Muchiri & another (Suing on behalf of the Estate of Tryphosa Musyoka Annan alias Tryphosa M Annan alias Tryphosa Nyoroka Mwereria alias Tryphosa Annan) v Aga Khan University Hospital (Civil Suit 120 of 2018) [2023] KEHC 2303 (KLR) (Civ) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 120 OF 2018

CW MEOLI, J

MARCH 16, 2023

BETWEEN

ROSE NKATHA MUCHIRI ..... 1ST PLAINTIFF

BETTY KAARI MURUNGI ..... 2ND PLAINTIFF

SUING ON BEHALF OF THE ESTATE OF TRYPHOSA MUSYOKA ANNAN ALIAS TRYPHOSA M ANNAN ALIAS TRYPHOSA NYOROKA MWERERIA ALIAS TRYPHOSA ANNAN

AND

AGA KHAN UNIVERSITY HOSPITAL ..... DEFENDANT

RULING

1. Rose Nkatha Muchiri and Betty Kaari Murungi (hereafter the 1st and 2nd Plaintiff(s)/Applicant(s)) filed this suit against the Aga Khan University Hospital (hereafter the Respondent) in 2018. Following a Notice To Show Cause why the suit should not be dismissed issued under Order 17 Rule 2 of the Civil Procedure Rules, the suit was dismissed for want of prosecution on 18.03.2022. This prompted the Applicants' motion dated 18.03.2022 seeking that the court be pleased to set aside the order issued on 16.03.2022 dismissing this suit for want of prosecution and that the suit be reinstated and be set down for hearing and determination on the merits. The motion is expressed to be brought under Section 1A, 1B, 3, 3A & 63 of the *Civil Procedure Act* and Order 51 Rule 1 & 3 of the *Civil Procedure Rules* (CPR), inter alia, on grounds on the face of the motion as amplified in the supporting affidavit sworn by 1st Applicant, on her own behalf and on behalf of the 2nd Applicant.

2. The affidavit is to the effect that while this court on 16.03.2022 dismissed the suit for want of prosecution, the Applicants were always desirous to prosecute the same and had made attempts to

inquire from their counsel the position of the matter; that they had learned that letters to the Deputy Registrar seeking entry of default judgment against the Respondent had not elicited a response. Hence, she asserts that the Applicants should not be punished for the mistakes of the Deputy Registrar, the court registry or counsel handling the matter. That the suit was ready for hearing and the delay in its prosecution is not inexcusable and that justice can still be done despite the delay.

3. The deponent states further that the Applicants have an arguable case which raises triable issues of law and fact and at the very least they ought to be allowed to prosecute the suit. She further asserts that the Applicants were not served with the notice to show cause or afforded an opportunity to be heard before the dismissal order could be made. In conclusion she deposes that it is in the interest of justice that the orders sought be granted and no prejudice will be suffered by the if the motion is allowed.

4. The Respondent opposes the motion by way a replying affidavit sworn by Angela Cherono, counsel on record for the Respondent. Counsel asserts that the Applicants have never taken steps in the suit since the Respondent filed its pleadings in 2019. She points out that the letters attached to the Applicants' affidavit material were never served or lodged in the judiciary e-filing portal. She swears that the Applicants have been indolent in prosecuting the matter as evidenced by delayed service of summons; that for more than four (4) years since filing suit, the Applicants never took no reasonable steps to progress the matter; that despite the temporary interruption of court proceedings due to the Covid-19 Pandemic, the court commenced issuing hearing dates as early as June of 2020; and that the firm of Messrs. Wachira Wambugu & Company Advocates upon whom blame has been placed has always represented the Applicants.

5. Counsel further states that the court exercised its discretion judiciously in dismissing the suit and the Applicants have not demonstrated new or compelling facts to warrant setting aside of the dismissal order of 16.03.2022. That besides, the Applicants were represented in court on 16.03.2022 and it is therefore untrue that the suit was dismissed in their absence. Further that the Respondent shall be gravely prejudiced by way of further legal costs if the suit is reinstated.

6. The motion was canvassed by way of written submissions. Counsel for the Applicants began by rehashing the contents of her affidavit material in support of the motion. Counsel cited several authorities including, *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR as cited in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR, *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporuim v M.D Popat & Others* [2016] eKLR, and *Joseph Kinyua v GO Ombachi* [2019] eKLR in support of the motion. He contended that the Applicants were not negligent and that delay in prosecuting the suit was occasioned by their erstwhile counsel. That mistake of counsel ought not to be visited on the Applicants and the dismissal denies them a hearing which was their constitutional right.

7. Counsel emphasized that the motion was filed without undue delay and that the prejudice to be suffered by the Applicants if the suit is not reinstated outweighs the loss or prejudice, if any, to be suffered by the Respondent if the suit is reinstated. Placing reliance on the provisions of Section 27 of the *Civil Procedure Act* the Applicants urged the court to exercise its discretion by reinstating the suit.

8. On behalf of the Respondent, counsel equally reiterated the matters in her affidavit in opposition to the motion. Citing the provisions of Order 45 Rule 1 of the *Civil Procedure Rules* and the decision in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR counsel submitted that parties were afforded an opportunity to file responses to the Notice to Show Cause (NTSC) when it came up for hearing on 16.03.2022 and therefore the motion is an attempt by the Applicants to re-litigate the NTSC; that the court is functus officio and lacks jurisdiction to entertain the instant motion.

9. On the merits of the motion, counsel reiterated her affidavit material to submit that, the Applicants have failed to offer any genuine reason why the suit has not been prosecuted for almost four (4) years since filing. It was further contended that, the Applicants have not tendered alleged communication between themselves and their advocates urging expedition of the matter. Stating that equity aids the vigilant, counsel asserted that reinstatement of the suit would prejudice the Respondent as it will be compelled to expend further legal costs to the defend a suit that the Applicants are not keen on prosecuting. Counsel urged the court to dismiss the motion with cost for want of merit.

10. The court has considered the material canvassed in respect of the motion. The motion is chiefly anchored on the provisions of Section 1A, 1B, 3, 3A of the *Civil Procedure Act* (CPA), the latter which 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 that;-

> " 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."
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> The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malolm Bell* [2013] eKLR, to add the following:-
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> "Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

11. However, before delving into the substance of the motion, the court will address the jurisdictional challenge raised by the Respondent. Their position was that having heard the Applicants on the NTSC and made a determination, this court is functus officio and lacks jurisdiction to entertain the instant motion.

12. The Supreme Court of Kenya in expounding on the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 R*aila Odinga & Others vs. IEBC & Others* [2013] eKLR cited with approval the decision in J*ersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that;-

> " A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the

court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

12. To contextualize the objection, it is apposite to review the events immediate to the proceedings and eventual dismissal order of 16.03.2022. The record reveals that through its Deputy Registrar, the court issued the NTSC pursuant to Order 17 Rule 2 of the *Civil Procedure Rules*. Both parties attended the court. The Applicants' counsel claimed to have filed an affidavit in response to the NTSC which is not on the record. Counsel for the Respondent urged dismissal of the suit.

13. Order 17 Rule 2 of the *Civil Procedure Rules* in its entirety 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. Evidently, by dint of Order 17 Rule 2(6) of the *Civil Procedure Rules*, a party may approach the court in respect of a dismissal order made pursuant to Order 17 Rule 2. The suit having been dismissed pursuant to a NTSC issued pursuant to Order 17 Rule 2, the Applicants ought to have invoked the provisions of Order 17 Rule 2(6) in their motion. Failure to do so however is not fatal as the court is enjoined administer substantive justice without undue regard to procedural technicalities. It is therefore clear that under sub-rule 2(6) the court's jurisdiction to entertain an application of this nature is donated by statute. Thus, despite its earlier determination on the NTSC, the court is not functus officio and consequently the Respondent's objection is without merit.

13. Moving on to the substantive issue for determination, by their affidavit material, the Applicants variously blame the court for failing to respond to letters seeking to progress the matter and their own erstwhile counsel for failure to expedite the matter. The Respondent challenges this position by pointing out that the letters annexed to the Applicants' affidavit were neither served nor lodged in the judiciary e-filing portal (in the Case Tracking System (CTS).

14. The suit was filed on 29.05.2018 and on 19.06.2019 the Applicants' counsel lodged a request for entry of interlocutory judgment on account of the Defendant's failure to enter appearance and file a defence within prescribed time. The request was not allowed for reasons endorsed thereon to the effect that the affidavit of service, attached to the request for judgment was not accompanied by the process server's licensing certificate for the year 2019 in demonstration of authorization to practice as licensed process server for the said year. After the Respondent entered appearance on 24.06.2019 and filed a statement of defence on 08.07.2019, the Applicants wrote a protest letter to the Deputy Registrar which apparently did not elicit a response.

15. Thereafter there was no further action on the part of the Applicants. The alleged subsequent correspondence via email and letter both dated 11.01.2021 exhibited herein by the Applicants do not appear on the record. If indeed such letter was lodged, it is curious that the Applicants' advocate did not serve a copy on the Respondent's counsel. Seemingly, the Applicants were prompted to action by

the NTSC and dismissal order. Cases ultimately belong to the parties and it does not aid a party to merely blame his advocate for failing to take necessary steps to progress the matters in court.

16. Equally, while the court may have failed to communicate the decision declining the request for judgment, it is not enough for the Applicants to write a protest letter and sit back. There is no evidence of following up on the matter. That said, denying a party the right to hearing should be a last resort for a court. See *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR where the Court of Appeal outlined relevant considerations in such an application to include, 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 can reasonably be compensated by costs for any delay occasioned.

17. The discretion of the court to set aside as stated in that case is wide and unfettered. In the case *Shah –vs- Mbogo and Another* [1967] E.A 116 cited by the Court in Pithon Waweru Maina's, the rationale for the discretion was spelt out as follows :

> " 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."

18. The principles enunciated in *Shah –vs- Mbogo* (supra) were further amplified further by Platt JA in *Bouchard International (Services) Ltd vs. M'Mwereria* [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal force in this matter. Indeed, the dismissal order issued herein is equivalent to a judgment as it determined the suit by way of dismissal.

12. This suit is founded on medical negligence and was brought for recovery of damages. Despite the apathy on the part of the Applicants in prosecuting the case, it appears just and reasonable to allow reinstatement on terms. The Respondent can be compensated for the delay by way of costs. And reviewing all the pertinent matters, the justice of the matter lies in facilitating the Applicants' right to a hearing.

13. In emphasizing the right of hearing, the Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone* (2006) Limited (2020) eKLR stated the following:

> " Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of *Richard Ncharpi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; for the holding inter alia that:
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> (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
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> (ii) the right to be heard is a valued right; and
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> (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice..."

See also *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR

12. In this case, the explanation by counsel for failing to prosecute the suit is barely plausible. At a time when courts are deluged with heavy caseloads, it is not enough for any party caught up with dismissal of his case to merely blame the court and counsel. Parties and counsel are duty bound to co-operate with the court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with section 1A and 1B of the *Civil Procedure Act*. For the reasons given, the court will reluctantly allow the motion dated 18.03.2022 on condition that the suit be fully prosecuted within nine (9) months of today's date failing which it will stand automatically dismissed for want of prosecution. The costs of the motion are awarded to the Respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16TH DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Ms. Kavai for the Applicants

Ms. Cherono for the Respondents

C/A: Carol