



**Kaindi v Kenya Breweries Limited & another (Civil Case
1164 of 1996) [2024] KEHC 6378 (KLR) (Civ) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6378 (KLR)

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

CIVIL

CIVIL CASE 1164 OF 1996

AN ONGERI, J

MAY 31, 2024

BETWEEN

FRANCIS M. KAINDI PLAINTIFF

AND

KENYA BREWERIES LIMITED 1ST DEFENDANT

BARCLAYS BANK OF KENYA LTD 2ND DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 18/12/2023 brought under Order 45 Rule 1 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and all enabling provisions of the law seeking the following prayers;
 - i. That the honourable court be pleased to review the Order of dismissal of the plaintiff's suit made on the 8th of December 2023 and reinstate the said suit.
 - ii. That the honourable court does subsequently and subject to one above, issue fresh directions towards the hearing of the matter.
 - iii. That costs be in the cause.
2. It is based on the following grounds;
 - i. That on the 8th of December 2023, the honourable court dismissed the plaintiff's suit for non-attendance.
 - ii. That the reasons for non-attendance were not attributed to the plaintiff but arising from factors beyond the plaintiff's and/or his advocates control.



- iii. That in the interest of justice, good-conscience, fairness and equity it would be fair and just for the said order be set aside and the matter be set for hearing.
3. It is supported by the affidavit of Fred Mutua in which he deposed as follows;
- a) That on the 8th of December 2023, the Honourable Court was pleased to dismiss the Plaintiff's suit for non-attendance.
 - b) That I seek the dismissal Order be set aside, the suit reinstated and the matter be listed for hearing on the following germane grounds:-
 - c. That on the 17th of August 2023, the Honourable Court listed the matter for hearing on the 8th of December 2023, but at the same time, allowed for Court annexed mediation with a mention dated set for the 7th of November 2023.
 - d. That we subsequently informed our client on the same and of which mediation was acceptable to him.
 - e. That as at the 7th of November 2023, being the due mention date, not only was the Court file unavailable for mention but the proposed Court mediation process had not commenced as the file was unavailable.
 - f. That our various efforts in visiting the mediation registry prior to the said mention date set for the 7th of November 2023 were in vain as the Court file could not be traced.
 - g. That on the 10th of November 2023, we received a letter from Kaplan & Stratton confirming our averments and the Honourable Courts process of placing all Court files before the mediation registry for screening.
 - h. That in the sincere and honest belief that the mediation process would take precedence subsequent wherefore upon failure the matter would proceed for hearing, and noting that as at the 8th of December 2023 and at no fault of the Plaintiff, no invitation to commence mediation had been received, the firm was of the belief that the matter would be mentioned on the 8th of December 2023 towards further directions towards hearing, and not for the hearing on the said date, further noting that no further directions had been given towards cancelling, negating or setting aside the mediation process.
 - i. That it was our further honest belief that the Honourable Court would not proceed with the hearing without further directions on the mediation process which from the outset could be attributable to the Court registries.
 - j. That it would perhaps be on the said line of thinking that Counsel for the 1st Defendant, and in contradiction and contravention to the Court Orders issued on the 17th of August 2023 for all parties to have complied within 21 days of the 17th of August 2023, serves with it's witness statement on the 4th of December 2023 and of which service we had issue with.
 - k. That with due respect to Counsel for the 1st and 2nd Defendant, we surmise their application for dismissal of the Plaintiff's suit to be ill founded and hypocritical as they were seized of the same facts as ourselves and which we with all due honesty opine did not warrant dismissal.



- I. That it would be indeed be unconscionable, unfair and unjust to the Plaintiff for his suit to be dismissed for reasons not attributable to him, but mostly so due to inherent and inadvertent shortcomings in the Court registries.”
4. The defendant/respondent filed replying affidavits opposing the application as follows; the 1st defendant opposed the application *vide* Dorcas Kirarei’s replying affidavit dated 24/1/2024. In it she deponed that she is the legal operations manager of the 1st defendant and the history of this matter shows that the plaintiff long lost interest in the matter and the court exercised its discretion in dismissing the suit for want of prosecution.
5. That the plaintiff filed the suit back in 1996 and a substantial amount of time lapsed without the conclusion of the matter due to the plaintiff’s reluctance to prosecute the case. In view of the same the defendant filed an application dated 31/1/2022 for dismissal. The replying affidavit to the application was sworn by Mr. Fred Mutua counsel for the plaintiff on 17/4/2023.
6. He further averred that the failure by the plaintiff to prosecute the matter was subsequent to the Covid 19 Pandemic the firm was unable to trace the plaintiff. After hearing the application the court delivered its ruling on 17/8/2023. On account that the plaintiff was a senior citizen the court issued directions as follows;
 - a. There would be a mention on 7/11/2023 to confirm compliance with order 11. During the mention the Plaintiff would have to state all the witnesses that he would call at the hearing.
 - b. The matter would be heard on 8/12/2023 without any further adjournment.
 - c. Meanwhile, the matter would be considered for court annexed mediation and for that purpose placed before the court annexed mediation registry for screening;
 - d. If mediation failed all parties should return on 7/11/2023 for compliance with order 11 ready for the hearing.
 - e. If the mediation failed or did not take place the hearing would proceed on 8/12/2023.
7. She deponed that in preparation for the hearing on 8/12/2023 as directed by the Court on 17/8/2023, the Plaintiff filed his Bundle of pleadings and documents on 28/9/2023. The 1st Defendant filed my Witness Statement on 4/12/2023. By letters dated 10th and 30th November 2023, his firm requested the Deputy Registrar to have the matter screened for mediation in view of the hearing date of 8/12/2023.
8. The letters were copied to all the parties Advocates including the Plaintiffs who were well aware of the upcoming hearing date before the Judge. The Plaintiff Through his counsel did not initiate any steps to follow up on the screening of the mediation and the efforts were being made by the 1st Defendant through its counsel.
9. She deponed that the efforts to have the matter screened were successful but when the matter came up for hearing on 8/12/2023 the plaintiff failed to attend court and his Advocates applied for adjournment. The same was opposed and the court found that no proper reason had been given for the plaintiff’s failure to prosecute the matter and refused to adjourn and proceeded to dismiss for want of prosecution.
10. She deponed that the court can only review an order where there is some mistake or error apparent on the face of the record or discovery of new and important matter or evidence which, after the exercise



of due diligence was not within his knowledge or could or be produced by the applicant at the time when the orders were made.

11. The application herein was further opposed by the 2nd defendant's grounds of opposition dated 15/3/2024 as follows;
 1. The plaintiff has not demonstrated that there are any or any sufficient grounds to warrant review of the court's orders of 8th December 2023, in that;
 - a. There is no error apparent on the face of the record.
 - b. There is no new evidence which after the exercise of due diligence was not within his knowledge and could not be produced before the orders of 8th December 2023.
 - c. There is no other sufficient reason to warrant review of the decree.
 2. The orders of 8th December 2023 dismissed the suit for want of prosecution. The plaintiff has not shown any or any sufficient cause for consideration in an application to set these orders aside in that:
 - a. The plaintiff filed suit herein vide his plaint dated 14/5/1996.
 - b. The matter first proceeded for hearing on 31/5/2011 being almost 15 years after the suit was filed.
 - c. An application to dismiss the suit was filed in January 2022, being over ten years from the last hearing date.
 - d. The court delivered its ruling on the 1st defendant's application on 17/8/2023 wherein it dismissed the said application and directed the matter come up for pre-trial conference on 7/11/2023 and hearing on 8/12/2023. The matter was also to be screened for mediation in the meantime.
 - e. The plaintiff did not take any steps thereafter to ensure compliance with pre-trial or even to follow up on the mediation which was to be considered in the interim.
 3. The plaintiff is guilty of laches and is not entitled to any equitable relief. See *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR.
 4. The delay in having the matter determined in over 27 years will infringe upon the legitimate expectation of the 2nd defendant that the dispute against it will be determined timeously in violation of Article 159(2)(c) of the [Constitution](#) of Kenya. See [Crossley Holdings Limited v Nagendrasaxena & 3 others](#) [2016] eKLR.
 5. The application is an abuse of the court process.
12. The parties filed written submissions as follows; the plaintiff/applicant submitted that Subject to the court's directions on 17/8/23, the Plaintiff filed and served its bundle of documents dated 25/8/2023. The matter came up for mention on 7/11/23 to confirm compliance with Order 11. However, the matter did not appear on the cause list and upon follow up with the registry, they were informed that the court file could not be traced at the registry.
13. Thereafter, they received a letter dated 10/11/23 from the 1st Defendant's Advocates which averred that the court file had been in chambers and had since been forwarded to the mediation registry for screening. On 8/12/23, when the matter came up for hearing, the Plaintiff was not ready to proceed on



grounds that it was their honest belief that mediation having not been commenced, the court would issue directions on how to proceed with the matter.

14. The plaintiff/applicant argued that mediation would take precedence subsequent wherefore upon failure the matter would proceed for hearing and therefore in this case, mediation having not commenced, then further directions would be issued by the court on how to proceed. The Plaintiff upon being informed of the directions given on 17/8/23 was amenable for mediation to take place and filed his bundle of documents within time. This is a clear indication of the Plaintiff's intention fully prosecute his suit to its conclusion. It would be unfair, unjust and unconscionable for the Plaintiff's suit be dismissed for reasons not attributable to him as we honestly believed that mediation proceedings had to be exhausted first and in the event it failed, then the hearing would proceed subsequently.
15. The 1st defendant submitted that it is trite law that any order for review can only be made if there is mistake or error apparent on the face of the record, or there has been no discovery of new and important matters or evidence, which, after exercise of diligence, was not within the knowledge or could not be produced by the Plaintiff at the time when the order was made, or it is shown that there is sufficient reason to warrant review.
16. Further, that it is evident that there is no obvious error on the face of the record and none has been given as alleged by the plaintiff/applicant. The plaintiff/applicant has not demonstrated that he has discovered any new evidence that was not within his knowledge at the time the dismissal order was made.
17. The 1st defendant submitted that the plaintiff has approached this court with dirty hands since in paragraph 2 of its supporting affidavit stated that on 8/12/2023 the court dismissed the plaintiff's suit for non-attendance yet the matter was dismissed for want of prosecution as is evident from the court record.
18. The 2nd defendant reiterated the submission of the 1st defendant on review and indicated that the plaintiff has not satisfied any of the conditions for application of review. No reasonable explanation has been provided for the failure by the plaintiff to attend court on 8/12/2023 and the plaintiff's lawyer could not explain why his client was not in court.
19. The 2nd defendant further submitted that 28 years in prosecuting the plaintiff's claims is inordinate and the 2nd defendant will suffer prejudice if the matter is reinstated as is its legitimate expectation that the dispute against it will be determined timeously pursuant to Article 159 (2) (c) of the *the constitution* will be violated.
20. The sole issue for determination is whether this court should review the Order of dismissal of the plaintiff's suit made on the 8th of December 2023 and reinstate the said suit for hearing.
21. The plaintiff was given a last opportunity to prosecute the suit on 17/8/2023.
22. I find that there is no mistake or error apparent on the face of the record in this case neither has there been discovery of any new and important matters or evidence, which, after exercise of diligence, was not within the knowledge of the applicant or could not be produced by the Plaintiff at the time when the order was made.
23. I find that it has not been shown that there is sufficient reason to warrant review of the order dismissing this suit for want of prosecution.
24. This case was filed in court in the year 1996 and the plaintiff has been over indulged by the court and further, the plaintiff was granted the last adjournment by the court prior to the dismissal.



- 25. Equity will not assist the indolent but will come to the aid of the vigilant.
- 26. The application dated 18/12/2023 lacks in merit. The same is dismissed with no orders as to costs and the file is marked as closed.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant

