Wanga v Kenya Power & Lighting Co. Limited (Civil Application Sup 884 of 2001) [2023] KEHC 21738 (KLR) (Civ) (23 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPLICATION SUP 884 OF 2001

AN ONGERI, J

AUGUST 23, 2023

BETWEEN

GEORGE OGOSIA WANGA ..... PLAINTIFF

AND

KENYA POWER & LIGHTING CO. LIMITED ..... DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated November 28, 2022 seeking to set aside the dismissal order which dismissed the plaintiff's suit on September 29, 2017 for want of prosecution.

2. The application is based on the grounds on the face of it and supported by the affidavit of the applicant George Ogosia Wanga sworn on November 28, 2022.

3. The applicants have deponed that the suit was instituted in the year 2001 through the firm of Enonda, Makolooo, Makori & Co. Advocates which underwent restructuring in 2016 leading to some partners leaving the firm. Thereafter the applicant could not tell who among the partners was handling the file. He found out that the file was with James T. Makori Advocate and then instructed the firm of Musungu, Miriti & Naliaka Advocates LLP to take over the matter from the year 2021.

4. The new firm found that the physical court file was not traceable. The court file was traced on October 30, 2022. Upon perusal, the applicant found that the case had been dismissed on September 29, 2017 yet the Notice to show cause had been served on the firm of Mithega & Kariuki Advocates who were not on record for the applicant.

5. The current application was filed as soon as the file was traced.

6. The applicant also deposed that it would be prejudicial and unfair for the suit to be dismissed since the subject matter is a colossal amount which ought to be compensated by the Defendant, and failure to fix the matter for hearing has been through no fault of his own.

7. At the point of dismissal, the matter was only pending fixing of a hearing date.

8. The Defendants would not be prejudiced if the application is allowed and it would be in the interest of justice to reinstate the suit and let it be heard on merit.

9. The defendant filed a replying affidavit opposing the application which I have duly considered.

10. The Plaintiff applicant submitted that the restructuring of the firm of his previous advocates on record caused the matter to have been forgotten until August 2021 when the advocate dealing with the matter forwarded the file to his advocates currently on record, after which the Court file could not be traced. The file was traced in October 2022 and upon perusal, his advocates discovered that the matter had been dismissed in the year 2017. H learnt that the Notice to show cause had been served upon the firm of Mithega & Kariuki advocates who were not representing him at any time and he had no notice of the dismissal. He submitted that it would be unfair to dismiss the matter since it was seeking a colossal amount of Kshs. 20,000,000.

11. He further submitted that reinstatement was within the Court's discretion, noting that though there was admitted delay, the same had been properly explained. He explained that the delay was caused by the mistake of his advocates, he was not afforded the chance to a fair hearing since he had not been served with the notice to show cause and that he would be highly prejudiced if the suit was not reinstated as it was just awaiting being slated for hearing. He relied on the decision in the case of *Belinda Muras & 6 others -v- Amos Wainaina* 1978) eKLR where the Court defined mistake of Advocates as follows:

> " The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."

12. Theplaintiff also relied on the decision in the case of *Philip Chemwolo & Anor -v- Augustine Kubebe* (1982-1988) KLR 103 at 1040 where the Court held that:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the pain of his case not being heard on merit."

13. The Plaintiff/applicant submitted that this court has discretion to reinstate the suit and that reasons for delay in filing this application have been properly explained.

14. The applicant also submitted that the mistake of the advocate should not be visited upon the innocent client. In his case, the former advocates were restructuring, leading to the matter being dormant.

15. The applicant also submitted that his advocates on record were not served any the Notice to show cause why the matter should not be dismissed, which is a violation of his right to fair hearing as guaranteed under the *Constitution of Kenya, 2010*. He argued that had his advocates been served with the notice, they would have demonstrated to court the reason for the dormancy and proceeded to

expedite prosecution of the case. He relied on the case of *Martha Wangari Karua –v-iebc* Nyeri Civil Appeal I of 2017 where the Court of Appeal held that:

> " Rules of natural Justice require that the Court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his case may be".

16. The applicant urged the court to reinstate the suit as it seeks a colossal amount of Kshs. 20,000,000 and to remove him from the seat of justice would be draconian and prejudicial to him yet no prejudice would be suffered by the defendant if the application is allowed.

17. The respondent submitted that the Plaintiff should suffer the consequences of his indolence. He referred to article 159 (1)(b) of the *Constitution of Kenya* , which provides that Justice should not be delayed and section 1A of the *Civil Procedure act* which provides for the expeditious, proportionate and affordable resolution of disputes governed by the Act.

18. The Respondent also referred to section 1A(3) of the *Civil Procedure Act* which provides that:

> " 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."

19. The Respondent also submitted that it would be greatly prejudiced by having to prosecute a suit that had delayed so much until its witnesses retired.

20. The respondent further submitted that though reinstatement is at the discretion of the court, it ought to be exercised in a just manner. They relied on the finding in *Bilha Ngonyo Isaac -v- Kembu Farm Ltd & anor* where the court stated that:

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

21. The sole issue for determination is whether the plaintiffs suit should be reinstated.

22. This case was filed in court on May 28, 2001. It was the duty of the plaintiff to follow up the case and ensure the same is prosecuted.

23. The suit was dismissed on September 29, 2017 and the application for reinstatement was filed on November 28, 2022.

24. The court has a discretion to grant the plaintiff/applicant an opportunity to prosecute his case.

25. In the case of *FM v EKW* (2019) eKLR relied on and cited the case of *Kenya Pipeline Company Limited Vs. Mafuta Products Limited* (2014) eKLR) and that of *Shah Vs Mbogo* (1967) E.A. 166 the court held as follows;

> " .... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit."

26. I find that it is not in dispute that the case had been dismissed on September 29, 2017 yet the Notice to show cause had been served on the firm of Mithega & Kariuki Advocates who were not on record for the applicant.

27. I have perused the file and I find that the plaintiff was granted an interlocutory mandatory injunction and therefore this case has been partially determined.

28. I find that it is in the interest of justice that the plaintiff be granted one more chance to prosecute his case.

29. I accordingly allow dated November 28, 2022 the Application and reinstate the plaintiff's suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF AUGUST, 2023.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

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