REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3620 of 1987

CATHERINE WANJIKU NDWATI..... PLAINTIFF

Versus

JOANNE BAKERY & ANOTHER..... DEFENDANT

RULING

This is an application, by Notice of Motion, dated 20th August, 1999 brought under section 3 A of the Civil Procedure Act, Order 44 Rules (1) and

(6) And Order 16 Rule 6 of the Civil Procedure Rules praying:

"2. THAT Orders made on l0th July 1997 dismissingsuit for want of prosecution be set aside and thesuit be restored.

3. THAT an appropriate date be set for the approvaland recording of the full and final settlement of the matter."

Section 3 A makes provisions for the inherent powers of the court. Order 16 Rule 6 of the Civil Procedure Rules makes provisions for a suit to be dismissed if no step taken for three years and allows the filing of a fresh suit. It states:

"In any case not otherwise provided for in whichno application is made or step taken for a period ofthree years by either party with a view toproceeding with the suit the court may order thesuit to be dismissed; and in such case, the plaintiffmay, subject to the law of limitation, bring a freshsuit."

Although Rules (1) and (6) of order 44 have both been mentioned, the most important one is Rule (1) which states as follows:

"(1) Any person considering himself aggrieved

(a) By a decree or order from which anappeal is allowed, but from which noappeal has been preferred; or

(b) By a decree or order from which noappeal is hereby allowed,

and who from the discovery of new and importantmatter or evidence which, after the exercise of duediligence, was not within his knowledge or couldnot be produced by him at the time when the decreewas passed or the order made, or on account ofsome mistake or error apparent on the face of therecord, or for any other sufficient reason, desires toobtain a review of the decree or order, may applyfor a review of judgment to the court which passedthe decree or made the order without unreasonabledelay."

It is my view that since order 44 Rule (1) and order 16 Rule (6) are specific and clear, I have no good reason to revert to section 3 A of the Civil Procedure Act.

This Civil Suit was filed in this court on 11th September 1987. By thetime the case file was listed before me for dismissal under order 16 Rule 6,no step had been taken to proceed with the suit for a period more than threeyears. It was 10 years if taken from the date 28th September 1987. It wasnine years, almost 10, if taken from the date 8m January 1988 or 13thJanuary 1988. There is a record of change of Defendant's advocate doubledated 28th October 1993 and 1st November 1993. But it has not beendisputed that the suit, at the time of its dismissal on 10th July 1997, did fallwithin the armpits of order 16 rule 6 of the Civil Procedure Rules.

It is apparent the first page of the record, or memo, in use when thiscourt case file was brought to me for dismissal is missing. The memo dated28th September 1987 from which the period of 10 years was reckoned istherefore missing. Instead there are three memos of later dates each onehaving the effect of reducing the 10 year period that was reckoned. I am surethat if those three memos were there on 10th July 1997, it could not havebeen said that the last step had been taken on 28th September 1987 and thattherefore there had been a delay of 10 years. It appears something is wrongsomewhere at the High Court Civil Case Registry. I suspect Registry stafftogether with the Advocates handling or who have handled this suit. This is the third case I have noticed having this problem. Just before this case, I hadHCCC No.3785 of 1989 where the inordinate delay period of 8 yearsreckoned from the memo dated 5th October 1989 as at 12th November 1997was reduced to a paltry six months by a memo made in 1993 thereby forcingme to allow the Application to set aside the dismissal of the suit entered on10th July 1997. The page with the memo dated 5th October 1989 was nowhere to be seen. And the page with the memo made in 1993 disguised as page one

These type of applications have started coming up two years after the dismissal of the cases affected. Perhaps the culprits have been planning their strategies. The head of the High Court Civil Registry and the DeputyRegistrars handling cases there should take steps to arrest that bad trend.Otherwise many more problematic applications similar to this one are likelyto come up as I dismissed many cases under Order 16 Rule 6 of the CivilProcedure Rules.

It should be understood that before 10th July 1997; I personally did notknow the existence of this suit in this court. But I was aware, like everybodyelse, that there was a general public complaint that cases are taking long toget finalized in our courts of law. Those who complain always and squarelyblame courts for the delays.

The then Chief Justice was concerned about those complaints and oneof the steps he took to try and reduce the number of cases pending in thiscourt, because of delays, was to advise the dismissal of those cases that fellwithin the armpits of Order 16 Rule 6. He picked on me and specificallyassigned me the duty of fixing for hearing and hearing pre -1990 Civil Casesin this Court with strict instructions to avoid further delays in the cases sohandled. That included civil cases in which parties were sleeping and werecovered by Order 16 Rule 6 of the Civil Procedure Rules.

I had a very hard time moving the cases in which parties appearedbefore me. Contrary to expectation that such parties would come to courtanxious to move a head to complete their pending cases, virtually almost allcame to court with intent to cause further delays and therefore the cases Iheard and completed, I did so because of forcing the parties, at least one ofthem would be unwilling, to move a head and have the cases heard tocompletion. I had to encounter and endure the wrath of many an advocate.A number may have appealed against my decisions.

For the sleeping parties where I had to handle their cases under Order16 Rule 6, although that rule does not require the giving of notice to thesleeping parties, I decided, on my own, to give notice to the parties. I was giving two weeks notice not only attached to the court cause list but alsoposted on the Notice Boards in the court corridors. On the date each groupof files was due for dismissal, I would not dismiss any without appearanceuntil after lunch. That was in my effort to allow as much time as possible forparties who did not want their cases dismissed to appear and prevent thedismissals. Advocates were well aware of this as it is an exercise I undertookfor quite a while.

In the instant case, no body appeared and I went a head to dismiss thecase on that 10th July 1997 as had been specified in the notice.

It is therefore very wrong, as it is misleading, for the Applicant'scounsel to tell the court that his client's case was dismissed without noticehaving been given. Counsel could say that but could not say whether hisclient was, under the rules, entitled to such a notice. Even if I had not givenany notice therefore, his client in my view was not entitled to use failure togive the notice as a ground for this application.

Back to what happened, the suit was dismissed on 10th July 1997.The Plaintiff/Applicant, who by then had an advocate Mr. Kihara Mutu, wenton sleeping for a further full year up to 31st August 1998 when she filed herfirst application, a Chamber Summons, seeking to set aside the order made on 10th July 1997 dismissing her suit.

I heard that application and dismissed it on 18th September 1998.There was no appeal against my ruling and perhaps the same advocate didnot want to re-appear before me in the instant application. There was changeof advocates whereby Mr. Ogoti Nyangena took over the case. He found noproblem coming to me with this second application by the Plaintiff. Thistime it is a Notice of Motion supported by an affidavit by Mr. OgotiNyongena who filed his notice of appointment on 20th August 1999 togetherwith the Notice of Motion of same date.

Surprisingly Mr. Nyangena omits to mention certain things he shouldhave mentioned in his affidavit, while he mentions some things withoutdisclosing his source of information. He talks of the loss of this courts casefile in this matter but has not obtained an affidavit to that effect from theconcerned officers in the High Court Civil Registry. He mentions MessrsKihara Mutu Advocate, SS. Danji Advocate and K. Mwaura & CompanyAdvocates in connection with certain activities without bothering to obtainaffidavits from them. He does not disclose that he was Mr. Kihara Mutu'sassistant in this matter. He does not disclose when he left the firm of MessrsKihara Mutu & Company Advocates. He talks of an application made on 18th September 1998 by the Plaintiffs advocate to set aside the dismissal ofthe suit and adds that the judge who heard the application erroneously ruledthat he had no jurisdiction to restore the suit. He does not mention the Judgeand the date that Judge made the erroneous ruling.

I have checked through the case file. I do not find the said applicationmade on the 18th September 1998. Moreover if there had been such anapplication referred to in paragraphs 13 and 14 of his affidavit dated 20thAugust 1999,1 wonder what will have been the purpose of the ChamberSummons the Plaintiff

filed on 31st August 1998 dated that same day. I havesaid I heard the application dated 31st August 1998 and dismissed it on 18thSeptember 1998 and there has been no appeal against my ruling. If that isthe ruling counsel for the Applicant is referring to, it does not have lack ofjurisdiction as the ground for dismissing it (the Chamber Summons). Buteven if it did, and it were found that that was an error, such an error in aruling on 18th September, 1998 cannot be used as a ground to set aside ajudgment or a dismissal of a suit dated 10th July 1997. It can and shouldonly be used as a ground to set aside the ruling dated 18th September 1998.But that ruling is not being challenged in the Notice of Motion before me to-day. See prayer (2) in the Notice of Motion.

How then can I set aside the judgment dismissing the suit on 10th July1997 when an application to set aside that judgment was dismissed on 18thSeptember 1998 and that dismissal of 18th September 1998 still subsists anddoes so unchallenged.

I have said that under order 16 Rule 6, of the Civil Procedure Rules, nonotice is required although, contrary to what the learned counsel says inparagraph 16 of his affidavit, I actually gave notice. Not only was itunnecessary but also cumbersome to file a copy in each case file as I wasdealing with about 100 case files on each occasion a part from my daily loadof case files for interpartes hearing, applications and main suit hearings.

I should add that under order 16 Rule 6, no arguments are required aswell as knowledge of the parties and that a dismissal of a suit entered shouldbe a perfected order needing nothing else more to perfect it, unless there areamendments to that rule not yet brought to my attention. A mereadministrative procedure failure to extract a formal order from a judgmentdoes not, in my view, depreciate the relevant court judgment or orderdismissing a suit. Otherwise the perfection of court orders must be at themercy of parties including parties, like in this suit, unwilling to extract formalorders thereby making the court orders affected to remain imperfect indefinitely. I hear Courts submit to that. I would not like it.

In the same light I should now comment on prayer (3) in the Notice ofMotion. Not only is that prayer superfluous but also misconceived as no suchan order is necessary, in an application like this one, to fix a date for theapproval and recording of a settlement. Dates are taken as a matter of causeat the court Registry where case files are kept.

With regard to prayer (2), the Application is for review under order 44Rule 1. But the application says completely nothing about review. Instead itis talking about the setting aside. "Review" and "setting aside" are twodifferent things. That is why "review" is handled under Order 44 Rule 6while "setting aside" is handled under Order IXB Rule 8 of the CivilProcedure Rules. Counsel must therefore be too smart to come to court underOrder 44 Rule (1) when all he wants is relief under Order IXB Rule 8 whichhe has not cited for the application.

Furthermore, a look at order 44 Rule (1) which I have already set outabove clearly reveals that there are specific grounds upon which a notice ofmotion brought under those provisions must be based. That is basically whyit is insisted that such ground or grounds must be specifically stated in thebody of the Notice of Motion. If not so stated, the Notice of Motion becomes incompetent. Those grounds are:

(1) The discovery of new and importantmatter or evidence which, after theexercise of due diligence, was notwithin the knowledge of the Applicantor could not be produced by him at thetime when the decree was passed orthe order made.

(2) Some error or mistake apparent on theface of the record.

(3) Any other sufficient reason.

And any other sufficient reason must be a reason related to the grounds in (1)and (2) above.

But looking at the five reasons given in the body of the Notice ofMotion before me, I do not think any of them falls within the three categoriesstated above. Reminding me in grounds (a) and (b) of the Notice of Motionthat I have inherent powers and jurisdiction and going on to repeat to mewhat I was told on 18th September 1998 that the parties endeavoured to settlethe matter out of court and that they now wish to have their settlementapproved and recorded and adding that if the case is restored, theDefendant/Respondent will not be deprived of any defence they originallypleaded; all do not satisfy any of the requirements of order 44 Rule..

I said above I should not use section 3 A the Civil Procedure Act whenthere are specific provisions of the rules properly governing the issues inquestion. Section 3 A is properly used where there are no specific provisionsgoverning the issue to be solved. If on the other hand that section is appliedto defeat or by-pass specific provisions of the law, including rules under theCivil Procedure Rules, then the tendency would be to create chaos in the law.People will not be knowing what they are doing although they will bedeceiving themselves thinking they know what they are doing.

That leads me to Order 16 Rule 6 of the Civil Procedure Rules. It wasenacted in the rules after section 3 A of the Act had been enacted. Even ifSection 3 A came later as a result of an amendment, it was enacted with thefull knowledge that Order 16 Rule 6 existed. The two, that is the section andthe rule, were left to co-exist and both have been in operation for years.Each had a purpose to serve. Order 16 Rule 6 was intended to deal withparties who file cases in courts and thereafter go to sleep. The Legislaturehad the intention of limiting time so that those cases do not have to remainpending in our courts indefinitely resulting into backlogs. A limited period ofthree years was fixed and this, to my mind, is a very good piece of legislationif we are really concerned with the backlog of cases resulting from delays in our courts.

I have the impression that this area of problems in the administrationof justice in our courts does not bother parties and their advocates becausealways when a finger is pointed out as to who is responsible for the backlogof cases or for delays in the administration of justice in our courts, that fingeris never directed at the parties and their advocates. It is always directed atCourts, Judges and Magistrates. In those circumstances, parties and theiradvocates can go to courts. File their cases. Thereafter go to sleep assoundly as possible and as long as they wish, without a bother because it isthe court and the judge or magistrate to blame for any delay that may beresulting from that sound and deep sleeping of the parties and advocates. Butwhen the Chief Justice or the court one day wakes up and tries to reduce thebacklog using Order 16 Rule 6, for example, the court is told by the sameparties who have been sleeping that the court is causing injustice to theparties and that section 3 A of the Civil Procedure Act be applied to defeatOrder 16 Rule 6 of the Civil Procedure Rules.

Defendants/Respondents like Joanne E. Bakery and Phillip KiplagatChangwony in this suit can therefore afford to keep away from an applicationlike this Notice of Motion, although they are fully aware of it, thereby giving the Plaintiff's counsel a field day to tell and show the court anythingincluding the alleged settlement which I found out, on the 18th September1998, to be contained in a letter dated 28th July 1998 being one year after Ihad dismissed this suit on 10th July 1997. An alleged settlement after the suithad been dismissed and the dismissal had woken up the slumbering parties.Tactics to defeat what the court has done thereby, not only inconveniencingthe court, but also adding more and unnecessary work, hearing oneapplication after another and may be the main suit so that Order 16 Rule 6 ofthe Civil Procedure Rules is rendered useless.

In that rule, consideration of the problem of limitation was done. Thatis why that problem is specifically referred to in the rule which also has aminimum fixed period of three years after which a pending suit may bedismissed for want of prosecution. I think the rule was intended to have theparties who sleep be caught up by the law of limitation so that they do nothave the opportunity to come back to court to start sleeping a fresh or to keepadding to the already existing backlog of cases.

To say therefore that this suit should be revived because the Plaintiffwill be barred by the law of limitation Act from bringing a fresh suit is to saythat Order 16 Rule 6 should be rendered useless. Why that should be done by the court I see no good reason for the court doing so especially in the circumstances of this case which I find distinguishable from the case of Rawal v The Mombasa Hardware Ltd. (1968) E.A. 392 where it was held that the remedy provided for in order 16 Rule 6(that is of bringing a fresh suit) was not intended to be exhaustive and the inherent jurisdiction vested in the court by Section 97 of the Civil Procedure Act(Similar to our Section 3 A) was for that reason not excluded.

It is better to note that the decision in the case of Rawal by the Court of Appeal did not restore the main suit. The appeal was against a ruling dismissing an interlocutory application to restore the main suit. The Court of

Appeal did not therefore apply the inherent power under Section 97 to restore that suit as there was no appeal for restoration of the suit before it. The decision of the court merely advised the judge in the re-trial, ordered in the High Court, to use section 97. The Court of Appeal said as per Law J. A. who wrote the leading judgment with which all the other three judges agreed:

"I would allow this appeal and order the applicationfor the re-institution of the suit be returned to ajudge of the High Court for consideration as towhether, in the exercise of the court's inherentjurisdiction and of his general discretion a case hasbeen made out so as to justify the re-institution ofthis particular suit and the setting aside of the order for its dismissal."As to whether that was done during the re-trial, counsel for thePlaintiff/Applicant in the instant Notice of Motion has not brought to myattention. I would have been interested to know what happened.

From the judgment of the Court of Appeal alone therefore, it is notproper to conclude that section 97 of the Civil Procedure Act was applied torestore the main suit.

But assuming that section 97 was subsequently applied by the HighCourt, there are a few peculiarities in the Notice of Motion before me whichmake the case of Rawal distinguishable from the instant case.

First, the application to restore the suit in Rawal's case was broughtunder section 97 of the Civil Procedure Act only. Before me the Applicantrelied on Section 3 A of the Civil Procedure Act as well as Order 44 Rule 1and Order 16 Rule 6 of the Civil Procedure Rules. The problems raisedbefore me as a result of the Applicant having included the Civil ProcedureRules did not therefore arise in the case of Rawal. One may ask. If theApplicant wanted to rely on Section 3 A of the Civil Procedure Act, why didshe at the same time say was relying on Order 44 Rule 1 and Order 16 Rule6, especially Order 16 Rule 6 which provides own remedy"

The second peculiarity in the instant Notice of Motion becomesapparent when it is realised that the use of inherent powers under section 3 A,especially in circumstances where there are other specific provisions likeOrder 16 Rule 6 governing the matter in question, is discretionary dependingon the circumstances of each case. The back ground in the case of Rawal isnot apparent and I do not know it.

In the Notice of Motion before me, I know its court back ground as Iam the trial judge and I have already outlined it above. A bad picture ispainted from that background, especially looking at the Plaintiff/Applicantand her advocates. There was too much and too long sleeping, and the factthat the then Chief Justice specifically assigned me the hearing and disposalof pre 1990 Civil cases because of public complaints about delays andbacklog of cases in this court, brings out circumstances not found in the caseof Rawal where the Court of Appeal thought it was the High Court's Orderwhich was going to cause injustice to the Appellant

In the instant suit the parties have already caused injustice tothemselves by leaving it here un prosecuted for 10 or so years unless justicedelayed is not justice denied. They now talk of a settlement to record but as Ihave pointed out, they never had one by the time I was dismissing the suit on 10th July 1997 and it was not until one year later that they came up withsomething framed on 28th July 1998 to hoodwink this court into granting thePlaintiff's first application dated 31st August 1998. I dismissed thatapplication. These are parties who could still go back to sleep if their suit isrestored.

Moreover by adding to the backlog of pending cases in this court andinsisting that their case remains, the parties will be extending the injusticethey have caused to themselves to parties in other cases in this court whosetime for hearing will be encroached upon by this case thereby causing delay.It may not be appreciated, but here I am handling this suit for the third timeon same issue of dismissal of the suit. Subsequent to 10th July 1997 whenthe court has been handling this suit on the same issue of dismissal, the courtwould have been handling other cases, - cases properly deserving to behandled on those dates. They were not handled because of this case That isdelay to those cases yet justice delayed is justice denied. It is injustice.

Of cause everybody else will say that the injustice is being cause by thecourt. The parties before me are not therefore bothered, because delays andresulting injustice caused by parties to a suit are deemed to be delays andinjustice caused by the court. However in those circumstances I would not be prepared to exercise my discretion, under section 3 A in favour of thePlaintiff/Applicant.

Be that as it may, the third peculiarity I find in this Notice of Motionbefore me as I have already pointed out elsewhere, is that Order 44 Rule 1 ofthe Civil Procedure Rules for review is being relied upon yet no review isasked for. Instead it is the setting aside of the dismissal that is being askedfor. As a result, the provision of Order 44 Rule 1 were not complied with.These constitute fatal defects, which were not found in the case of Rawal.

Fourthly, and as I have also pointed out elsewhere, the error apparenton the face of the record which the Applicant tried to identify was alleged tobe in the ruling dated 18th September 1998. The Applicant tried to identifythat error, improperly, in the supporting affidavit - paragraphs 13 and 14. Anerror which is not actually on the face of that record. But assuming that it isthere and that the way it is brought is acceptable, I have ruled that an errorapparent on the face of a ruling dated 18th September 1998 dismissing aninterlocutory application to restore the main suit cannot form a ground forreviewing the dismissal of the main suit dated 10th July 1997. This type ofsituation was not in the case of Rawal, and reveals the incompetency of thisapplication which should therefore fail.

Fifthly, since my ruling dated 18th September 1998 dismissing thePlaintiff’s first application to restore the main suit herein by setting aside thedismissal of the suit dated 10th July 1997 still subsists, albeit unchallenged,the Notice of Motion dated 20th August 1999 now before me is asmisconceived as it is irregular, if not res judicata, and is therefore notproperly before me and ought to be dismissed. This situation was not in thecase of Rawal where the appeal was from the ruling dismissing the Plaintiffsfirst application to restore the main suit.

In conclusion therefore the above five peculiarities in this matterconstitute five grounds each one, in my view, of them sufficient to have thePlaintiff's Notice of Motion dated 20th August 1999 dismissed. The fivegrounds put together, therefore, the Notice of Motion must be dismissed andit is hereby so dismissed.

There will be no order for costs of the application as theDefendant/Respondent never bothered to say anything or to appear.

Dated this 4th day of November 1999.

J.M. KHAMONI

JUDGE