Madison Insurance Co Ltd v Mwamba (Civil Appeal 68 of 2021)
[2023] KEHC 27243 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 68 OF 2021

DKN MAGARE, J

DECEMBER 20, 2023

BETWEEN

MADISON INSURANCE CO LTD ..... APPELLANT

AND

JUMA KATANA MWAMBA ..... RESPONDENT

RULING

1. Thomas Hobbes in his Leviathan once stated that in a state of nature there are no arts; no letters; no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short. This could be in a world without law and order. Life could be easier, not nasty brutish and short, if we were all to be diligent. Diligence is not however one of the commonest senses.

2. In May, 2023, I perused this file and found action was taken out. I admitted for hearing and scheduled the same for further directions. The matter was subsequently listed for hearing. No action was taken and as such the matter was placed for dismissal during an internal service week. This was well announced and a cause list posted on the Kenya Law website. This matter was cause listed as No. 27 of the cause list on Kenya Law.

3. The same was also updated on the CTS. The update means the information was then sent to clients and advocates. The mater was called out on the said date and placed aside as other matters were dealt with since there was no response.

4. The matter was thereafter called but the Appellant did not attend court. The matter was dismissed for want of prosecution. The matter had been pending for 2 years without action on part of the Appellant. Action was on part of the court or Respondent.

5. The appellant now seeks to set aside the dismissal on grounds that the date was said to be fixed without their prior participation. They state that attempts to fix the mater for hearing was futile. They state

that they filed an application dated 21/8/23 to reconstruct the lower court file. They also state they sought proceedings on 12/5/2021.

6. The application that was said to have been filed was filed after the dismissal of the suit and just a filing of the current Application. The grounds for reconstruction of the file is that the appeal had been dismissed.

7. What the Applicant is studiously silent on are three fundamental issues: -

   a. The dates in court were fixed suo moto after the applicant was unable to attend court.

   b. The matter was listed for hearing and a cause list displayed at Kenya law.

   c. No action was taken in the lower court in terms of paying and collecting proceedings since filing of memorandum of appeal.

8. The application is opposed by Carolyne Mboka, advocate. She stated that there were no follow up after May, 2021.

9. The Applicant wrote a letter bespeaking proceedings did not pay and sat on this laurels. At least the lower court file was available till May, 2023. Even after dismissal the applicant did nothing till 21/9/2023. There had been no explanation for the delay.

10. They blame the applicant for delay of over 3 years. She laments that the application has never had a chance to enjoy fruits of his judgment.

11. They stated that on their part they did not slumber they wrote letters which elicited no response.

12. They stated that the Applicant was thus indolent and was only awaken from deeps slumber by the dismissal. They are not aware of the disappearance of the court file. They were surprised that the application to reconstruct was made immediately after dismissal of the appeal.

13. It is their case that equity only aids the vigilant not he indolent. It is their case that it is not in the interest of justice to go back to the case hence more slumber.

Analysis

14. I directed parties to file submissions. Instead of filing submissions, the applicant filed a record of appeal to a dismissed appeal. Annexed to it is a statutory Notice received on 5/10/2017. The suit in the lower Court had been filed as CMCC 1674 of 2017 on 2/10/2017. They were served with a statutory notice but did not respond.

15. It is important to note that provision of section 12 of the *cap 405* do not seem to have been complied with. The same provides as doth: -

> " Duty of person against whom claim made to give information.
>
> 1. Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act or would have been so insured if the insurer had not avoided or canceled the policy and, if he was or would have been so insured, give such particulars with

respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.

(1A) The insurer shall, upon being served with the statutory notice and documents, admit or deny liability for the claim or judgment by a notice in writing to the person or persons presenting the claim or judgment.

(1B) The claimant or judgment debtor or his representative shall upon receipt of the admission of liability shall allow the insurer a period of not more than sixty day to settle the claim or judgment out of court and both the insurer and the claimant or judgment debtor or his representative commit to arbitration or mediation during that period before resorting to court.

2. If, without reasonable excuse, any person fails to comply the provisions of this section, or willfully makes any false statement in reply to any such demand as aforesaid, he shall be guilty of an offence."

16. As per the documentation I do not find that it serves no use purse serve to reinstate a hopeless appeal with a view of dismissing it.

17. Secondly, the requisite notices were served and the cause was not shown why dismissal should not be done. There was no loss of the file from the court below all actions were done the Appeal as dismissed.

18. The applicant was aware of the hearing date having been served by the Court and having notified twice through: -

a. Automatic CTS messaging Ltd.

b. The cause list at Kenya Law.

19. A represented party cannot just sit on their laurels and wait for the case to fix itself for hearing. Order 35 provides as doth: -

" 35. Dismissal for want of prosecution [Order 42, rule 35.]

(1) Unless within three months after the giving of directions under rule 13 the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty either to set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal."

20. The matter was dismissed 2 years and a few months after filing a memorandum appeal. Not even proceedings were paid for. Indeed, it is a plain lie that the file could not be traced. Who fixes appeals for hearing physically, anymore? Every matter that has ever had a date this year, continues to have a date unless dismissed. A review of the efiling platform will show the Appellant the status. I refuse to board.

21. It is such conduct that Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the reasoning of Madan J, (as he then was) in the case of *N vs. N* [1991] KLR 685. The Learned Judge lamented as follows:

Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or

no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in N vs. N [1991] KLR 685 when he expressed himself in the following terms:

"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

22. In the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969) EA 696, Law JA stated as doth: -

In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha's case purported to follow the decision of Windham m C.J. in Mulji v Jadavji, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an l alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed."

23. In the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, HON. Justice L. L. Naikuni, stated as doth: -

"...the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words, if the delay is satisfied with the Plaintiff's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available. "This court on the legal ration of Order 17 (2) (3) of the Civil Procedure Rules, 2010 relies on the decision of "Investment Limited –Versus - G4s Security Services Limited (2015) eKLR where court held :-

"This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of *the Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "Sword of the Damocles". But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of *the Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff."

24. In this case the Applicant failed to aid the court in administration of Justice. The applicant has no approached equity with clean hands. They have not fully explained their indolence. Being a discretionary order, reinstatement cannot be given to a party who tries to overreach. Doing too little

too late is not enough. In *Amina Karama v Njagi Gachangua & 3 others* [2020] eKLR, justice Y M Angima held as doth: -

> "20. It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of Ibrahim Mungara Mwangi v Francis Ndegwa Mwangi [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99:
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> "The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing."

25. I say no more. The application is dismissed with costs of 20,000/= to the respondent.

Determination

26. The upshot of the foregoing is that I make the following orders: -

    i. The application date 27/9/2023 is dismissed with costs of 20,000/=

    ii. The same shall be paid within 30 days, failing which execution do issue.

    iii. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF DECEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Bosire for the Appellant/Applicant

Miss Caroline Mboku for the Respondent

Court Assistant - Brian