



**Mwau v Pike & another (Civil Suit 46 of 2015)
[2024] KEHC 1962 (KLR) (Civ) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1962 (KLR)

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

CIVIL

CIVIL SUIT 46 OF 2015

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

JOHN HARUN MWAU PLAINTIFF

AND

WILLIAM PIKE 1ST DEFENDANT

RADIO AFRICA LIMITED T/A THE STAR NEWSPAPER 2ND DEFENDANT

RULING

1. The motion dated 05.02.2020 by William Pike and Radio Africa Limited t/a The Star Newspaper, (hereafter the 1st and 2nd Defendant/Defendants), seeks that the suit by John Harun Mwau, (hereafter the Plaintiff), be dismissed for want of prosecution. The motion is expressed to be brought under section 1A, 1B & 3A of the Civil Procedure Act (CPA) and order 17 rule 2(1) & (3) of the Civil Procedure Rules (CPR), among others. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Linda Musita, the Head of Legal at the 2nd Defendant, who asserts to be conversant with the issues in controversy, competent and duly authorized by the 1st Defendant to depose.
2. The gist of her affidavit is that the Plaintiff instituted suit against the Defendants on 28.01.2015; that the Defendants entered appearance and filed their statement of defence on September 22, 2015; and that after service of the plaint and summons to enter appearance, the Plaintiff has delayed neglected, refused and or failed to take any steps to prosecute the suit. She goes on to depose that delay in prosecuting the matter is inordinate and unexplained and the suit ought to be dismissed for want of prosecution in light of the Plaintiff's lack of interest. Which delay she says is likely to cause great prejudice to the Defendants in terms of procuring attendance of witnesses and possible compromise



- of the quality of their evidence due to passage of time since 2014. In conclusion she states that it is only just, fair, and expedient that the suit be dismissed for want of prosecution, with costs to the Defendants.
3. The Plaintiff opposes the motion through a replying affidavit dated 18.07.2023. He states that since filing the suit, he has followed up on the matter with his erstwhile counsel on record and was always informed that the suit was proceeding well, and he would at the appropriate time be summoned to testify at the hearing. That in 2020 there was a break down of communication with erstwhile counsel who was unresponsive to calls and that at the onset of the Covid-19 Pandemic, he did not receive any updates on the suit and therefore requested erstwhile counsel to return his file to enable him to appoint another advocate to act in the matter. That he has yet to receive the original file from erstwhile counsel but to avoid further delay, had instructed counsel presently on record to act on his behalf. He states that at all material times, he was secure in the assurances given by erstwhile counsel that the matter was proceeding properly, yet the said counsel had never taken any steps to progress the matter.
 4. He asserts his desire to have the matter heard and determined on merits. He attributes the delay in prosecuting the matter to mistake or error on the part of former counsel which should not be visited on him. That the suit raises triable issues, and the court ought not to deny a party the right to be heard unless such a party has deliberately sought to undermine or obstruct the course of justice. He further deposes that the overriding objective in civil proceedings is the administration of substantial justice and concludes by stating that it is in the interest of justice that the motion be dismissed, and the suit be set down for hearing.
 5. The motion was canvassed by way of written submissions. Counsel for the Defendants anchored his submissions on the decisions in *Invesco Assurance Company Limited v Oyangge Barrack* [2018] eKLR, *Ivita v Kyumbu* (1984) KLR 441 and *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR regarding the principles to be considered in an application of this nature. It was submitted that the motion meets the test set out in the foregoing decisions, the Plaintiff having failed to explain the delay of eight (8) years in the prosecution of his suit. Here counsel reiterating the Defendants' affidavit material. In conclusion, counsel submitted that the delay herein is inexcusable and offends the provisions of article 159 of the *Constitution*. He therefore urged that the suit ought to be dismissed with costs.
 6. On the part of the Plaintiff, counsel began by restating the contents of the Plaintiff's affidavit material to the effect that the delay in prosecuting the matter is inadvertent and due to an error by erstwhile counsel, and for which the Plaintiff ought not to be condemned to suffer grave prejudice and injustice. While calling to aid the decision in *D.T Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR, counsel contended that the Plaintiff's suit raises serious triable issues for hearing on merits. Counsel asserted, there was no intentional or deliberate attempt by the Plaintiff to obstruct the course of justice so as to disentitle himself from exercising his right to be heard. The decision in *Belinda Murai & others v Amos Wainaina* [1978] eKLR was called to aid in that regard.
 7. Asserting that previous counsel may have inadvertently lost track of the suit to the detriment of the Plaintiff, counsel citing *Philip Chemwolo & Another v Augustine Kubende* (1982-88) KAR, stated that his mistake should not be visited on the innocent Plaintiff. And that the Defendants will not be prejudiced by the suit proceeding to hearing on its merits, which prejudice in any event had not been demonstrated. Besides, even where delay is inexcusable, a suit should only be dismissed if justice cannot be done, here citing the decision in *Ivita* (*supra*). In conclusion, counsel urged the court to dismiss the motion with costs and order that the suit be expedited for hearing.
 8. The court has considered the material canvassed in respect of the motion. As earlier noted, the Defendants' motion is primarily anchored on the provisions of order 17 rule 2(1) & (3) of the



CPR. Order 17 Rule 2 of the CPR echoes the constitutional injunction in article 159(2)(b) of the Constitution and the overriding objective in section 1A and 1B of the CPA for the expeditious dispensation of justice. Order 17 rule 2 of the CPR provides inter alia that:

- “(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)
- (6)
”

9. The locus classicus on the above rule is the case of *Ivita* (supra) which has been followed in a long line of authorities, including those cited by the parties herein. The Court of Appeal restated the principles enunciated therein in the case of *Rajeshb Rugbani v Fifty Investments Limited & another* [2016] eKLR by stating that: -

“The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita -v- Kyumbu* (1984) KLR 441). The test was expressed as follows:

The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is to both the plaintiff and the 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 the disappearance of human memory resulting from lapse of time; the defendant must 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.”

See also *Argan Wekesa Okumu* (supra).

10. The relevant history of this matter is that the Plaintiff’s suit was filed on 28.01.2015 concerning a cause of action that allegedly arose on 31.01.2014. The Defendants entered appearance and filed their statement of defence on September 22, 2015. No further activity took place in the matter, and in 2020, the Defendants moved the court vide the instant motion, and three years later on 24.01.2023, parties appeared before the Deputy Registrar for pre-trial directions. On that date, counsel appearing for the Plaintiff sought time to comply with order 11 of the CPR. When the parties subsequently appeared before the Deputy Registrar on April 13, 2023, counsel for the Defendants brought to the court’s attention the pending motion seeking that it be listed before a Judge for consideration.
11. Undisputedly, after filing the suit and the close of pleadings around October 2015, the Plaintiff did not take any further step in the matter. The Plaintiff’s explanation that essentially heaps blame on his erstwhile advocate is not supported by any concrete evidence, not even by way of copies of follow-up



correspondence with or from his erstwhile advocate. If indeed the Plaintiff was actively pursuing the progress of the case with his previous counsel as he claims, he should have in his possession at least one letter sent or received in the five years that lapsed since filing suit and this motion. Without such tangible proof, it is difficult to see the basis of the alleged error or mistake of counsel asserted by the Plaintiff.

12. Apaloo, J.A. (as he then was) famously stated in *Phillip Kiptoo Chemwolo* (supra) that; -

“I think a distinguished equity judge has said:

“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 determined on its 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 parties and not for the purpose of imposing discipline....

13. Although such an error or mistake may provide succor to a deserving party, the party pleading the error or mistake must reasonably demonstrate it to the court to justify the court’s exercise of its discretion. Besides, the Court of Appeal in the recent case of *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR stated that;

“.....The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. “

14. Thus, the Plaintiff was obligated to demonstrate his own initiative in progressing the case since 2015, and hence his former advocate’s alleged error or mistake in following up on the suit, despite the client’s persistence. It is settled that cases belong to parties who bring them to court, and in this instance, the onus was on the Plaintiff to take steps to progress his case. There is no explanation for the Plaintiff’s delay in appointing new counsel, if indeed his follow-up with previous counsel only yielded unfulfilled promises in a period of five years.

15. Delay in litigation, whether deliberate or inadvertent, is almost always prejudicial to the party who has been dragged to court. As observed in Ivita’s case, delay may affect the likelihood of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. This is an important consideration and the Court in Ivita’s case stated that:

“ Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.” (sic)

16. The delay to date is over eight (8) years and the Defendants’ apprehension of possible prejudice appears real. Given the lengthy delay, which has not been satisfactorily explained, it is foreseeable that procuring witnesses may pose a difficulty, while their recollection of pertinent events may have faded by the time the matter is finally set down for hearing, which will, in all likelihood, be delayed by the fact that parties



are yet to fully comply with order 11 of the CPR. In the circumstance, it appears doubtful that a fair trial can still be held, and justice done between the parties.

17. The cause of action in this case arose in 2014, and close to nine (9) years later, the matter is yet to be set down for hearing let alone pre-trial directions. Further, Order 17 Rule 2(1) and (3) of the CPR cannot be read in isolation from myriad court pronouncements on the need to curb delay in the resolution of cases. This is the duty of the court under the overriding objective in Section 1A and 1B of the CPA. At a time when the courts are deluged with heavy caseloads, they must firmly discharge their duty under the overriding objective and refuse to allow slovenly parties the costly privilege of litigating at their own leisure.

18. In Karuturi Networks Ltd & Anor v Daly & Figgis Advocates, Civil Appl. NAI. 293/09 the Court of Appeal said of the application of the overriding objective in section 1A and 1B of the Civil Procedure Act 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...” (emphasis added).

See also: Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.

19. The Plaintiff’s undisputed constitutional right to be heard on the merits of his case is not absolute and must be balanced against the Defendants’ corresponding right to the expeditious determination of a suit into which they have been dragged. See Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR. The Plaintiff, having clearly squandered the opportunity to be heard for close to 9 years, has only himself to blame for the lethargic progression of his case, and should not expect the court to require the Defendants to pay the price for his own lethargy.

20. Consequently, the court is persuaded that the justice of the matter lies in allowing the motion dated February 5, 2020. Accordingly, the Plaintiff’s suit is dismissed for want of prosecution with costs to the Defendants.

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

C.MEOLI

JUDGE

In the presence of:

For the Defendant/ Applicants: Mr. Angwenyi

For the Plaintiff/ Respondent: Mr. Ouma h/b for Mr. Musyoki

C/A: Carol

