



**Njoroge v Transchem Pharmaceuticals Ltd & another (Civil Suit
461 of 2013) [2023] KEHC 3187 (KLR) (Civ) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3187 (KLR)

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

CIVIL

CIVIL SUIT 461 OF 2013

CW MEOLI, J

MARCH 30, 2023

BETWEEN

REBECCA WAMBUI NJOROGE PLAINTIFF

AND

TRANSCHEM PHARMACEUTICALS LTD 1ST DEFENDANT

NATION MEDIA GROUP 2ND DEFENDANT

RULING

1. Rebecca Wambui Njoroge (hereafter the Applicant) sued Transchem Pharmaceuticals Ltd and Nation Media Group (hereafter the 1st & 2nd Respondent (s)). On 23.09.2021 when the matter was listed for hearing, the court informed the parties that pursuant to orders issued by Kamau, J on 18.09.2019 the suit stood dismissed for want of prosecution. This prompted the Applicant's motion dated 07.10.2021 seeking primarily that the suit be reinstated and be fixed for a hearing at the earliest.
2. The motion is expressed to be brought under Order 10 of the *Civil Procedure Rules, inter alia*, and is premised on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Thomas Mbaria Kuria, counsel for the Applicant.
3. The gist of the affidavit is that by orders issued on 18.09.2019 by Kamau, J. the Applicant was directed to set down the matter for hearing within 14 days from the date thereof, failing which the suit would stand dismissed; that the advocate thereafter drew a letter dated 19.09.2019 inviting the adverse parties to fix a hearing date on 26.09.2019 but the file could not be located. Counsel goes on to depose that subsequent attempts to set down the matter for hearing in October 2019 and most of 2020 were unsuccessful, as the Covid-19 Pandemic interrupted court operations.



4. Thus, counsel only managed to set down the matter for hearing on 10.03.2021, when due to Ministry of Health guidelines on the Covid-19 Pandemic, the matter could not proceed. That on 23.09.2021 when the matter further came up for hearing the same could not proceed on account of non-compliance with the directions issued on 18.09.2019. Counsel asserts that no prejudice will be occasioned to the Respondents if the case is reinstated. In conclusion, he deposes that the Applicants case raises triable issues which should be ventilated at trial. Hence the motion ought to be allowed as prayed.
5. The 1st Respondent filed grounds of opposition dated 22.01.2022. Taking issue with the motion on grounds that it is misconceived, incompetent, bad in law and an abuse of the court process; that on 27.05.2019 when the matter came up for hearing, the Applicant's counsel sought adjournment which was granted and he was ordered to pay Court Adjournment Fees (CAF) and the Respondents' advocates attendance fees for the day; that the Applicant did not comply with the orders; and that on 20.06.2019 the Applicant had neither complied nor served the Respondents and once more, the court ordered the Applicant to pay CAF, before fixing a mention on 18.09.2019.
6. Further that, the Applicant did not comply with the orders and on 18.09.2019, the court reiterated its order directing the Applicant to comply by paying CAF, and the Respondent's advocates attendance fees before setting down the matter for hearing within 14 days, failing which, the suit would stand dismissed for want of prosecution. Nonetheless, the Applicant never complied with the orders of the court issued on 18.09.2019 in its entirety, and has made a mockery of the court orders to the detriment of the Respondents; and that the suit was rightly and justly dismissed. Hence the Applicant's motion lacks merit and should be equally dismissed with costs.
7. The motion was canvassed by way of written submissions. Counsel for the Applicant first rehashed the contents of the respective parties' material. And citing the provision of Section 3A of the [Civil Procedure Act](#) and the decision in [Ivita v Kyumbu](#) (1984) KLR 441, counsel contended that the decision whether a suit should be reinstated after being dismissed is matter of judicial discretion and depends on the facts of each case. On considerations such as the reasons for delay, whether delay is prolonged and inexcusable and if justice can still be done despite the delay. Concerning delay, counsel reiterated alleged attempts to fix the matter for hearing in the time frame of 14 days as ordered and asserted that the outbreak of the Covid 19 Pandemic compounded the situation. He argued that reasonable explanations had been proffered for delay and urged the court excuse the delay, noting that the Applicant had been ready to proceed with the trial on the last date.
8. Counsel asserted that directions by the court were that costs be paid before the next hearing date and non-compliance ought not to be a basis for rejecting the instant motion, as the Applicant has every intention of settling the said costs as directed. Invoking provisions of Article 159 (2)(d) of the [Constitution](#) he urged the court to endeavor to dispense substantive justice rather than paying regard to procedural technicalities.
9. On behalf of the 1st Respondent, counsel equally reiterated the principle that reinstatement of a dismissed suit is a matter of judicial discretion and dependent on the unique facts of the case. Counsel pointed out that this suit having been filed in 2013, had not been heard as of 18.09.2019 due to the tardy conduct of the Applicant and or her counsel. He dismissed the explanation offered by counsel for the Applicant, as regards the non-availability of the court file, which claim was not supported by evidence, such as a complaint letter to the Deputy Registrar. Relying on the case of [Josphat Oginga Sasia v Wycliffe Wabwile Kiiya](#) [2022] eKLR he asserted that the Applicant is undeserving of the orders sought and urged that the motion be dismissed with costs.
10. The 2nd Respondent opted not to participate in the motion by either filing a response or submissions.



11. The court has considered the material canvassed in respect of the motion. The events leading to the instant motion have been captured by the parties in their respective material outlined above. The key facts canvassed therein can be verified from the record herein. The Applicant's motion invoked Order 10 of the Civil Procedure Rules which is entitled "Consequence of Non-appearance, Default of Defence and Failure to Serve". What the Applicant seeks is the reinstatement of a suit dismissed for want of prosecution. Therefore, the provisions of Order 10 of the Civil Procedure Rules have no relevance here.
12. The appropriate provisions to my mind would be Order 17 Rule (2) 6 of the Civil Procedure Rules Rule, and possibly, together with 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". The Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR stated that: -

"Also cited was Section 3A of the Civil Procedure Act which enshrines 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. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated *inter alia*, that, by "inherent power" it means that

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

The Supreme Court went further in Board of Governors, Moi High School Kabarak and another v Malolm Bell [2013] eKLR, to add the following:-

"Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

13. While the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated 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. In the case Shah v Mbogo and Another [1967] E.A 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 history of this matter is well documented. The Applicant's suit was filed on 04.11.2013 in respect to a cause of action allegedly arising on 02.11.2012. Both Respondents filed defences in the suit. Thereafter, parties variously appeared before the court on 24.09.2014, 29.10.2014, 26.11.2014, 21.03.2016, 13.07.2016, 29.03.2017, 21.01.2019, 30.01.2019 and 02.04.2019 *inter alia* for compliance purposes, and hearing which obviously never took off.



15. Eventually, on 27.05.2019 the matter was listed for mention (rather than hearing) before Kamau J., and the learned Judge upon hearing advocates appearing for the respective parties directed as follows; -

“I have carefully listened to counsel for all the parties and note that despite the matter having been listed as a mention the same would still have proceeded as a hearing herein. However, as the Plaintiff has been acquitted of a criminal offence in late April 2019 and wishes to adduce the proceedings in the matter, it would be in the interests of justice that she be given an opportunity to fully present her case. Any inconvenience caused to the Defendants counsel can be compensated by costs. Notably, their respective witnesses are currently not inside the court room and cannot therefore be awarded costs. I therefore direct as follows;-

- (1) This matter is hereby taken out of today’s cause list.
- (2) The Plaintiff to file and serve cross-referenced witness statement by 11.06.2019 as requested by counsel.
- (3)
- (4) the Plaintiff to pay the Defendant advocate costs for the day in the sum of Kshs. 2,100/- for each advocate before the next mention date.
- (5) The Plaintiff to pay today’s CAF in the sum of Kshs. 2,000/- for occasioning today’s adjournment.
- (6) “

16. Parties further appeared for mention before Kamau J. on 20.06.2019 and for hearing on 18.09.2019 when the court directed as follows, after hearing the advocates appearing before her;-

“The Plaintiff has no audience before the court for not paying the CAF and the advocates costs for the day. The matter has been mentioned several times, but the Plaintiff has failed to comply with the court’s directions. I am not therefore inclined to give a hearing date in court. I hereby direct as follows;-

- (1) The Plaintiff to pay the CAF and advocates costs that was ordered to be paid on 27.05.2019 before fixing any date at the registry.
- (2) The Plaintiff to pay today’s CAF in the sum of Kshs. 2,000/- for occasioning today’s adjournment and the same to be paid before any date can be fixed at the registry.
- (3) Dates to be fixed at the registry within fourteen (14) days from today failing which this matter will stand as automatically dismissed for want of prosecution with costs to the Defendant.”

17. A further perusal of the record reveals that, the Applicant proceeded to fix the matter for hearing on 10.03.2021, but the hearing did not proceed, and subsequently on 23.09.2021. The present motion was prompted by the court’s direction on the latter date that the suit stood dismissed on account of the order above by Kamau J. The Applicant herself did not find it necessary to swear an affidavit to explain her failure to comply with the orders, leaving the matter to her counsel. Her counsel has asserted that, by a letter dated 19.09.2019 marked as annexure “TMK’a’ & TMK’b” he had intended to invite the adverse parties to date fixing but the court file could not be traced and that prosecution of the case was



- subsequently hampered by the onset of the Covid-19 pandemic which affected court operations. His affidavit is silent on the question of non-payment of CAF and the Respondents' advocates' costs.
18. The orders issued by Kamau, J on 18.09.2019 were explicit. The first limb of the order required the Applicant to pay the CAF and advocates costs as ordered on 27.05.2019 before fixing any date in the registry. And by the 2nd limb, to pay CAF in the sum of Kshs. 2,000/- before fixing any date in the registry for occasioning an adjournment on 18.09.2019. Lastly the Applicant was required under the 3rd limb, to set down the matter for hearing within fourteen (14) days of 18.09.2019 failing which the suit would stand automatically dismissed for want of prosecution, with costs to the Defendant.
 19. Evidently, based on the acknowledgement of receipt stamps endorsed on the face of the annexure "TMK'a" an attempt was indeed made to fix the matter for hearing within 14 days from 18.09.2019 pursuant to the 3rd limb of Kamau J's order.
 20. Admittedly, the Applicant did so without complying with the 1st and 2nd limbs of the order requiring her to pay CAF and the advocates costs before fixing any date. Three years since the orders were issued, the Applicant has not complied even as she clamours for an opportunity to be heard on her claim. No explanation is given for this default, which is not a technicality as the Applicant's advocate appears to assert but read together with the other limbs of the order, is a substantive direction such as envisaged in Order 17 Rule 2(4) of the *Civil Procedure Rules*. The Applicant elected to comply with the one limb of the order that suited her purposes while ignoring the other limbs. No party ought to be allowed to treat court orders with such casualness. Moreover, there is no evidence to support the allegation by the Applicant's advocate that the court file was missing in the material period.
 21. The provisions of Article 159 (2)(d) of the *Constitution* cannot be called to the aid of such a party. As Ojwang, J (as he then was) held in *B v Attorney General* [2004] 1 KLR 431:-

"The Court does not, and ought not to be seen to, make orders in vain; otherwise, the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people."
 22. Therefore, the Applicant has not only flagrantly and inexplicably disobeyed court orders, but further appears to blame the court without proof, and the Covid-19 pandemic for what is clearly her own apparent tardiness. The suit was filed in 2013 and had lingered in Court for six years before the pandemic. It is a matter of public record that while the pandemic occasioned the temporary scaling down of court operations, by mid-2020 court operations had been migrated online making virtual proceedings possible. Thus, while physical access to courts and registries was indeed limited, parties could correspond with the court and file processes electronically. Had the Applicant been seriously desirous of complying with court orders or meaningfully progressing her matter, nothing stood in her way. The record contains no material evincing such desire in the said period.
 23. Undisputedly, the Applicant was entitled to be heard on the merits of her case. However, that cannot be at her leisure, and on her own terms, to the detriment of the parties she dragged to court, and in blatant violation of the overriding objective. At a time when courts are deluged with heavy caseloads, they cannot allow such luxury to a party who by her own slovenly conduct has squandered the opportunity to be heard. At the time of this ruling, the suit has been in court almost ten years, the cause of action arising some eleven years ago with no demonstrated personal interest by the Applicant to bring it to conclusion. Cases belong to parties and not their advocates. The least the Applicant could have done was to swear her own affidavit on pertinent matters rather than remain in the shadows as her counsel bore a burden that was rightfully hers.



24. Concerning the overriding objective encapsulated in section 1A and 1B of the *Civil Procedure Act*, the Court of Appeal stated in *Karuturi Networks Ltd & Anor. v Daly & Figgis Advocates*, Civil Appl. Nai. 293/09 that: -

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court”.

25. That is the prism through which the orders of Kamau J 18.09.2019 inter alia must be read and enforced. Anything less would amount to an abdication of the court’s duty to further the overriding objective. The orders issued were core to the fair and expeditious administration of justice and cannot be trifled with in the manner attempted by the Applicant in this instance. The Applicant’s demonstrated conduct disentitles her from benefitting from the court’s discretion. Consequently, finding no merit in the Applicant’s motion dated 7.10.2021, the court will dismiss it with costs to the 1st Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 30TH DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Mr. Ajulu h/b for Mr. Kuria for the Applicant

Mr. Ongeru for the 1st Respondent

Mr. Chege for the 2nd Respondent

C/A: Carole

