Lakepharm Limited v Port Florence Community Hospital (Civil Appeal E063 of 2023) [2024] KEHC 5509 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5509 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E063 OF 2023

RE ABURILI, J

MAY 15, 2024

BETWEEN

LAKEPHARM LIMITED .... APPELLANT

AND

THE PORT FLORENCE COMMUNITY HOSPITAL .... RESPONDENT

(Being an appeal from the Ruling and order of Hon. T. Odera, CM, delivered on 3rd November 2022 dismissing the suit for want of prosecution in Kisumu CMCC No. 207 of 2020)

JUDGMENT

1. On 3rd November 2022, Hon. T. A. Odera, CM, now Judge of the High Court of Kenya, dismissed the suit in the lower court, being Kisumu CMCC No. 207 of 2020, for want of prosecution.

2. Vide an application dated 7th November 2022, the Appellant sought and obtained leave of lower court to appeal against the said Ruling. The leave to appeal was granted on 13th April 2023 and on 20th April 2023, the Appellant who was the Plaintiff in the lower court matter filed this appeal vide memorandum of Appeal dated 27th April 2023, raising the following six (6) grounds of Appeal:

   i. That the Learned Magistrate completely misunderstood the evidence before her, wrongly analyzed the evidence and therefore came to wrong conclusions of fact and law.

   ii. The Learned Magistrate erred in law and in fact by failing to take in to consideration that the delay that was complained of was excusable and that the Respondent did not satisfy the court on how they were prejudices by such delay and that justice will not be done in the case due to prolonged delay on the part of the Plaintiff.

   iii. That the Learned Magistrate erred in fact and in law by failing to take in to consideration the explanation that was given by the Plaintiff's counsel that they have just come on record and they are ready and willing to prosecute the matter since it is the previous advocate who was on

record who delayed the matter and the mistake of an advocate cannot be revisited upon the client.

iv. The Learned Magistrate erred in fact and in law by not taking into consideration that the Appellant was still keen and interested in pursuing the matter going forward in the fullness of time and they ought to have been given chance to prosecute this matter to its conclusion.

v. The Learned Magistrate erred in fact and in law by failing to take into consideration the fact that the prolonged delay alone should not prevent the court to serve substantive justice to all the parties to the suit, the Plaintiff, the Defendant and other third party or interested parties to the suit.

vi. The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before her and therefore arrived at a wrong conclusion.

3. The appeal was canvassed by way of written submissions which are summarized in the body of determination of the appeal which was against a ruling hence not much of evidence rehashing is involved.

4. I have considered the grounds of appeal and the submissions filed by the respective parties' counsel. The issues for determination are first, whether the trial court erred in law and fact in dismissing the suit for want of prosecution and secondly, what orders should this court make on costs of the dismissed suit.

5. To determine the first issue, this court must examine the history of the suit and how the lower court arrived at the decision to dismiss the suit.

6. The suit was filed on 28th May 2020 vide plaint dated 27th May 2020 by the firm of Athunga & Company Advocates.

7. The Plaintiff's claim against the defendant was for a liquidated sum of Kshs.1,075,905 being sums due and owing by the defendant hospital to the plaintiff on account of goods ordered and supplied to the defendant on diverse dates.

8. The Plaintiff also prayed for costs of the suit and interest. It also filed documents in support of its case among them, statement of accounts with the defendant, letters of demand, and an admission that the defendant, now respondent, owed the appellant/plaintiff the sum demanded. that letter was written by the defendant's Head of Clinical services and it is dated 3rd May 2020.

9. On 29th May 2020, the defendant entered an appearance through the firm of Maua & Company Advocates and on 4th June 2020, the said law firm filed a statement of defence denying the Plaintiff's claim against it.

10. On 14th July 2020, the Plaintiff filed a reply to defence reiterating the contents of the plaint. That was the last action taken by the Plaintiff and vide Notice of dismissal of suit under Order 17 Rule 2 of the Civil Procedure Rules, the Court on its own motion issued Notice to both parties' counsel and fixed the suit for dismissal on 3rd November 2022 which was a period of two years from the 14th July 2020 when Reply to defence was filed.

11. On 2nd November 2022, after the Plaintiff's advocate received Notice to dismiss suit dated 22nd September 2022, it instructed the firm of Otieno & Achieng Advocates to file Notice of change of Advocates, which notice is dated 1st November 2022 then the said firm appeared on 3rd November 2022 for the Notice to Show Cause hearing.

12. Immediately the suit was dismissed for want of prosecution on 3rd November 2022, on the same day, the defendants' counsel filed a Bill of Costs for taxation.

13. The Plaintiff on its part filed an application dated 7th November 2022 to stay of enforcement of the order of dismissal of suit and for leave to appeal the ruling of 3rd November 2022. That application was heard by Hon. D. O. Chief Magistrate, after the Hon. T. O. Odera was appointed Judge of the High Court.

14. The trial court allowed the prayer for leave to appeal while the prayer for stay of enforcement of the order of 3rd November 2022 was dismissed. Costs were taxed on 13th April 2023 at Kshs.99,350.

15. In their submission in support of the Notice to Show Cause (NTSC) whcy the suit should not be dismissed, the defence counsel submitted that the suit was filed in March 2020 hence it should be dismissed with costs.

16. Opposing /showing cause why the suit should not be dismissed, the Plaintiff's newly appointed counsel, Ms. Ruth Otieno submitted that the Plaintiff had instructed Mr. Athunga advocate to proceed but he messed up by not presenting the matter and that it had since changed advocates and was ready to proceed because the advocate kept telling the plaintiff, now appellant m that he was following up the matter.

17. Mr. Maua counsel for the defendant submitted that the matter was automatically dismissed after lapse of 2 years as stipulated in Order 17 Rule (2) of the Civil Procedure Rules and that there was no proof of follow up hence it was a total waste of court's time.

18. The trial magistrate agreed with the defence counsel that where no action is taken in a suit for 2 years then the suit stands dismissed and that the Plaintiff had been awoken by the Notice to Show Cause. That as there was nothing to be determined, the suit had to be dismissed.

19. The same submissions were reproduced in this appeal save that the parties counsel now expanded the submissions to include case law, which I have considered.

20. Order 17 Rule 2(1) of the Civil Procedure Rules, which governs dismissal of suits for want of prosecution provides that:

> " 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."

21. Further Order 17 Rule 2(3) of the Civil Procedure Rules provides that:

> " Any party to the suit may apply for its dismissal as provided in sub-rule (1)."

22. From the above provisions, the statutory threshold set out under Order 17 Rule (2) of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution:

> " if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit."

23. In Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:

> " The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita v Kyumbu [1984] KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."[emphasis mine]

24. The rationale for enactment of Order 17 Rule (2) of the Civil Procedure Rules was well captured in the case of Pius Wanjala v Permanent Secretary, Ministry of Medical services & 4 others [2021] e KLR where Mbaru J cited decision in the case of Ivita v Kyumbu [1975] e KLR that: -

> " 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 not 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."

25. Whether to exercise the power of dismissal for want of prosecution under Order 17 is, however, a matter that is within the discretion of the court. In the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR, the court stated as follows:

> " 11. Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita v Kyumba [1984] KLR 441 espoused that:
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> "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. 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 time. It is a matter of and in the discretion of the court." [emphasis mine]

26. In Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR, the court observed that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows:

> " 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."
>
> <u>... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate."</u> (Emphasis added)

27. I have perused the brief trial court record proceedings and as stated above, the court did issue notice to show cause to both parties' counsel on why the suit should not be dismissed for want of prosecution after 2 two year delay without any action being taken.

28. In Mwangi S. Kimenyi v Attorney General and Another, Misc. Civil Suit No. 720 of 2009, the court restated the test as follows:

> " 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
>
> 2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

29. Ultimately, taking the law and the facts into account, it is clear to me that the matter which commenced in 2020, took long and the appellant's indolence as disclosed in the analysis of the record of proceedings shows a casual, disinterested and laid back approach of the appellant/plaintiff in prosecuting the claim.

30. However, since the plaintiff/ appellant was represented by an advocate who did not even apply to cease acting for the plaintiff/ appellant for want of instructions, it would be unjust to assume that the plaintiff was totally indolent and to condemn the appellant/ plaintiff by denying it the opportunity to prosecute its case to the end.

31. In addition, it is not correct as submitted by the respondent's counsel that the suit was automatically dismissed upon expiry of two years from the date when it was last active in court. If that were to be the case, then there would have been no need for the trial court to issue Notice to Show Cause to the parties' advocates, to appear and demonstrate to the satisfaction of the court why the suit should not be dismissed for want of prosecution. The court would simply have closed the file.

32. Order 17 Rule (2) contemplates a situation where if a party receiving notice to show cause does show cause why the suit should not be dismissed, then the court would sustain the suit and allow the party to prosecute the suit.

33. In this case, in my humble view, despite the delay, the appellant did show cause why the suit could not be dismissed by engaging a new advocate who appeared and was ready to set down the suit for hearing, and lamented that the previous advocate is the one who went to slumber and failed to inform the plaintiff. Of course, the plaintiff takes part of the blame for not disengaging with such indolent counsel early enough. However, the appellant having shown cause why its suit should not be dismissed for want of prosecution, the trial court should have accorded it an opportunity to be heard on the merits. Furthermore, the respondent did not seek to have the suit dismissed following the prolonged delay.

34. In the end, I find that this appeal is merited and I proceed to make the following orders:

    a. The appeal succeeds and the trial court's ruling dismissing the appellant's suit for want of prosecution is hereby set aside and substituted with an order reinstating the plaintiff's suit being Kisumu Chief Magistrate's Court Civil Suit No. 207 of 2020 for hearing on its merits.

    b. In allowing the appeal, the appellant is ordered to ensure that the suit is fixed for hearing within 30 days from the date that the original lower court file herein is returned and a notification issued by the lower court to the parties, of the receipt of the file.

    c. The hearing shall proceed expeditiously, and shall be concluded within three months of its commencement

    d. Due to the indolent conduct of the appellant and its counsel on record, the appellant is ordered to bear the costs of this appeal assessed at Kshs 30,000 payable to the respondent within 30 days of today.

    e. I shall not interfere with the order on costs as ordered by the trial court.

35. This file is closed.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 15TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE