



**Nanji (Executrix of The Estate of Jantilal Devchand Nanji - Deceased)
v Aga Khan University Hospital, Nairobi & 2 others (Civil Suit
243 of 2018) [2022] KEHC 12306 (KLR) (Civ) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12306 (KLR)

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

CIVIL

CIVIL SUIT 243 OF 2018

CW MEOLI, J

JULY 28, 2022

BETWEEN

**NIRANJANA JANTILAL NANJI (EXECUTRIX OF THE ESTATE OF JANTILAL
DEVCHAND NANJI - DECEASED) PLAINTIFF**

AND

AGA KHAN UNIVERSITY HOSPITAL, NAIROBI 1ST DEFENDANT

MAGID M. WARSHOW 2ND DEFENDANT

HARPER GILL 3RD DEFENDANT

RULING

1. The motion dated March 2, 2021 by The Aga Khan University Hospital, Nairobi, the 1st Defendant (hereafter the Applicant) seeks that the suit by Niranjana Jantilal Nanji, the Plaintiff (hereafter the Respondent) be dismissed for want of prosecution. The motion is expressed to be brought under Section 3A of the *Civil Procedure Act* and Order 17 Rule 2 of the *Civil Procedure Rules*, among others. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Alfred Ochieng Opiyo, counsel for the 1st Defendant and seized of the conduct of this matter.
2. Counsel deposes that the Plaintiff instituted the instant suit against the Defendants on October 26, 2018; that on 1st November 2018 the 1st Defendant entered appearance and subsequently proceeded to file a statement of defence on November 14, 2018; that the parties have since complied with Order 11 of the *Civil Procedure Rules* having duly filed and exchanged their respective pleadings and documents in readiness for hearing but the Plaintiff however has failed to set down the matter for pre-trial directions to facilitate certification that the suit was ready for hearing or to communicate with the Defendants on the matter. Counsel contends that by such default, the Plaintiff has demonstrated no interest in



- prosecuting the matter. Counsel deposes finally that the continued subsistence of the suit represents an abuse of court process and that in the interest of justice the suit be dismissed for want of prosecution.
3. The Plaintiff opposes the motion through a replying affidavit sworn by her counsel Sanjeev Khagram. He views the motion as frivolous, an abuse of the court process, and bereft of factual and legal foundation in light of the Plaintiff's inalienable right to a fair trial under Article 159 (2)(d) of the Constitution. Counsel in restating the Plaintiff's steps in the matter highlighted her earlier attempt to obtain interlocutory judgment against the 1st and 2nd Defendant on January 17, 2019 and the 2nd Defendant's subsequent motion seeking to set aside the judgment dated April 16, 2019 following which the court file could not be traced as the judiciary was in the process of mapping of all files in preparation for the transition to the electronic filing system in July, 2020. He cites the closure of courts in March 2020 with the advent of the Covid-19 Pandemic as further contributing to delay in progressing the matter.
 4. Counsel further deposes that because a sense of normalcy has resumed in the courts, and given the nature of the claim, and the provisions of Article 50 of the Constitution guaranteeing the right to a fair hearing, it would be a travesty of justice for the Court to dismiss the matter for want of prosecution. He asserts that the Plaintiff has always been willing to prosecute her case as against the Defendants but was hindered by circumstance beyond her control; that the 1st Defendant has not provided any compelling reasons why the suit ought to be dismissed. In conclusion counsel deposes that it is fair and just that the Plaintiff be given an opportunity to prosecute her case in view of the circumstances demonstrated.
 5. The 2nd Defendant's counsel intimated support for the motion, while the 3rd Defendant's counsel abstained from participating in the motion. Neither of them filed a response to the motion.
 6. The motion was canvassed by way of written submissions. The 1st Defendant anchored its submissions on Article 159 of the Constitution of Kenya, the provisions of Order 17 Rule 2(3) of the Civil Procedure Rules and the decision in Invesco Assurance Company Limited v Onyango Barrack [2018] eKLR regarding the applicable principles in an application of this nature. Counsel also relied on the case of Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR counsel and pointed out that for about two years and eight months since its institution, no steps to progress it had been taken by the Plaintiff; that the delay is inordinate, inexcusable, and prejudicial to the 1st Defendant. Stating that the Plaintiff has not given a satisfactory reason for her delay in prosecuting the suit, he urged the court to dismiss the suit for want of prosecution.
 7. Counsel for the Plaintiff posited that the substantive justice principle which is firmly rooted in the Constitution dictates that the dispute between parties be heard and determined on merit and that the right to be heard is a fundamental principle of the rule of law and summary dismissal defeats the principle. Counsel reiterated that the Plaintiff's affidavit material and asserting that the Plaintiff's conduct cannot be said to be indolent or dilatory given the prevailing circumstances. Counsel cited Pkiech Chesimaya v Lomakorwai Achipa [2020] eKLR to assert that the 1st Defendant has not demonstrated how it has been prejudiced by the delay or how it stands to be prejudiced if the suit is not dismissed. He concluded by reiterating that in the circumstances obtaining, it was fair and just that the Plaintiff be given an opportunity to prosecute her claim and urged that the motion be dismissed.
 8. The court has considered the material canvassed in respect of the 1st Defendant's motion. As rightly submitted by the Applicant, Order 17 Rule 2 (3) of the Civil Procedure Rules (CPR) echoes the constitutional injunction in Article 159(2) (b) of the Constitution and the overriding objective in



Section 1A and 1B of the Civil Procedure Act for the expeditious dispensation of justice. Order 17 Rule 2 of the CPR provides inter alia 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)
- (6) ”

9. The locus classicus on the above Rule is the case of *Ivita v Kyumbu* (1984) KLR 441 which has been followed in a long line of authorities, including those cited by the parties herein. The Court of Appeal recently restated the principles enunciated therein in the case of *Rajesh Rughani v Fifty Investments Limited & Another* (2016) eKLR by stating that:

“The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita v Kyumbu* (1984) KLR 441). The test was expressed as follows:

The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is to both the plaintiff and the 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 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.”

See also *Argan Wekesa Okumu v Dima College & 2 Others* (2015) eKLR.

10. The history of this matter is well documented and is relevant in putting the 1st Defendant’s motion in perspective. The Plaintiff’s suit was filed on October 17, 2018 in relation to a cause of action allegedly arising in 2015. The matter has never been set down for hearing or even pre-trial directions. The 1st Defendant entered appearance on 1.11.18 and filed its statement of defence on 14.11.18 while the 3rd Defendant entered appearance on 9.11.18 and filed a statement of defence on 23.11.18. The 2nd Defendant entered appearance on 12.11.18 but no defence was filed, and on 3.12.18 the Plaintiff lodged a request for interlocutory judgment. On 17.1.19 the Deputy Registrar entered default interlocutory judgment against the 2nd Defendant.

The 2nd Defendant thereafter successfully moved this court to set aside the interlocutory judgement. Kamau, J in allowing the motion ordered that the 2nd Defendant’s statement of defence dated January 15, 2019 and filed in court on January 16, 2019 be deemed as properly filed. Since then, no step was taken by any of the parties until the instant motion seeking to dismiss the suit for want of prosecution.



11. It is clear from the foregoing that the last step taken by the Plaintiff to progress her case prior to the instant motion was the request dated December 3, 2018 seeking entry of interlocutory default judgment against the 1st and 2nd Defendants. The Plaintiff has claimed that delay in progressing the matter was occasioned by the application by the 2nd Defendant to set aside default judgment and the onset of the Covid-19 pandemic. The record shows that despite notice, the Plaintiff did not attend the hearing in respect of the 2nd Defendant's motion dated 16.4.19 which Kamau J allowed as unopposed. Secondly, the alleged the advocate then handling the matter from the firm of Messrs. V.A Nyamodi & Co. Advocates on the instructions of the Plaintiff's counsel has not sworn an affidavit to demonstrate attempts made to find out the position obtaining in the matter.
12. Moreover, as deposed by Sanjeev Khagram, it is his firm, namely, Messrs. A.B Patel & Patel Advocates that was duly instructed by the Plaintiff to prosecute her claim. The onus was therefore on the Plaintiff and or her instructed counsel to demonstrate efforts made to inquire into the position obtaining in the suit and or take appropriate steps if the court file was missing. There is no tangible evidence tendered by either of them in this regard. While the court takes judicial notice of the adverse effects of the Covid-19 Pandemic on the country at large and by extension the judicial system, it is a fact that practice directions were promptly issued by the Judiciary leadership to transition the court business to online platforms, including the early adoption of the electronic filing system. Thus, although physical access to courts and registries was indeed limited, parties could correspond with the court and file processes electronically.
13. Despite the foregoing, there is no evidence that between 2019 and 2021 the Plaintiff made any attempts to progress her matter. Cases belong to the litigants who lodge them in court, and in this instance, it is not available to the Plaintiff to blame the Court and the third-party advocate for her failure to take steps to progress her case. As rightly argued by the 1st Defendant, a hiatus of about two years since the 2nd Defendant's motion was determined amounts to inordinate delay, which has not been adequately explained. That said, and while such delay runs afoul of the overriding objective, it has not been demonstrated that the Applicant stands to be prejudiced in terms of effectively defending the suit if allowed to proceed.
14. As observed in Ivita's case, delay may affect the likelihood of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. However, in that case the Court also stated that:

“ Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time. It is a matter in the discretion of the court.” (*sic*)
15. Prolonged delay in the prosecution of claims defeats the overriding objective and may well result in unjust outcomes for the innocent party. The suit herein is now over three years old. I agree with the 1st Defendant that the Plaintiff's explanations for the delay appear specious and are barely convincing. The fundamental question to be considered, notwithstanding, is whether justice can still be done between the parties in the circumstances of this case. The parties have already exchanged pleadings and the documents they intend to rely on in compliance with Order 11 of the CPR, and there would be no plausible reason for further delay once pre-trial directions are taken and a hearing date fixed.



16. The court is alive to the overarching need for parties to be heard and the matter determined on its merit. As the Court of Appeal reiterated in *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR :

“The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there would be proportionality.”

17. Flowing from all the foregoing, the Court most reluctantly declines the 1st Defendant’s motion dated 2nd March 2021 and instead directs that the Plaintiff to fully prosecute her suit within 12 (twelve) months of today’s date, failing which the suit will stand automatically dismissed for want of prosecution. The costs of the motion are awarded to the 1st Defendant in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28TH DAY OF JULY 2022.

C.MEOLI

JUDGE

In the presence of:

Ms. Mutune h/b for Mr. Khagram for the Plaintiff

Mr. Chasia h/b for Mr. Ochieng for the 1st Defendant

C/A: Carol

