



REPUBLIC OF KENYA



**Oyugi (Deceased) & another v Mogaka on behalf of Kisii Prestige Shuttle Ltd
(Civil Appeal 12 of 2019) [2024] KEHC 1860 (KLR) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1860 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 12 OF 2019
SM MOHOCHI, J
FEBRUARY 27, 2024**

BETWEEN

SHEM OYUGI (DECEASED) 1ST APPLICANT

HARUN SAISI MOGAKA 2ND APPLICANT

AND

**GEORGE MOGAKA ON BEHALF OF KISII PRESTIGE SHUTTLE
LTD RESPONDENT**

RULING

1. This suit had been filed on the 10th April 2019 and the same has not been set down for pre-trial hearing and has already graduated as a case forming backlog in the Judicial System. Court had on the 13th October 2023 allowed the Applicants/Defendants Application dated 17th May 2023 as undefended and in the absence of the Plaintiff/Respondent on the following specific terms: -
 - i. An Order is hereby issued, to the Registrar of Companies to reinstate Harun Mogaka Saisi, Shem Oyugi(deceased), Samuel Isaboke, Charles Oginda and Harun Mogere Nzaria as directors and shareholders of Kisii Prestige Shuttle Limited.
 - ii. An Order is hereby issued, directing the Respondent to immediately terminate all leases and/or tenancy agreements that he has entered into as sublet(s) on behalf of Kisii Prestige Limited.
 - iii. An Order is hereby issued directed at the Respondent to forthwith, hand over all tools of the trade, belonging to Kisii Prestige Shuttle to the Applicants.
 - iv. That the Application dated 17/05/23 is hereby marked as spent.
2. The above Orders were a formulation suo motu by the Court bearing in mind the ongoing leadership wrangles affecting the smooth functioning of a company subject to the *Companies Act* 2015, that transports hundreds of Kenyans, as fare paying passengers, across the country and which company the



law anticipates would not expose the public to any risk owing to internal wrangles hence the decision made on the 13th October 2023.

3. This decision aforesaid in paragraph (1) above has given rise to two (2) conflicting Applications filed twenty-four hours apart, the 1st Application dated 8th November 2023, is by the 2nd Applicant/Defendant- seeking to cite the Respondent/Plaintiff in contempt of Court for disregarding the orders of the Court dated 25th October 2023 and that the police be ordered to provide security to enforce the Court Orders, it was supported by the sworn Affidavit of Harun Saisi Mogaka.
4. The 2nd Application dated 9th November 2023 is by George Mogaka on behalf of Kisii Prestige Shuttle Ltd seeking seven (7) Orders as follows;
 - i. Spent
 - ii. That, this Honourable Court do issue leave in order for the firm of Nyabochoa Lagat & Co. Advocates be placed on record on behalf of the Respondent/Applicant in place of Messrs. A.N Geke & Co. Advocates.
 - iii. That, the Orders dated 25th October 2023 issued by S. Mohochi be set-aside and/or vacated *ex debito justitiae*.
 - iv. Spent
 - v. Spent
 - vi. That, the officers Commanding Police Stations (OCS) Central Police Station Railways Nakuru implement the Orders.
 - vii. That, the costs of this application be provided for.
5. The 2nd Application is equally grounded on a staggering eighteen (18) grounds as follows:
 - i. That, the 2nd Defendant/Applicant has already obtained Orders against the Respondent/Applicant and the Respondent/Applicant is threatened with execution of the Orders thereof.
 - ii. That, the 2nd Defendant/Applicant may proceed to execute the said Orders to the detriment of the Respondent/Applicant.
 - iii. That, the Respondent/Applicant has now instructed the firm of Nyabochoa Lagat & Co. Advocates coming on record post issuance of the said Orders.
 - iv. That, the Respondent/Applicant prays this Application be certified extremely urgent in the first instance in order to dispense justice before the Respondent proceeds to execute.
 - v. That, the Application dated was not served upon the Respondent Applicant and therefore he was not accorded an opportunity to respond to the issues raised therein.
 - vi. That, the Orders were obtained without the participation of the Respondent/Applicant in the said Court proceedings.
 - vii. That, the Respondent/Applicant Advocate on record Mr. Andrew Geke of Messrs. A.n Geke & Co. Advocates fled a filed a Notice of Withdrawal of Suit dated 8th August 2023 but the Honourable Court ignored the Same.



- viii. That, the Respondent's /Applicant's has belatedly realized that his Advocate on record Andrew Geke of Messrs. A.n Geke & Co. Advocates did not attend Court when the matter came up for hearing 17th May 2023.
 - ix. That, the errors and omissions of an Advocate cannot be visited on the Respondent/Applicant.
 - x. That, to the Respondent's /Applicant's best knowledge and belief the matter was withdrawn as he was advised by Messrs. A.n Geke & Co. Advocates who were his Advocates on record.
 - xi. That, the instant Orders dated 25th October 2023 are based on a suit that was filed and withdrawn by the Respondent/Applicant.
 - xii. That, the Respondent/Applicant is ready to sufficiently respond to the issues raised in the Application dated 17th May 2023.
 - xiii. That, the Orders dated 25th October 2023 are final Orders therefore Respondent's/Applicant's right of a fair trial under Article 50 of the Constitution of Kenya has been disregarded.
 - xiv. That, Order 4 as listed in the Orders dated 25th October 2023 is an infringement of the Constitution of Kenya 2010 particularly Article 50 on fair trial.
 - xv. That, as it stands the Respondent/Applicant has been condemned unheard against the rules of natural justice and the Bangalore Principles.
 - xvi. That, if the Orders are executed before this Application is heard the Respondent/Applicant will suffer irreparable loss and damage hence the urgency of this application.
 - xvii. That, if the orders sought in this Application are not granted ex-parte the Respondent/Applicant stands to suffer irreparable damage and it is in the interest of justice that the prayers sought in the Application are granted.
 - xviii. That, this Application is brought without undue delay and is made in good ok and in the interest of justice and fairness.
6. This is a classic case of weaponization of litigation and obfuscation to cause confusion. This suit was filed in 2019 and is yet to be set-down for hearing and as things stand it forms part of the backlog of cases in the judicial system and that the Plaintiff is thus expected to be keen to prosecute the core dispute which unfortunately appears otherwise.
 7. Weaponization of litigation and obfuscation by litigants negates all constitutional predicates of administration of justice and should be discourages.
 8. Since filing of the principal suit a flurry of Applications have been filed as follows:
 - a. Notice of Motion dated 29th July 2019 by George Mogaka;
 - b. Notice of Motion dated 24th September 2019 by Harun Saisi;
 - c. Notice of Motion dated 30th January 2020 by Harun Saisi;
 9. The Consideration of the three (3) Applications gave rise to the adverse decision by T Matheka J against the Respondent/Plaintiff dated 25th June 2020.



10. Despite the bulky and extensive submissions that this Court has keenly noted and taken into consideration, but will not regurgitate, as the Application seeks to appeal to the Court to exercise judicial discretion.
11. This Court has considered all the arguments and counter arguments, the multiple lengthy affidavits and keenly taken note of the aversions by the parties.
12. I concur with the holding of the Supreme Court of India, which stated in *Sangram Singh v Election Tribunal, Kotah*, AIR 1955 SC 664, at 711 cited in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that:

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”
13. That was the position adopted by the Court of Appeal in *Onjula Enterprises Ltd v Sumaria* [1986] KLR 651, where it was held that:

“The rules of the Court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the Court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another v Greenlands Limited* [1916] 2 AC 15 at 38.”
14. This position is locally supported by the holding of Ojwang, J (as he then was) in *Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others* [2004] eKLR where he held that:

“The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.”
15. In *Wachira Karani v Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that: -

“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”
16. In considering whether or not to set aside a judgement or ruling a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge.
17. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the Court is satisfied that there



is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the Court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure.

18. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193; *Evans v Bartlam* [1937] 2 All ER 647.
19. In this case the Plaintiff/Respondent's failure to appear in Court when hearing of the Application dated 17th May 2023, was scheduled is attributed to lack of notification and the fact that the Appellants' counsel was not present in Court on that date. Even if the absence of the Plaintiff/Respondent's was to be blamed on their counsel, as was appreciated by Apaloo, J. A (as then was) in the case of *Philip Chemowolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040:

“Blunder 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.”
20. That mistakes do occur in the process of litigation was appreciated by the Court of Appeal in *Murai v Wainaina* (No. 4) [1982] KLR 38 where it was held 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 are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which Courts of appeal sometimes overrule.”
21. This Court is not convinced of the bonafide of the notice of withdrawal of the entire suit, whoever filed the notice of withdrawal accessed the Court file and was fully aware of a pending Application. This Court is of the view that the same was not intended to further the course of justice but rather thwart the same.



22. I associate fully with the position held by Matheka J. in *Sophia Wanjiru Njuguna v Kyoga Hauliers Kenya Limited* [2020] eKLR:

“It is my humble view that in their submissions counsel for the respondent failed in their duty as given under Section 1A of the *Civil Procedure Act* which states;

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a 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.” (emphasis mine)

23. The Plaintiff /Respondent equally argued that he had caused the entire suit to be withdrawn on the 25th of August 2023 when his Advocate filed a notice of withdrawal dated 8th August 2023. It is his contention that the notice automatically took effect upon service and that the Court could under these circumstances not entertain the pre-existing pending Application.

24. Order 25 of the *Civil Procedure Rules* provides for withdrawal of suits as follows;

- (1) At any time before the setting down of the suit for hearing, the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
- (2) (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn upon the filing of a written consent signed by all the parties.
- (2) Where a suit has been set down for hearing, the Court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit and otherwise, as are just.”

25. The right to withdraw a suit under Order 25 Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so. However, under Order 25 Rule 2(2), withdrawal of a suit requires permission of the Court and the withdrawal may be subject to terms that the Court considers just, including payment of costs or filing of any other suit.

26. In the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No. 16 of 2014, the Supreme Court stated as follows;

“a party’s right to withdraw a matter before the Court cannot be taken away. A Court cannot bar a party from withdrawing his matter. All that the Court can do is to make an order as to costs where it is deemed appropriate.”

27. Without belaboring the point, the notice of withdrawal dated 8th August 2023 was- quietly filed when the Court had on the 31st of May 2023 issued (specific and time bound) directions on the hearing of



- the Application dated 17th May 2023. The Directions on the Application dated were served upon the Advocate on record who rather than comply with the Directions elected to file a notice of withdrawal.
28. The Plaintiff/Respondent never moved the Court for the adoption notice of withdrawal of suit in fact the same was never served upon the Applicants/Defendants.
 29. A ‘notice’ is a one when it serves the intended purpose, it was the duty of the Plaintiff Applicant to notify the parties. The failure to notify the parties effectively rendered the intention to terminate the proceedings “stillborn”.
 30. The affairs of Kisii Prestige Shuttle Limited remains the central focus of this Court and that any continued wrangles must as a matter of priority be resolved by this companies’ Court.
 31. The Respondent/Plaintiff is sued on behalf of the company and as such the orders made thereon are directed to the company and his belated attempt at distinguishing himself from the company is mischievous and not in furtherance of justice.

Conclusion and Determination

32. Owing to the foregoing reason(s) this Court is Not persuaded to set-aside, vary, modify or in any way whatsoever alter its orders as issued on the 13th October 2023.
33. The Application dated 9th November 2023, is hereby found to be without merit and the same is dismissed.
34. The firm of Nyabochoa Lagat & Co. Advocates is hereby admitted on record on behalf of the Respondent/Applicant in place of Messrs. A.N Geke & Co. Advocates.
35. This Court finds merit in the Application dated 8th November and hereby Orders that the Officer Commanding Station (OCS) the Central Police Station Nakuru do provide security to ensure strict compliance of All the Orders issued on the 25th October 2023.
36. The Personal Representatives to the estate of Shem Oyugi may consider moving the Court to be properly enjoined.
37. The parties are hereby directed to take such necessary steps as soon as is practically possible with a view to having this suit heard and determined at full trial without any further delay.

It is So Ordered.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 27TH DAY OF FEBRUARY, 2024.

MOHOCHI S.M

(JUDGE)

