



**Waqo v Nation Media Group & 2 others (Civil Suit 202 of 2018)
[2024] KEHC 9611 (KLR) (Civ) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9611 (KLR)

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

CIVIL

CIVIL SUIT 202 OF 2018

CW MEOLI, J

JULY 15, 2024

BETWEEN

HALAKE D WAQO PLAINTIFF

AND

NATION MEDIA GROUP 1ST DEFENDANT

TIMOTHY WANYONYI 2ND DEFENDANT

SAM KIPLAGAT 3RD DEFENDANT

RULING

1. For determination is the motion dated 28.02.2023 by Halake D. Waqo (hereafter the Plaintiff) seeking *inter alia* that the court be pleased to set aside the order made on 14.10.2022 dismissing the suit herein for want of prosecution; that the suit herein be reinstated and heard on merit. The motion is expressed to be brought under Sections 1A, 1B & 3A of the Civil Procedure Act (CPA) and Order 51 Rule 1 of the Civil Procedure Rules (CPR). It is premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by the Plaintiff.
2. The gist of his deposition is that the suit was dismissed on 14.10.2022 for want of prosecution; that the matter was last in Court on 03.10.2019 when it was scheduled for hearing was adjourned at the behest of counsel for the Plaintiff to enable him file further witness statements ; and that the Court directed that a fresh hearing date be fixed at the registry. He goes on to depose that after the filing the witness statements, efforts were made to set down the matter for hearing through several letters from his counsel to the defence counsel inviting the latter to attend date fixing at the Court registry for purposes of fixing a hearing date. He states that the suit was adjourned on subsequent hearing dates prior to the Notice to Show Cause (NTSC) why the suit should be dismissed, issued by the Court on



- 03.08.2022. He claims that the postage stamp thereon indicates that the NTSC was posted after the scheduled hearing date of the NTSC.
3. Raising argumentative matters on the propriety of the service of the NTSC, the deponent states that the NTSC was only received at counsel's office on 31.01.2023. He thus maintains that failure by counsel to attend Court was inadvertent and occasioned by the NTSC being received after the scheduled hearing date. Emphasizing further that prior to dismissal of the suit, his counsel never failed to attend Court on any occasion and had been diligent in taking steps towards progressing it. He asserts that he has a lawful claim and failure to reinstate the suit will be prejudice him by curtailing his right to access to justice. He concludes by deposing that the motion has been brought timeously and therefore it is in the interest of justice that he be accorded an opportunity to prosecute the suit.
 4. Nation Media Group Limited, Timothy Wanyonyi and Sam Kiplagat (hereinafter the 1st, 2nd, & 3rd Defendant/Defendants) opposed the motion through grounds of opposition dated 11.12.2023. Therein taking issue with the motion on grounds that the Plaintiff has not provided any good and sufficient reasons to explain the delay in prosecuting the matter since the last date it was in Court, or shown any efforts taken to set down the matter for hearing. Further that the Plaintiff has not explained and/or attempted to explain the delay in setting down the matter for hearing after 23.03.2021; and that the Plaintiff has not provided a good and sufficient reason to justify his absence or that of his counsel on 14.10.2022 for hearing of the NTSC.
 5. The grounds further assail the application as legally flawed and fatally defective for not invoking the relevant and applicable provisions of the law; that the Plaintiff is guilty of inordinate and inexcusable delay and therefore not deserving of any of the orders sought; that the Plaintiff has not placed sufficient material to justify the exercise of the court's discretion in his favour; that it would be unfair and unjust to reinstate the suit relating to a cause of action that arose over four (4) years ago to the prejudice of the Defendants; and that no useful purpose will be served by setting aside the dismissal order as the suit in any event stands dismissed by virtue of provisions of Order 17 Rule 5 of the CPR.
 6. The motion was canvassed by way of written submissions. Counsel for the Plaintiff opened his submissions by restating the affidavit material in support of the motion and invoked Section 3A of the *CPA*, Order 12 Rule 7 of the CPR, the decision in *Ivita v Kyumbu* [1984] KLR 441 as cited in *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 Others* [2021] eKLR, *HAM v SOS* [2021] eKLR and *Bilha Ngonyo Isaac v Kemu Farm Ltd & Another* [2018] eKLR. To support the submission that reinstatement of a suit is discretionary; that equity will not suffer a wrong going without remedy and that the Plaintiff has demonstrated the steps taken to ensure that the suit was prosecuted expeditiously. It was further argued that failure to attend Court for the NTSC was not deliberate, the notice having been received after the date the NTSC was due to be heard. Hence, it would be prejudicial to drive the Plaintiff away from the seat of justice.
 7. On behalf of the Defendants, counsel asserted that the discretion of the court to set aside ought to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion of otherwise to obstruct or delay the course of justice. Counsel argued that no explanation has been offered for delay in prosecuting the suit and that the Plaintiff cannot hide behind the date of the postage stamp of the NTSC having previously failed to take steps in progressing the matter after 23.03.2021. It was further contended that no evidence was adduced to demonstrate the allegations that the NTSC was received on a date after the scheduled hearing and that service was duly effected by way of registered post.



8. Counsel citing Section 17 Rule 1(2) of the CPR and the decision in *Fran Investments Limited v G4S Security Services Ltd* [2015] eKLR, submitted that the rule requires the Court to give notice but not to serve the NTSC before dismissing a suit for want of prosecution. It was further posited that in the absence of any explanation why the Plaintiff had not taken any steps to set down the suit for hearing since 23.03.2021, the Court should find that the delay of almost two (2) years is inordinate and cannot be attributed to inadvertence, excusable mistake or error on the date of the stamp on the NTSC. The decision in *Patrice Kipkemei Chepkwony v National Bank of Kenya Limited* [2016] eKLR was cited in the foregoing regard.
9. Counsel contended further that the present application was filed nearly five (5) months after the dismissal of the suit which delay has since not been properly explained. That the said delay and in prosecuting the suit amounts to abuse of the Court process and that the Defendants are likely to be prejudiced by reinstatement of the suit. Counsel here citing the decisions in *Municipal Council of Embu v Postal Corporation of Kenya* [2014] eKLR and *Bilha Ngonyo Isaac v Kembu Farm & Another* [2018] eKLR. In conclusion, it was submitted that the motion ought to be dismissed with costs.
10. In rejoinder by way of supplementary submissions based on the cases of *Ibrahim Athman Said v Ibrahim Abdille Abdullah & Another* [2014] eKLR and *Stephen Ngugi Ndegwa & 3 Others v Njogu Mang'ethi & 3 Others* [2021] eKLR, counsel for the Plaintiff asserted that in light of the Plaintiff's deposition in support of the motion, the trial Court was obligated to make an inquiry as to whether there was proper service of the NTSC before proceeding to dismiss the suit for want of prosecution. Further relying on Article 25 & 50 of the *Constitution* and the decision in *Radio Jambo Trading as Radio Doldings International Limited v Communications Authority of Kenya* (Appeal 1 of 2019) [2021] KECMAT 453 (KLR), he argued that through dismissal of the suit, the Plaintiff was condemned unheard, which alone is sufficient reason to set aside the orders made on 14.10.2022 and thereby reinstate the suit. Finally asserting that the Plaintiff has demonstrated efforts to prosecute the case and that motion was timeously filed.
11. The Court has considered that material canvassed in respect of the motion and has equally taken the liberty of perusing the entire Court record. Undoubtedly, the Plaintiff's suit was dismissed for want of prosecution vide a short order and or ruling delivered on 14.10.2022 by Chepkwony. J. on the basis of the NTSC dated 03.08.2022. The NTSC was issued pursuant to Order 17 Rule 2 of the CPR. The Plaintiff's motion invokes *inter alia* the provisions of Section 3A of the *Civil Procedure Act*, the latter which reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". Nevertheless, the more relevant provision, Order 17 Rule 2 of the *CPR*, not invoked by the Plaintiff provides 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) A suit stands dismissed after two years where no step has been undertaken.



(6) A party may apply to court after dismissal of a suit under this Order.”

12. Rule 2(6) of the foregoing Order grants the Court jurisdiction to entertain an application of this nature. As correctly asserted by the respective parties, the discretion of the Court to set aside a dismissal order while unfettered, obligates a successful applicant to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court’s discretion in their favor.

13. In the case of *Shah v Mbogo* and Another [1967] EA 116 the rationale for the discretion was spelt out as follows: -

“The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

14. The principles enunciated in *Shah v Mbogo (supra)* were further amplified further by Platt JA in *Bouchar International (Services) Ltd v. M’Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal measure in this matter. Indeed, the dismissal order issued herein is equivalent to a judgment, as it determined the suit conclusively by way of dismissal.

15. From his affidavit material, the Plaintiff’s explanation is two-pronged. First, that despite successfully fixing the matter severally for hearing, the suit was adjourned on the scheduled hearing date necessitating the fixing of further hearing dates, and hence he was not indolent. Secondly, the NTSC while issued by the Court on 03.08.2022 was according to the postage stamp thereon posted after the date of the hearing of the NTSC. Thus, he was condemned unheard. The Defendants have challenged this position with verve pointing out that the Plaintiff has not provided any good and sufficient reasons to justify the delay in prosecuting the suit and he cannot hide behind the postage stamp on the NTSC, having failed to take any steps to set down the matter for hearing since 23.03.2021

16. To contextualize the rival arguments and contentions above, it is apposite to revisit the record and restate the pertinent events. The suit herein was filed on 17.08.2018. The Defendants entered appearance and subsequently filed their statement of defence on 20.09.2018. The Plaintiff through counsel fixed the matter for pre-trial directions on 20.02.2019. The Deputy Registrar then certified the suit ready for hearing with directions that a hearing date be fixed at the registry. In compliance the Plaintiff set the suit down for hearing on 03.10.2019. As correctly deposed by the Plaintiff, when the suit came up for hearing before Njuguna, J. on the latter date, it was adjourned at the behest of the Plaintiff’s counsel, the Court directing that witness statements by both parties be filed and served within twenty-one (21) days.

17. The record further indicates that following the above directions the Plaintiff attempted to set down the matter for hearing on 04.06.2020 and 23.03.2021 but there was no subsequent activity in the matter until the Court issued the NTSC dated 03.08.2022. The NTSC was listed on 14.10.2022 before Chepkwony. J., in the absence of any party. The Court upon being satisfied by the return on service on record proceeded to dismiss the suit for want of prosecution, by stating as follows; -

“Notice having been given to show cause why this suit should not be dismissed and there being no satisfactory response, the suit is hereby dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules.” (*sic*)



18. The Case Tracking System (CTS) reveals that it was not until 06.03.2023 that the Plaintiff moved this Court via the present motion. Regarding the date of postage on the face of the NTSC, (See annexure marked HDW-3), it appears to contradict the contents of the return of service by the Court Process Server dated 22.09.2022 and the NTSC itself, both which indicate that the NTSC was presented to the High Court Mail Registry Section for postage on 24.08.2022. Annexure HDW-3 relied on by the Plaintiff which bears a franking stamp indicates postage of the NTSC on 28.11.2022 well after the scheduled hearing set for 14.10.2022. Inexplicably, this suggests that the NTSC was posted more than a month after the NTSC was scheduled to come up for hearing, despite the NTSC being received at High Court Mail Registry Section for postage on 24.08.2022. This appears strange though likely, especially since the Defendants too did not attend court for the NTSC or tender evidence of postage contrary to controvert the Plaintiff's material. That said, without the benefit of the copy of the NTSC posted, the court was entitled, on the strength of the NTSC and affidavit of service on record, to dismiss the suit as it did, in the absence of cause being shown.
19. Moving on, the discretion to set aside a dismissal order involves exercise of discretion which is "intended to avoid injustice or hardship resulting from accident, inadvertency or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice". The Plaintiff's affidavit while reasonably accounting for the period prior to 23.03.2021 is reticent on attempts made to prosecute the suit in the period running from 23.03.2021 to 14.10.2022 when it lay dormant. Further no explanation has been offered for the lengthy delay in filing the present motion (between 14.10.2022 and 06.03.2023). The delay is over one year thus inordinate and compounded by delay in bring in the instant motion.
20. The period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the Court's discretion. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR succinctly addressed the argument of delay as follows;-
- "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....."
21. There is no evidence that between 23.03.2021 to 14.10.2022, the Plaintiff made any significant attempts to progress his matter. Cases ultimately belong to the litigants who lodge them in court. And at a time when Courts are deluged with heavy caseloads, it is not enough for a party caught up with dismissal to blame peripheral factors without acknowledging his responsibility in respect to the dismissal of the suit. Parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the *Civil Procedure Act*. Prolonged delay in the prosecution of claims defeats the overriding objective and may well result in unjust outcomes for the innocent party.
22. The suit herein has been pending for over six (6) years now. While it may well be that the NTSC was not duly served on the Plaintiff, the Defendants' assertion that the Plaintiff's explanation for the delay in prosecuting the suit and filing the instant motion appears specious appears justified. That said, the fundamental question to be considered, is whether justice can still be done between the parties. Additionally, the court concurs with the sentiments by the Defendants that re-opening the matter could spell prejudice against them given the nature of the suit and the passage of time.



23. This important consideration was emphasized in *Ivita v Kyumbu* [1984] KLR 441, namely, that extended delay impacts adversely on the possibility of a fair trial being eventually held, as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. The Defendants while apprehensive concerning the reinstatement of the suit have not alluded to any potential difficulty in mounting their defence, in such event. The court notes that the matter has already been certified ready for hearing and the court can give appropriate directions with a view to curbing further delay on the part of the Plaintiff.
24. Moreover, denying a party the right to be heard should be a matter of last resort, as held in *Pitbon Waweru Maina v Thuka Mugiria* [1983] eKLR. In that case, the Court of Appeal while asserting that the discretion of the Court to set aside is wide and unfettered spelt out relevant considerations in an application of this nature to include, the nature of the action, whether it is just and reasonable to grant the prayer for setting aside, the prejudice on the respondent and whether he can reasonably be compensated by costs for any delay occasioned. See also *Vishva Stone Suppliers Company Limited v RSR Stone* [2006] Limited [2020] eKLR. It seems to the court that the suit is not complex, being one founded on defamation and can therefore be heard expeditiously. Any prejudice to the Defendants can be compensated through an award of costs.
25. All considered, it appears to the court that the justice of the matter lies in allowing the motion conditionally, to facilitate the Plaintiff's right to hearing. The Court therefore allows the motion on condition that the suit be fully prosecuted by 30.11.2024 failing which it will stand automatically dismissed with costs, for want of prosecution. To expedite the matter, the court will immediately hereafter schedule a hearing date. The costs of the motion are awarded to the Defendants in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Kamau h/b for Mr. Ngatia SC

For the Defendants: Ms. Wahinya h/b for Mr. Githua

C/A: Erick

