Registered Trustees Mission in Action Nakuru Baby Orphanage v Rigiri & another (Civil Suit E002 of 2023) [2024] KEHC 15958 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15958 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT E002 OF 2023

HI ONG'UDI, J

DECEMBER 18, 2024

BETWEEN

REGISTERED TRUSTEES MISSION IN ACTION NAKURU BABY ORPHANAGE ..... APPLICANT

AND

DAMARIS RIGIRI ..... 1ST RESPONDENT

CYRUS KIVUTI ..... 2ND RESPONDENT

RULING

1. In the Notice of motion dated 21st August 2024 the plaintiff herein prays for the following orders;

   i. Spent.

   ii. This honourable Court be pleased to vacate, review, rescind, vary, and/or set aside the proceedings and orders issued on 7th May, 2024, and reinstate the plaintiff's case.

   iii. This honourable Court be pleased to review, rescind, vary, and set aside orders issued on 17th May, 2024 unfreezing accounts and properties belonging to Mission in Action Baby Orphanage and reinstate the interlocutory orders intervening before 7th May 2024.

   iv. The Honourable Court be pleased to set aside subsequent orders issued pursuant to the dismissal of the Plaintiff's case.

   v. That upon reinstatement, the said Application be heard on a priority basis.

   vi. The suit be reinstated for proper determination of the plaintiff's case on merit.

   vii. The firm of K.O.M ADVOCATES be deemed as properly on record.

   viii. Costs of the Application be in the cause.

2. The application is premised on the grounds on its face as well as the affidavit of one Slavica Summerscales, an official of the plaintiff/applicant sworn on even date. She deponed that the non-attendance on 7th May 2024 was due to the negligence of the law firm formerly on record for the plaintiff/applicant. Further, that the new advocate shared the court link but all her attempts to log into Court were futile.

3. She further deponed that owing to the non-attendance of her advocates on record, the suit was dismissed for want of prosecution. She only came to know of the dismissal on 16th June, 2024 through third parties and any attempts to seek clarification on the matter from the defendant/respondents had been futile. That due to the failure of communication, she had to contact a new law firm for assistance K.O.M ADVOCATES.

4. She deponed that the defendants/respondents had since filed a chamber summons dated 16th May, 2024 seeking for un-freezing of accounts and lifting of injunctions placed in respect to movable properties belonging to Mission in Action Nakuru Baby Orphanage and the said orders sought were granted on 17th May, 2024. With the advice of her advocate on record she deponed that it was trite law that a mistake of an advocate should not vest on an innocent litigant or affect their case.

5. The 1st defendant/respondent in response filed a replying affidavit sworn on 30th July 2024. She averred that the plaintiff's/applicant's application was incompetent and bad in Law and should be dismissed for being an abuse of the court process. With the advice of her advocates on record, she averred that matters belonged to litigants/clients and not advocates and it was therefore the client's sole duty to do prompt follow ups on updates regarding their cases.

6. She further averred that the matter came up for mention in the month of February, 2024 for purposes of fixing a hearing date and Slavica Summerscales was ably represented by her then advocate. That a date was mutually fixed and both their advocates consented to parties and their witnesses appearing physically in Court on 7th May 2024. She added that it was in the best interest of the children in the plaintiff/applicant institution that this court dismissed the applicant's application with costs.

7. The application was disposed of by way of written submissions.

Plaintiff/Applicant's submissions

8. These are dated 25th October, 2024 and were filed by K.O.M advocates. Counsel identified three issues for determination by this court.

9. The first issue is whether the application for reinstatement of the suit is merited. He submitted that the plaintiff /applicant had shown intention through prompt action in seeking reinstatement of its suit and had given a reasonable justification. He cited Order 12 rule 7, 17 rule 2(6) of the Civil Procedure Rules 2010 and the decision in Utalii Transport Company Limited & 3 Others v NIC Bank & Another [2014] eKLR where the court affirmed that dismissal of suits should be a last resort and that a hearing should be granted if the plaintiff demonstrates an intention to prosecute her case.

10. He further placed reliance on Articles 50 (1) and 159 of *the Constitution* of Kenya 2010, sections 1A, 1B and 3A of the *Civil Procedure Act* and the decisions in Wachira Karani v Bildad Wachira [2016] eKLR. Martha Wangari Karua V IEBC Nyeri Civil Appeal No. 1 of 2017, Crescent Construction Co. Ltd V Delphis Bank Limited [2007] eKLR among others.

11. The second issue is whether the orders issued on 17th May 2024 unfreezing account and properties belonging to mission in action baby orphanage ought to be set aside interlocutory and orders intervening before 7th May 2024 ought to be reinstated. Counsel submitted in the affirmative. She

further submitted that the plaintiff/applicant was apprehensive that the defendant /respondent were keen on depleting the contested properties for their personal gain to the exclusion of the vulnerable children of Mission in Action Nakuru Baby Orphanage.

12. In support this position, he relied on Order 40 rule 6 of the Civil Procedure Rules 2010 and the decision in Keesi & 2 Others (Suing as the administrator of the Estate of Jonathan Keesi Ngunzi – Deceased) v Keesi & 9 others (En (Environment & Land Case 337 of 2017) [2024] KEELC 1372 (KLR) where the court in reinstating interlocutory orders previously issued to the applicants held that;

> " The Plaintiffs have shown the steps that they have undertaken in progressing this matter to full hearing. These in my view are special circumstances that the court will consider where a matter has not been finalized within 12 months."

13. Lastly, on whether the defendant/respondent is entitled to costs of the application, the court's attention was drawn to section 27 of the *Civil Procedure Act* and Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol. 10 paragraph *16*.

14. In conclusion, he submitted that the defendants/respondents would not suffer from any undue hardship by the court allowing this matter to be heard on merits and that would serve the interest of justice.

Defendants'/respondents' submissions

15. These are dated 28th October, 2024 and were filed by S.K. Mburu & Company advocates. Counsel submitted on four grounds on which the plaintiff/applicant's application ought to be dismissed.

16. The first ground is the notice of change and the subsequent application filed by the plaintiff's incoming advocates which offends Order 9 Rule 9 of the Civil Procedure Rules. That the dismissal of the plaintiff's suit caused the closure of this file an action that is akin to judgment. Further, that the accepted principle in law is that a dismissal of a case even if caused under Order 12 Rule 3(1), amounted to a judgment in a matter, requiring parties to strictly adhere to subsequent procedures that are bound to arise post such actions by the Court.

17. He further submitted that pursuant to the provisions of Order 9 Rule 9, an incoming advocate must either execute a consent with the outgoing Advocate or make a prayer to be allowed to come on record for the plaintiff in the instant application. He placed reliance on the Court of Appeal decision in Njue Njagi v Ephantus Niiru & another [2016] eKLR and Elosy Murugi Nyaga v Tharaka Nithi County Government & another [2020] eKLR.

18. The second ground is that the application has been brought late in the day, having been filed 2 months post dismissal of the plaintiff's suit. Counsel submitted that no reason had been given for the delay in filing the application and the same ought to be dismissed. The third ground is that the plaintiff's deponent was not notarized but was instead commissioned by a resident advocate in Nairobi yet the said deponent was away in Australia during the said period. He submitted that the supporting affidavit was defective and therefore the application ought to be the dismissed.

19. The fourth ground is that the plaintiff's annexures were unmarked and unattested yet the law is very clear on how annexures should be adduced mandatorily requiring such to be marked and attested bearing the annexures stamp as stipulated in the Oaths and Statute Declaration Act. Counsel submitted that Rule 9 of the Oaths and Statutory Declarations Rules requires that annexures must be sealed and stamped. He added that the said rule stipulates that all exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with the serial letters

of identification. The courts' attention was drawn to the decisions in Jeremiah Nyangwara Matoke v Independent Electoral and Boundaries Commission & 2 others 2017 eKLR, Jaldesa Tuke Dabelo v IEBC & Another [2015]eKLR.

20. In conclusion, counsel submitted that the plaintiff's primary duty was to take steps to progress their case since they are the ones who dragged the defendants to court. Further, that the plaintiff was not interested in prosecuting its case and this had prejudiced the defendants. He placed reliance on the decisions in Tabelgaa Chepngeno Tele & 2 others v John Kiprotich Ngetich & 5 others [2022] eKLR and Mwaro & another v Charo & 5 others (Environmental & Land Case 27 of 2018) [2022] KEELC 15473 (KLR) (21 December 2022). He urged the court to dismiss the plaintiff/applicant's with costs.

Analysis and determination

21. I have carefully considered the application, affidavits and the submissions by both parties, I opine that the issue for determination by this court is whether the applicant has made out a case for reinstatement of the plaintiff's suit dismissed on 7th May 2024.

22. It is not in dispute that this court on 7th July 2024 dismissed the plaintiff/applicant's suit for want of prosecution. What the application is seeking among other orders is review of the said orders and its case be reinstated.

23. The jurisdiction of this court for review of orders is provided for under Order 45 Rule 1 (1) of the Civil Procedure Rules which provides as follows:

> "(1) Any person considering himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

24. The decision on whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu [1984] KLR 441, Chesoni, J. (as he then was) held that:

> "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the

plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

5) What prejudice will the dismissal occasion to the plaintiff?

6) Whether the plaintiff has offered a reasonable explanation for the delay;

7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"

25. Following the decision cited above, the court ought to consider whether there was inordinate delay on the plaintiff's part in prosecuting its case and whether a reasonable excuse has been given for the said delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.

26. Inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. In Allen V Alfred Mcalphine & Sons [1968] 1 All ER 543: a delay of fourteen (14) years was considered inordinate and inexcusable. However in of Agip (Kenya) Limited V Highlands Tyres Limited [2001] KLR 630 and Sagoo v Bhari [1990] KLR 459, a delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. Also, in NBI HC ELC CASE NO 2058 OF 2007 where delay of about 1 ½ years was considered not to be inordinate.

27. In light of the authorities cited above, I will proceed to examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable.

28. The plaintiff/applicant's explanation for the delay is that there was negligence on the part of her former advocates who never attended court and her attempts to log into court were futile. Further, that she came to know of the dismissal on 16th June, 2024 through third parties and any attempts to seek clarification of the matter from the defendant/respondents had been futile. The defendant/ respondents on their part have argued that matters belonged to litigants/clients and not advocates and it was therefore the client's sole duty to do prompt follow ups on updates regarding their cases.

29. The principles of law drawing upon *the Constitution* include; promoting access to justice, enforcing the principles of justice especially on substantive justice in Article 159 of *the Constitution* and achieving a just resolution of disputes filed in court through a fair and public hearing in accordance with Article 50(1) of *the Constitution*.

30. After consideration of the circumstances of the case, I note that the application for stay of execution was filed approximately 1 month and 25 days from the date of the judgment. There was a delay of 25 days in filing of the application but in my opinion the said delay was not inordinate.

31. Further, the same has not given rise to substantial risk to fair trial or resulted into grave injustice to the defendant/ respondents. The hearing of the case is still possible without causing injustice or extreme difficulties to either party. Further, the defendant/ respondents have not shown that they would suffer any prejudice or that the delay had worsened their position in the suit.

32. On the issue of K.O.M advocates coming on record. the applicant contends that due to the failure of communication with her former advocates, she had to contact a new law firm for assistance that is K.O.M Advocates. The respondents on their part argued that the notice of change and the subsequent

application filed by the applicant's incoming advocates offended Order 9 Rule 9 of the Civil Procedure Rules. That pursuant to the provisions of the said Order, an incoming advocate must either execute a consent with the outgoing advocate or make a prayer to be allowed to come on record.

33. In addressing the said issue, this court is guided by the provisions of Order 9 Rule 9 of the Civil Procedure Rules which states as follows:

> " When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
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> (a) upon an application with notice to all the parties; or
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> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

34. The reasoning behind the said provision was well articulated in the case of S. K. Tarwadi v Veronica Muehlemann [2019] eKLR where the judge observed as follows:

> " ...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

35. Further, in Connection Joint –vs- Apollo Insurance [2006] eKLR, the court held that; -

> " ...Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect. By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate..."

36. In view of the above, it is clear that the provisions of Order 9 rule 9 of the Civil Procedure Rules as to change of an advocate after judgment is only meant to cater for the interests of the advocate whom the applicant wants to change. In this case it is not disputed that the plaintiff/applicant has not filed any consent from its former advocates allowing it to bring new advocates on record. Moreover, no leave was sought to introduce the new advocates. However, the plaintiff/applicant's former advocates have not challenged the move by the plaintiff/applicant to introduce the firm of K.O.M advocates as its advocates in this matter. The choice and change of an advocate for legal representation is one's right. However, this action has to comply with the set down procedure.

37. The above being the position, this court will not deny the plaintiff the liberty to change advocates as per its application, but there shall be strict conditions to be observed.

38. In view of the foregoing, this court shall exercise its discretion and in the interest of justice allow the prayer for reinstating the plaintiff/applicant's suit.

39. Prayer two (2) in the application seeks for the court to review, rescind, vary, and set aside orders issued on 17th May, 2024 unfreezing accounts and properties belonging to the applicant and reinstate the interlocutory orders intervening before 7th May 2024. This court has not been supplied with the current status of the said accounts or properties and can therefore not proceed to issue any orders regarding the said prayer for now. The applicant is given ten (10) days to avail the same to court to enable the court issue appropriate orders.

40. Accordingly, I set aside the order issued on 7th May 2024 dismissing this suit.

    i. The suit is re-instated and must be heard and concluded within 12 months.

    ii. The firm of K. O. M is granted ten (10) days to formally come on record for the plaintiff/applicant to avoid further delays in the matter.

    iii. Once the documents sought by the court are filed the court will issue the appropriate orders.

    iv. The Application succeeds as stated above. Costs shall be in the cause.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 18TH DAY OF DECEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE