2022 to show cause why the suit should not be dismissed for want of prosecution. When the matter was called out on the latter date, neither of the parties and/or their legal representatives were in attendance. In the absence of any cause shown, the suit was dismissed for want of prosecution.
16. The Applicant by his affidavit complains that the NTSC was not served upon his advocates, and attributes delay in the matter to his prolonged illness and the fact of the file being missing. Disputing the claims, the Respondent faulted the Applicant for the inordinate delay and laxity in the matter and asserted that the NTSC was indeed served upon the Applicant's advocates.
17. The court upon perusing the record before it has noted that on 14.03.2018, the matter was listed before Njuguna J for hearing. The learned Judge was informed that the Applicant had instructed a new firm, presumably the firm of Adera & Kenyatta Co. Advocates who filed the instant Motion, to represent him forthwith. Additionally, the copy of the NTSC and affidavit of service on file disclose service upon the Applicant's erstwhile advocates, namely, the firm of Sisule & Associates Advocates who had filed the notice of change of advocates on 16th January, 2018. While it is difficult to ascertain the date of their appointment there being no copy of the notice of change of advocate regarding the present advocates, it appears from the proceedings and a copy of their letter to the court in early March 2018 that as of 14.03.2018, the firm of Adera & Kenyatta Co. Advocates were acting for the Applicant.
18. Thus, in the absence of a formal notice of change of advocate being placed on record, the court cannot be blamed for service of the NTSC on Sisule & Associates Advocates. That said, service was effectively made upon the wrong firm of advocates and the court will address this matter later.
19. The Applicant's annexures falling within the period between 2018 and 2020, being the order for reconstruction of the file, correspondence with the court and letter from his doctor (exhibited as DOO 1-3) demonstrate the Applicant's claims concerning the court file being unavailable and his medical challenges. Hence a portion of the otherwise prolonged delay since 2018 to the date of dismissal has been reasonably accounted for.
20. 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.”



21. 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 near completion as parties had filed submissions and all that remained was to present their respective witnesses pursuant to the court's order. Further trial dates can be scheduled without undue delay if the Applicant is 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.
22. 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. 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 also [Osbo Chemicals Ltd v Tabitha Wanjiru Mwaniki](#) [2018]eKLR.
23. Consequently, the court is persuaded that the justice of the matter lies in allowing, on condition, the Notice of Motion dated 25th April 2023. The dismissal order made on 13th October 2022 is hereby set aside and the suit is reinstated, on condition that the Applicant shall fully prosecute the suit by 30th October 2024, failing which, the suit shall stand automatically dismissed for want of prosecution, with costs to the Respondent. To expedite the matter, the parties will immediately hereafter schedule a hearing date on priority basis.
24. A further order is issued directing the Applicant's present advocates to regularise their appearance by filing and serving their notice of change of advocate pursuant to Order 9 Rule 5 of the [Civil Procedure Rules](#), within 7 days of today's date. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the Respondent: N/A

C/A: Carol

