AAM (Suing as Next Friend of AAZ) v Muchoki & another (Civil Appeal E061 of 2022) [2024] KEHC 146 (KLR) (12 January 2024) (Judgment)

Neutral citation: [2024] KEHC 146 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E061 OF 2022

M THANDE, J

JANUARY 12, 2024

BETWEEN

AAM (SUING AS NEXT FRIEND OF AAZ) ..... APPELLANT

AND

PHILIP MUCHOKI ..... 1ST RESPONDENT

OSHWAL ACADEMY MOMBASA ..... 2ND RESPONDENT

(An Appeal from the order and/or directions issued of Hon. E. Muchoki Resident Magistrate delivered on 30.3.22 in Mombasa CMCC NO. 184 of 2017)

JUDGMENT

1. The Appeal herein arises from a ruling of Hon. E. Muchoki Resident Magistrate delivered on 30.3.22 in Mombasa CMCC NO. 184 of 2017. In his ruling, the learned Magistrate allowed an application by the 2nd Respondent dated 30.4.21 seeking dismissal of the Appellant's suit for want or prosecution.

2. The Appellant is aggrieved by the said ruling and has filed the Appeal herein. The summarized grounds of appeal are that the learned trial Magistrate erred in law and in fact in:

    1. Failing to analyze the Appellant's evidence in his replying affidavit and newspaper advertisements attached thereto and his submissions.

    2. Failing to appreciate the peculiar circumstances of the suit or the principle that dismissing a suit is a draconian measure to be exercised only in exceptional circumstances.

    3. Failing to appreciate the legal principle with regards to shifting the burden of proof as provided in the *Evidence Act*.

    4. Failing to consider the case of merit through a hearing contrary to article 50 of the *Constitution*.

5. Failing to exercise his discretion and authority in a judicious, fair and equitable manner.

3. In the application in question, which was dismissed by the learned Magistrate, the 2nd Respondent stated that since filing pre-trial documents on 5.4.18, the Appellant had not taken any steps to prepare the suit for hearing. The delay has thus been inordinately long and has prejudiced the fair and just determination of the suit. As such, the Appellant having lost interest in the suit, it was only fair that the same be dismissed for want of prosecution.

4. In his replying affidavit sworn on 24.9.21, the Appellant denied not taking steps to prosecute the matter. He deposed that on 13.3.19, his advocates filed an application seeking to effect service of the plaint upon the 1st Respondent by way of substituted service, as his whereabouts were unknown. Upon granting of that application, his advocates effected service in the Daily Nation newspaper. Thereafter court operations came to a complete halt due to the Covid-19 pandemic and he was unable to prosecute the matter further. When normal court operations resumed, his advocates invited the 2nd Respondent to court to fix the matter for hearing vide letters dated July 22, 2020, August 4, 2020, 9.2.21 but the 2nd Respondent failed refused and/or ignored to honour the invitations. The Appellant further deposed that the suit is crucial as it involves assault and battery of a minor at the 2nd Respondent's institution and who was a student thereat. Dismissing the suit would thus hinder this Court from conclusively and substantively determining the suit.

5. The issue before this Court for determination is whether the learned Magistrate was justified in dismissing the suit herein for want of prosecution. The law relating to dismissal of suits is contained in order 17 of the *Civil Procedure Rules*. Rule 2 provides as follows:

    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.

6. The law is that where no application or step has been taken in any suit by either party for a period of 1 year, and no cause is shown why the suit should not be dismissed, the court may dismiss the same. The law further provides that any party to a suit may apply for its dismissal where the suit has remained dormant for a year. Additionally, the law provides that a suit in respect of which no step has been undertaken for a period of 2 years stands dismissed. These provisions of the law call for diligence on the part of parties, particularly the party that instituted the suit.

7. The record shows that the Appellant instituted the suit in the lower court by way of a plaint dated 31.1.17. The 2nd Respondent filed its defence on 5.4.17 and in response, the Appellant filed a reply to the defence on 12.5.17. Almost 2 years later on 13.3.19, the Appellant filed an application seeking to serve the 1st Appellant by way of substituted service, which application was allowed by an order dated 14.3.19. Between March 2019 and 30.4.21, the matter remained dormant and the Appellant took no steps to prosecute the same. Indeed, if the provisions of order 17 rule 2(5) were to be followed Rule strictly, the suit stood dismissed in March 2021.

8. The Appellant contends that he took active steps in prosecuting the matter and denies delaying the same inordinately. First, he deposed that substituted service was effected through a newspaper advertisement. Second, that there was the halt of court operations due to the Covid-19 pandemic in March 2020. Further that by letters dated 22.7.2020, 4.8.2020 and 9.2.21, his advocates wrote to the 2nd Respondent's advocates inviting them to the CM's court registry to fix a hearing date, which letters were not responded to.

9. In his ruling, the learned Magistrate found that the newspaper exhibited by the Appellant is unclear and the date thereof cannot be ascertained. Further that there was no evidence that the invitation letters to the 2nd Respondent to fix a hearing date were in fact served upon it. He proceeded to allow the application with the effect that the suit stood dismissed.

10. I have looked at the newspaper exhibited by the Appellant I note that the substituted service to the 1st Respondent of the summons to enter appearance, was published in the Daily Nation of 20.3.2020. Although I am satisfied that substituted service was indeed effected, it is not clear why the Appellant waited for almost 1 year after the order was granted, to do so. I have also looked at the 3 exhibited letters inviting the 2nd Respondent's advocates to fix a hearing date at the registry. None of them has a stamp of the said advocates, evidencing service of the same. All 3 letters, as is required of all such invitation letters, carried the following rider:

> Please Note that in the event that you fail to attend, ours shall proceed to fix the same for hearing ex-parte and a hearing notice shall be served upon yourself.

11. Even if the letters had been received, and there is no evidence that the same were in fact received, neither the trial court nor this Court has been told the reason why the Appellant's advocates did not proceed to fix the matter for hearing on the 3 occasions and serve a hearing notice.

12. It is in the public domain that courts halted operations in March 2020 due to the Covid-19 pandemic. What the Appellant has not explained to the Court is why from May 2017 when the last pleadings were filed, he did not fix the matter for hearing as against the 2nd Respondent who had filed a defence.

13. A party seeking the dismissal of a suit for want of prosecution must satisfy the tests that have been set in a long line of authorities and in particular in *Ivita v Kyumbu* [1975] eKLR, where Chesoni, J. (as he then was) stated:

> So 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 and that justice can still be done to the parties notwithstanding 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. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen v McAlpine*, at p

561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied.

14. Flowing from the cited authority, the test is that an applicant must demonstrate that the delay complained of is inordinate and inexcusable. Further that he is likely to be prejudiced by such delay. Where the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay, an application for dismissal will not be granted. Rather, the court will order that the suit be expeditiously set down for hearing. If however, the court is satisfied that there has been prolonged delay and no sufficient reason for the delay is proffered, the suit may be dismissed. This is because an unexplained delay is inexcusable.

15. In the *Ivita v Kyumba* case (*supra*), Chesoni, J. (as he then was) went on to state:

> One may say courts are harsh by striking out the plaintiff's suit, but as Lord Denning MR put it in *Allen v Sir Alfred McAlpine & Sons Ltd* at pp 546 & 547 and I quote the MR:
>
> > " The delay of justice is a denial of justice .....To no one will we deny or delay right or justice'. All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C1). To put right this wrong, we will in this Court do all in our power to enforce expedition: and, if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the court, and the rules of court expressly permit it. It is the only effective sanction that they contain."

16. In the cited case, the suit which was dismissed had remained dormant for a period of 2 years and 4 months. Similarly, in the case of *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR, the suit was dismissed having remained inactive for a period of 2 years and 10 months. By the time the 2nd Respondent filed the application for dismissal, the suit herein had been dormant for over 2 years, which is indicative of a party that had lost interest in the same.

17. In the case of *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, Azangalala, J. (as he then was) stated:

> " In *Sheikh v Gupta and others* (1969) E.A. 140 Travelyan J. as he then was said at page 141 (quoting Edmonds J. in *Victory Construction Co. v Dugal* (*supra*).
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> > " The purpose of rule 6 in my view is to provide the Court with administrative machinery whereby to disencumber itself of case records in which the parties appear to have lost interest."
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> However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.

18. I concur with the holding in the cited case that the court exercises its discretion to employ the available mechanism in Order 17 of the Civil Procedure Rules to disencumber itself of case records in which the parties, such as the Appellant herein, appear to have lost interest, in the case. This is more so because

the court is enjoined by article 159 2(c) of the *Constitution* to determine disputes and render justice without undue delay. Failure to do so will infringe upon the legitimate expectation of a party defending a case that the dispute against it will be determined expeditiously, and thus occasion prejudice.

19. The right to a fair trial as enshrined in article 50 of the *Constitution* is among the inviolable rights which cannot be limited. A court is required to accord all parties that come before it, an opportunity to be heard, thereby safeguarding the right to a fair trial. In the case of *Multiscope Consulting Engineers v University of Nairobi & another* [2014] eKLR, Aburili, J. observed:

> This court further employs the principle that a right to a hearing and therefore fair trial as enshrined in article 50(1) of the *Constitution* is a fundamental human right and the cornerstone of the rule of law. It also ties up with the right to access justice under article 48 of the *Constitution*. It is the duty of this court, therefore, to accord or ensure every person who has submitted themselves to its jurisdiction, an opportunity to ventilate their grievances.

20. Every party that submits itself to the jurisdiction of the court must be allowed to give vent to its case. Such party must however, abide by the rules of procedure. In so far as setting down a suit for hearing is concerned, a party must be put on guard so that it does not put its case on hold for as long as it pleases, without fear of consequences. The Appellant herein failed to discharge its duty to advance its case in an expeditious manner and thus suffered the consequences.

21. I have observed the conduct of the Appellant in this matter and note that it is characterized by delay at every stage. This is rather strange considering that the suit involves allegations of assault and battery of a minor, at the 2nd Respondent's institution. The delay clearly mitigates against the interests of the child. The reasons proffered by the Appellant for not taking steps to prosecute the suit are in my view not persuasive. I am therefore satisfied that the 2nd Respondent met the test for dismissal of the suit and the learned Magistrate, exercising his jurisdiction, cannot be faulted for dismissing the same. The maxims that equity aids that vigilant and not the indolent and justice delayed is justice denied, forever ring true and cut both ways.

22. In the end and in view of the foregoing, I find no basis for interfering with the decision of the learned Magistrate. Accordingly, the Appeal herein lacking in merit is hereby dismissed with costs.

DATED AND DELIVERED IN MOMBASA THIS 12TH DAY OF JANUARY 2024.

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M. THANDE

JUDGE