Nyasimi v Huyer & 3 others (Civil Suit 252 of 2019)
[2024] KEHC 9064 (KLR) (Civ) (15 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9064 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 252 OF 2019

CW MEOLI, J

JULY 15, 2024

BETWEEN

DR. MARY KERUBO NYASIMI ..... APPLICANT

AND

SOPHIA HUYER ..... 1ST DEFENDANT

KADRA RAYALE ..... 2ND DEFENDANT

INTERNATIONAL LIVESTOCK RESEARCH INSTITUTE (ILRI) .... 3RD DEFENDANT

WORLD UNIVERSITY SERVICE OF CANADA ..... 4TH DEFENDANT

RULING

1. The Notice of Motion dated 24th January 2023 (the Motion) is by Dr. Mary Kerubo Nyasimi (hereafter the Applicant). The substantive prayers therein seek the setting aside of the dismissal order made on 14th October, 2022 and for reinstatement of the suit; and stay of the proceedings herein pending hearing and determination of Civil Appeal No E560 of 2021 (the appeal) before the Court of Appeal, against the ruling by Sergon, J. of 26th August, 2021 in the present suit. The Motion is expressed to be brought under Section 3A of the *Civil Procedure Act* (CPA) and Order 12, Rule 7 of the *Civil Procedure Rules* (CPR).

2. The Motion is supported by the grounds set out on its face and the sworn affidavit of the Applicant, who stated that neither she nor her advocate were aware that the suit had been set down for dismissal for want of prosecution, and that they only came to learn of the dismissal upon receiving a notice to that effect on 16th January 2023. The Applicant stated that her advocate later confirmed the dismissal order upon attending court on 19th January 2023.

3. She went on to aver that she was aware that previously, Sophia Huyer and International Livestock Research Institute (ILRI) (hereafter the 1st and 3rd Defendants) had filed an application dated 27th July 2020 invoking immunity from being sued and seeking to have their names struck out from the suit and which application was allowed by Sergon, J. She stated that being dissatisfied with the said decision, she had instructed her advocates to prefer an appeal to the Court of Appeal. The Applicant expressed her desire to prosecute her suit, to conclusion, and asserted that it would serve the interest of justice for the orders sought in the instant Motion to be granted.

4. The Motion was opposed by Kadra Rayale and World University Service of Canada (hereafter the 2nd and 4th Respondents) who jointly relied on the replying affidavit sworn by the 4th Respondent's Deputy Country Director for the Kenyan office, Elise Kalinga on 27th April, 2023. Therein, the deponent stated that there has been inordinate delay in bringing the Motion since the issuance of the dismissal order; that the explanation given by the Applicant is insufficient; and that ultimately, the suit belongs to the Applicant and the responsibility lay with her to actively prosecute her suit.

5. Moreover, the pending appeal has no bearing on the present suit since it involves the 1st and 3rd Defendants, and therefore granting the stay order sought would greatly prejudice the 2nd and 4th Respondents who will be compelled to indefinitely to defend themselves in suit. In her view, the Applicant is not entitled to any of the orders being sought in the Motion, thus urging the court to exercise its discretionary powers in dismissing the Motion with costs, for want of merit.

6. The parties canvassed the Motion by filing and exchanging written submissions. Counsel for the Applicant anchored her submissions on the decisions in *Ivita v Kyumbu* (1984) KLR 441 and *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR on the discretionary power of courts to set aside judgments/orders. Counsel submitted that the Motion has been timeously filed and urged the court to favourably consider the depositions in the Applicant's supporting affidavit. Counsel submitting that the Respondents do not stand to be prejudiced by the orders sought and that if the stay order is denied, the appeal will be rendered an academic and futile exercise. For those reasons, the court was urged to exercise its discretion in favour of the Applicant, by allowing the Motion as prayed.

7. In response, counsel for the Respondents urged the court to consider the various legal provisions cited in his submissions, including Article 159(2)(b) of the *Constitution* concerning expedition of justice; Sections 1A and 1B of the *CPA* on the overriding objective; and Order 17, Rule 2 of the *CPR* on the dismissal of suits for want of prosecution. Counsel also citing the case of *Ivita v Kyumbu* (1984) KLR 441 where the court defined what constitutes inordinate delay, reiterating the contents of the replying affidavit concerning the inordinate and inexcusable delay in bringing the Motion.

8. Whilst placing reliance on the decision in *Patrice Kipkemei Chepkwony v National Bank of Kenya Limited* [2016] eKLR he asserted that the courts ought to be guided by the principle of justice and fairness for all parties involved in considering an application of the nature before the court. That in the present instance, the Applicant ought to have prosecuted her suit or sought a stay of proceedings soon after delivery of the impugned ruling. In submitting so, counsel relied on the decision in *Nzoia Sugar Company Limited v West Kenya Sugar Limited* [2020] eKLR concerning timely prosecution of suits.

9. Regarding the stay of proceedings, counsel for the Respondents cited the decision in *Joseph Obachi Dianga & another (suing as Legal Representatives of the Estate of Pius Dianga Audno – Deceased) v Kennedy Onyango Obiero & 2 others* [2021] eKLR where the court declined to grant a similar order in the absence of any reasonable explanation. Counsel further urged the court to consider the related principles spelt out in *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014]

eKLR and to find that the Applicant has not satisfied any of the said principles. Therefore, counsel urged the court to dismiss the Motion, with costs.

10. The court has considered the rival affidavit material and the submissions of the parties. Starting with the prayer seeking the setting aside of the dismissal order, Section 3A of the *CPA* being one of the statutory provisions applicable here cited 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 thus:

> " 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
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> > "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."

11. From the record, it is not in dispute that the Applicant's suit was dismissed for want of prosecution pursuant to a Notice to Show Cause (NTSC) issued under Order 17, Rule 2 of the *Civil Procedure Rules* which provides 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) 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."

12. The court's discretion to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of *Shah v Mbogo & another* [1967] E.A 116:

> " 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."

13. A successful applicant is obligated to tender credible material upon which the court should exercise its discretion in his or her favor, as spelt out in the case of *Shah v Mbogo & another* (*supra*) and further amplified by the court in *Bouchard International (Services) Ltd v M'Mwereria* [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein apply with equal force in this matter.

14. Here, the Applicant asserted essentially that she and her advocate were unaware of the NTSC and learned of the dismissal of the suit upon service of a notice to that effect. The 2nd and 4th Respondents dismiss the explanation as unsatisfactory, emphasizing the likelihood of prejudice to them.

15. The court record contains a copy of the NTSC e issued on 4th August, 2022 and scheduled for 14th October, 2022. Also on record is an affidavit of service sworn by the court process server , Martha Wangare, on 22nd September, 2022 evidencing service via registered mail of the relevant copies of the notice to show cause upon the parties herein and/or their respective advocates. Beyond asserting that she was not aware of the NTSC, the Applicant has not disputed the address used to serve her advocate, who equally eschewed swearing an affidavit in this connection. The court was satisfied at the time of dismissal, and even now that the NTSC was duly served upon the parties, and the Applicant's claims to the contrary are unsupported.

16. From the record, the last action in the suit was delivery of the ruling by Sergon, J. on 21st August 2021 in essence striking out the 1st and 3rd Defendants from the suit. The record shows that no further action took place thereafter, though it is apparent that the Applicant lodged the appeal against the said ruling. No reasonable or credible explanation has been given as to why Applicant did not move this court accordingly at the earliest, in view of the pending appeal to the Court of Appeal. In the court's view, doing so would have easily resolved the issue of inaction in the suit, yet the Applicant chose to essentially abandon the suit for the sake of the appeal. The present application was filed almost 5 months since the dismissal order, which came after a delay of another year since the last step in 2021. The court is therefore of the view that the delay is inordinate, and the explanation given by the Applicant is unsatisfactory, at best or untrue.

17. That said, the court must consider whether justice can still be done between the parties despite the age of the suit. Delay in litigation whether deliberate or inadvertent is often prejudicial to the party who has been dragged to court. Prolonged delay is an affront to the constitutional command in Article 159 of the *Constitution* and the overriding objective in sections 1A and 1B of the *Civil Procedure Act* for expeditious resolution of disputes.

18. As observed in Ivita's case, delay may affect the likelihood of a fair trial being held eventually as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. None of these circumstances are cited here, however, in that case the Court also added the rider 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)

19. The Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR stated: -

> " 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."

20. It is a matter of legal principle that denying a party the right to be heard ought to be an act of last resort. In *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR the Court of Appeal whilst asserting that the wide discretion of the court to set aside spelt out relevant considerations, including the nature of the action, whether it is just and reasonable to grant the prayer for setting aside, the prejudice on the respondent and whether he or she can reasonably be compensated by costs for any delay occasioned.

21. This suit is founded on the tort of defamation. It is apparent from the court record that pre-trial directions are yet to be taken and hence the suit has not been certified ready for hearing yet. Moreover, the court notes that the Respondents have not demonstrated that a fair trial cannot be held, despite the delay, hence it seems that any likely prejudice the Respondents can be compensated by an award of costs. Moreover, the court will make appropriate directions to curb further delay, and this impacts on the second prayer. In the interest of doing substantive justice, the court will most reluctantly exercise its discretion in favour of the Applicant concerning the prayer for reinstatement of the suit.

22. By her second prayer, the Applicant is seeking to stay of proceedings in the suit pending hearing and determination of the appeal. The power of the court to stay proceedings is found under Order 42, Rule 6 (1) of the *Civil Procedure Rules* which states that:

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court"

23. In the renowned case of *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 (UR) Ringera, J (as he then was) set out the applicable considerations in determining an application seeking to stay proceedings as follows:

> "As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously." (emphasis added).

See also *Christopher Ndolo Mutuku and another v CFC Stanbic Bank Limited* (2015) eKLR; and *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* (2014) eKLR.

24. As noted above, the judicious use of the Court's resources and the likelihood of the appeal being rendered nugatory are important considerations in an application of this nature. As observed by

Onyango Otieno, J (as he then was) in the authority of *Niazsons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd.* Nairobi HCCC No 126 of 1999:

> " Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay (stay of proceedings) should be granted."

25. Moreover, the Court of Appeal in the case of *Wachira Waruru & another v Francis Oyatsi* [2002] 2 EA 664 rendered itself thus:

> " In an application for stay of proceedings pending appeal where the judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility."

26. As already observed, the last step in the cause before dismissal was in August 2021, and despite lodging an appeal against the ruling of Sergon J, the Applicant did not immediately move the court to stay proceedings, but rather left the matter to lie dormant for over 14 months and was only roused from slumber by notice of the dismissal in January 2023. Whether or not her appeal to the Court of Appeal is arguable, there is no explanation for this tardiness. Besides, the Applicant did not consider it necessary to address the court on the status of the said appeal filed almost three years ago. Is it similarly lying dormant, and how much longer will the prosecution thereof take?

27. It is worth stating here that the Applicant is the author of her own misfortune, having failed to seek stay of proceedings in a prompt manner, and for which no explanation whatsoever has been given. To date, it seems that the suit has never been certified ready for hearing, and it is not immediately clear that there has been compliance with Order 11 of the *Civil Procedure Rules*. In these circumstances the Applicant's assertion that the objects of the appeal will be defeated if stay is not granted sounds self serving, oblivious and inconsiderate of the equal rights of the parties she dragged to court, to have the dispute resolved expeditiously.

28. Besides, the suit was only struck out against the 1st and 3rd Defendants and given the nature of the claim, there is no reason why the remaining Defendants sued separately should have their fate tied to the defendants in the appeal. And essentially made to pay for the Applicant's own tardiness. Whatever the outcome of the appeal, given the nature of the ruling appealed from, it will have no bearing concerning the claims against these remaining defendants so that the Applicant can still prosecute her claim against them.

29. In the court's view, it would be a travesty of justice, for the court, having reluctantly reinstated the suit against the remaining Defendants to subject them to further delay and costs while awaiting the conclusion of an appeal whose status is unknown. This suit is almost five years old. Justice cuts both ways. Granting the prayer for stay of proceedings is in the circumstances will not serve the interest of justice, and the prayer must fail.

30. Consequently, the Notice of Motion dated 24th January, 2024 is allowed only in terms that the dismissal order of 14th October, 2022 is hereby set aside and the suit is reinstated, on condition that, the suit shall be fully prosecuted by 30th November 2024, failing which it will automatically stand dismissed for want of prosecution, with costs to the Respondents.

31. In that regard, and to obviate further delays in the matter, the court will hereafter schedule an early hearing date. The costs of the motion are awarded to the 2nd and 4th Respondents in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff/ Applicant: N/A

For the 2nd and 4th Respondents: Ms. Kitur

C/A: Erick