



Kimaili v Registered Trustees, Archdiocese of Nyeri (Civil Appeal E070 of 2021) [2024] KEHC 7596 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E070 OF 2021
DKN MAGARE, J
JUNE 20, 2024**

BETWEEN

BETH NYAWIRA KIMAILI APPELLANT

AND

THE REGISTERED TRUSTEES, ARCHDIOCESE OF NYERI RESPONDENT

*(Being an appeal from the Ruling of Hon. Nelly W. Kariuki - PM
in Nyeri CMCC No. 48 of 2018, delivered on 23rd September, 2021)*

JUDGMENT

1. This is an appeal from the Ruling and order of the Hon. Nelly W. Kariuki on 23/9/2021 in Nyeri CMCC 48 of 2018. The ruling declined to set aside an order dismissing a suit for want of prosecution. This was done after the Appellant had been given several last adjournments.
2. The grounds of appeal set out in the Memorandum of Appeal dated 20/10/2021 filed on 22/10/2021 are as follows:
 - a. That the learned trial magistrate erred in fact and in law in failing to appreciate the reasons advanced by the appellant on the apparent delay in prosecuting her matter in the trial court.
 - b. That the learned trial magistrate erred in law and in fact in finding that the appellant did not give any satisfactory reason for the inordinate delay in prosecuting her matter in the trial court.
 - c. That the learned trial magistrate erred in law and in fact in finding that the Appellant did not give a credible excuse on the delay in filing the application the resultant of the impugned ruling in this appeal.
 - d. That the learned trial magistrate erred in law in failing to give effect to the overriding objective of ensuring just determination of suits espoused by the [Civil Procedure Act](#).



- e. That the learned trial magistrate erred in law and in fact in totally disregarding the submissions by the Appellant.
3. The plaintiff filed suit on 2/3/2018. The cause of action related to an emergency caesarian on 23/10/2013.
4. It is a claim based on negligence. It is not clear why the Appellant had to wait for 5 years to file a suit based on the tort of negligence. They applied and had been granted leave to file suit out of time. It is doubtful since the claim is largely a contractual claim though disguised as negligence. The hospital owed the Appellant a specific duty arising from contract.
5. The Respondent filed defence on 20/4/2018. The parties took hearing dates on 4/8/2020, 18/2/2020, 13/10/2020, 25/2/2021, 11/5/2021, 11/5/2020. However, the Appellant was unable to proceed. The court dismissed the suit on 18/5/2021. The record indicates that the advocate walked in at 11.10 am. An application was made to set aside the order for dismissal. There was no indication on whether the Appellant was present.
6. The court found the Appellant had never proceeded and as such the suit was dismissed for want of prosecution. This resulted in this appeal.
7. The appeal herein had also been subject to dismissal. This was averted by the court giving directions on hearing of the appeal.

Analysis

8. The Appeal raises one issue only. Whether the court erred in dismissing the suit for want of prosecution.
9. The Appellant never attended court, since institution of the case in the court below. All excuses in the book were given. The court had to issue last adjournments which did not persuade the Appellant to proceed. The court was thus under duty to stamp its authority to obviate unnecessary hardship. In the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696: -

In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in *Saldanha's* case purported to follow the decision of Windham m C.J. in *Mulji v Jadavji*, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed.

10. The matter herein is a classic study of how not to deal with a suit. The period of 5 years is too long for a suit to pend. I find no evidence of any effort to prosecute the suit. The excuses given are lame. I do not find any merit in the appeal. The same is accordingly dismissed. As regards costs, section 27 of the *Civil Procedure Act* provides as follows: -

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any



action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

11. The matter was dismissed for want of prosecution by the court. The best I can do is to have each party bear its own costs. The file is closed.

Determination

12. The upshot of the foregoing is that I make the following orders:
- a. The Appeal is dismissed for lack of merit.
 - b. Each party to bear its costs.
 - c. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 20TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties.

Court Assistant - Jedidah

