



**LS & another (Suing Through Next Friend and Guardian BS) v Wasuna & 2 others
(Civil Suit 124 of 2009) [2023] KEHC 21357 (KLR) (Civ) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21357 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 124 OF 2009
CW MEOLI, J
AUGUST 3, 2023**

BETWEEN

LS 1ST PLAINTIFF

KS 2ND PLAINTIFF

SUING THROUGH NEXT FRIEND AND GUARDIAN BS

AND

PROF. AGGREY WASUNA 1ST DEFENDANT

DR. HENNA J. HOOKER 2ND DEFENDANT

AGA KHAN UNIVERSITY HOSPITAL 3RD DEFENDANT

RULING

1. For determination is the motion dated 06.10.2021 by LS and KS , the 1st and 2nd Plaintiff/Plaintiffs (hereafter the 1st & 2nd Applicant/Applicants) seeking *inter alia* that the court be pleased to set aside or vary its orders of 13.02.2020 by which the suit herein stood dismissed for want of prosecution if not prosecuted within 90 days and that the court be pleased to reinstate the suit and allow the same to proceed to hearing on its merits.
2. The motion is expressed to be brought pursuant to Section 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules among others and is premised on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Biko Angwenyi, counsel for the Applicants.



3. The gist of the affidavit is that the Applicants filed suit on 13.03.2009 which was followed by protracted negotiations with a view of reaching an out of court settlement which did not yield the desired outcome, constraining parties to proceed to the hearing.
4. He goes on to depose that the Plaintiffs proceeded to set down the suit for hearing on 18.12.2018 and a day prior to the said date the Aga Khan University Hospital, 3rd Defendant (hereafter the 3rd Respondent) appointed new counsel who sought an adjournment to enable them acquaint themselves with matter; that the adjournment was allowed on condition that the suit be prosecuted within 120 days failure to which it would stand dismissed; that on 09.01.2019 the Applicants invited Dr. Aggrey Wasuna, Dr. Heena Hooker, the 1st & 2nd Defendant/Defendants (hereafter the 1st & 2nd Respondent/ Respondents) and 3rd Respondent to fix a hearing date for 14.03.2019; but that when the matter came up on the latter date the same did not proceed as the presiding judge was bereaved. Counsel goes on to depose that a further hearing date was fixed for 30.04.2019 when Githua, J. directed that the matter be mentioned on 10.06.2019 before Njuguna, J. for directions as the 120 days within to prosecute the suit had since lapsed.
5. That the on the latter date the court was not sitting, and the suit having stood dismissed the Applicant moved the court *vide* a motion dated 18.12.2019 to vary the order dismissing the suit upon which ruling was delivered on 13.02.2020 allowing the applicant to prosecute the instant suit within 90 days of the ruling failing which the same would stand dismissed. He deposes that in compliance with foregoing order the suit was set down for hearing on 30.03.2020 however the same was affected by scaling down of court operations due to the Covid-19 Pandemic consequent to which the court published a notice for parties to submit requests online for allocation of new dates for matters scheduled between 13.03.2020 and 24.04.2020. That despite lodging a request on 27.04.2020 the suit was not allocated another date and a court notice dated 15.05.2020 indicated that the matter would proceed for hearing on 02.06.2020 which time was beyond the 90 days directed by court, but the suit was not in the cause list for the day.
6. He further deposes that despite follow ups with the registry, the suit did not get allocated a date until early 2021. That from the foregoing it is evident that the Applicants endeavored to comply with the court orders issued on 13.02.2020 but all efforts to prosecute the suit were defeated by circumstances beyond the Applicants' or their counsel's control. In conclusion, he avows that delay was not deliberate or intentional stating that dismissal of the suit culminates in a great injustice to the Applicants who suffered and continue to suffer great loss from the negligent acts of the Respondents, and that it is only fair and just that the court exercises its discretion by allowing the motion.
7. The 1st & 2nd Respondent opposes the motion by way of a replying affidavit deposed by Mathew Kithinji Itonga counsel on record for the 1st & 2nd Respondent. He attacks the motion on grounds that it is an abuse of the court process, frivolous and unmerited. He goes on to depose that the Applicants have inordinately delayed in prosecuting the suit for close to thirteen years and that such delay is prejudicial and detrimental to the 1st & 2nd Respondents. Equally restating the chronology of past events, counsel stated that when the suit came up for hearing on 06.10.2021, the same already stood dismissed but despite filing the instant motion, it took the Applicants over a year to prosecute the same. A clear indication that they are no longer interested in the suit which should remain dismissed. Counsel dismissed as unconvincing the reasons advanced in support of the motion pointing out the absence of proof of concerted and deliberate efforts by the Applicants to prosecute the suit, and finally stated that litigation ought to come to an end.
8. The 3rd Respondent on its part opposes the motion by way of a replying affidavit deposed by James O. Okeyo counsel on record for the 3rd Respondent. He too attacked the motion on the sole ground



that the same is an abuse of the court process. He restated that it has been fourteen years since the institution of the instant suit which delay is prejudicial to the 3rd Respondent. Equally recounting the events leading to the motion, counsel asserts that as of 06.10.2021 the court confirmed that the suit stood dismissed and that the inordinate delay in prosecuting the instant motion demonstrates absence of will and desire by the Applicants to have the suit heard and determined.

9. The motion was canvassed by way of written submissions. Counsel for the Applicants began by emphasizing the fact that the suit ought to be reinstated as it raises triable issues. He anchored his submissions on the decision in *Allan v Sir Alfred McAlphine and Sons Ltd* [1968] 1 All E.R. 543 regarding the factors for consideration with respect to the instant motion. Invoking the provisions of Order 12 Rule 7 of the *Civil Procedure Rules* and the decision in *Phillip Chemwolo & Another v Augustine Kubende* [1982-1988] 1KAR he asserted that the suit herein has not delayed so inordinately and without excuse as to seriously prejudice the Respondents. Counsel reiterated that the suit is founded on medical negligence and that the Applicants have exercised reasonable diligence to prosecute the matter.
10. Concerning delay in prosecuting the suit within timelines given, counsel restated the Applicants' affidavit material in asserting that delay has been sufficiently explained. Counsel urged the court to consider the reasons advanced and exercise its discretion in favour of the Applicants as failure to reinstate the suit will drive the Applicants from the seat of justice unheard. The decision in *Ivita v Kyumbu* (1984) KLR 441 was cited in the foregoing regard.
11. Further, it was argued that the Applicants are willing and eager to set down the suit for hearing to obviate prejudice to the Respondents. In conclusion, it was contended that dismissal of a suit is a draconian measure.
12. On behalf of the 1st & 2nd Respondent, counsel calling to aid the decision in *Argan Wekesa Okumu v Dima Collection Ltd & 2 Others* [2015] eKLR as cited in *Nzoia Sugar Co. Ltd v West Kenya Sugar Ltd* [2020] eKLR, pointed out that there has been inordinate and inexcusable delay in prosecuting the matter causing prejudice to the Respondents. Relying on the case of *Ivita (supra)* counsel asserted that the Applicants were accorded ample opportunity to prosecute the suit which they wasted hence the suit ought to remain dismissed. It was further submitted that the Applicants have not given any compelling reasons why they have not prosecuted the suit, as such the court should not exercise its discretion in their favour. In conclusion it was argued that the motion lacks merit, is an abuse of court process and ought to be dismissed with costs.
13. On the part of the 3rd Respondent, counsel after rehashing the background to the instant motion called to aid the decisions in *Edward Akong'o Oyugi & 2 Others v Attorney General* [2019] eKLR and *Boniface Kamau Njoroge v John Waweru Wanjobi* [2021] eKLR. To assert that the Applicants have not sufficiently explained the delay in prosecuting the suit and the instant motion is an attempt to defeat the maxim that litigation ought to come to an end. That the manner in which the Applicants have conducted themselves in respect of the suit demonstrates their disinterest in prosecuting the suit and the court should dismiss the motion with costs.
14. The court has considered the material canvassed in respect of the motion. The events leading to the instant motion have in part been captured by the parties in their respective material outlined above. Nonetheless, the key facts canvassed therein can be verified from the record herein. The Applicants motion invoked Order 12 of the *Civil Procedure Rules* which encompasses "Hearing and Consequence of Non-Attendance". What the Applicants essentially seek by dint of the reliefs in the instant motion is the reinstatement of this suit that was dismissed for want of prosecution within 90 days from



13.02.2020. Therefore, it is the court's reasoned view that the provisions of Order 12 of the Civil Procedure Rules have no relevance here.

15. The appropriate provisions to my mind would be Order 17 Rule (2) 6 of the Civil Procedure Rules Rule, and possibly, as read with Section 3A of the Civil Procedure Act, 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:

"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."

The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malolm Bell* [2013] eKLR, to add the following: -

"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)

16. While the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in their favor. In the case *Shah -vs- Mbogo and Another* [1967] E.A 116 the rationale for the discretion was spelt out as follows:-

"The discretion to set aside an ex-parte 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."

17. The history of this matter is well documented. The suit was filed on 13.03.2009 in respect of a cause of action allegedly arising on 2007. The Respondents filed defences in the suit. Earlier the 1st & 2nd Respondent and 3rd Respondent had moved the court *vide* motions dated 13.02.2012 and 13.03.2012 seeking to dismiss the instant suit for want of prosecution however the said motions were compromised on 04.06.2012. On 17.09.2012 the matter came up for pretrial directions and thereafter between 17.10.2012 and 21.02.2013 it appears parties were attempting to negotiate an amicable out of court settlement.



18. On 26.02.2015 when the matter came up again upon a notice to show cause under Order 17 Rule 2 of the *Civil Procedure Rules*, for dismissal for want of prosecution, Aburili, J. directed that the suit be fixed for hearing within 7 days failure to which it would stand dismissed. However, it was not until 04.03.2015 that the Applicants fixed the suit for hearing on 20.04.2015 when the matter could not proceed as the 3rd Respondent had not complied with pretrial directions. Between the latter date and 16.02.2016 parties appeared before the deputy registrar for compliance purposes, and eventually on 05.09.2016 parties appeared before this court for hearing. Again, the hearing did not take off.
19. The Applicants on 04.05.2018 then fixed the suit for hearing on 18.12.2018 but again the same did not take off as the 3rd Respondent's new counsel had just come on record. Njuguna, J. though reluctantly granting new counsel's request for adjournment ordered that the suit be prosecuted within 120 days of the foregoing date. Pursuant to these directions, the Applicants proceeded to set down the suit for hearing on 14.03.2019 when the matter was put off at the behest of the Applicants. Parties subsequently appeared before the court on 30.04.2019, 30.07.2019 and 03.02.2020 during which period the Applicants filed a motion dated 18.12.2019 seeking to set aside or vary Njuguna, J's orders of 18.12.2018 and that the court be pleased to reinstate the suit and allow the same to proceed for hearing on its merits. Njuguna, J on 13.02.2020 upon hearing of the motion delivered her ruling allowing the same on condition that the Applicants prosecute the suit within 90 days of delivery of the ruling.
20. On 24.03.2021 the suit came up for hearing and again did not take off and was set down for hearing on 06.10.2021, when Thurania, J. observed that the suit stood dismissed pursuant to the court's earlier orders issued on 13.02.2020. It is the foregoing event that prompted the instant motion that is presently for determination before this court.
21. As earlier observed setting aside a dismissal order involves exercise of discretion of which is "intended to avoid injustice or hardship resulting from accident, inadvertency 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" The court proposes to deal with both the issue of setting aside and reinstatement of the suit contemporaneously.
22. On 13.02.2020 Njuguna, J. directed that the instant suit be prosecuted within 90 days which translated to prosecution of the suit on or before 13.05.2020. A perusal of the record reveals that, it was not until 02.03.2021 that the Applicants proceeded to fix the matter for hearing on 24.03.2021. Evidently, beyond the 90 days within which the suit was to be prosecuted and the court correctly observed on 06.10.2021 when the suit came up for hearing that the same stood dismissed pursuant to the court's earlier orders issued on 13.02.2020.
23. Of particular interest to this court is the 90-day window after delivery of the court's ruling on the latter date and the efforts taken by the Applicants to prosecute the suit. The Applicants have blamed the failure to prosecute the suit on Covid-19 and factors beyond the Applicants' control. It was the Applicants explanation through counsel that upon delivery of the ruling of the court on 13.02.2020 they proceeded to set down the matter for hearing on 30.03.2020 but the date was affected by scaling down of court operations due to the Covid-19 Pandemic.
24. A perfunctory review of the record reveals the fact that it was not until 02.03.2021, that the Applicants made any attempt to set down the suit for hearing. It is not evident that any attempts were made to fix the suit for hearing within the 90 days granted on 13.02.2020. Further to the foregoing, the court takes judicial notice of the adverse effects of the Covid-19 Pandemic on the country at large and by extension the judicial system. It is a matter of public record that practice directions were promptly issued by the Judiciary leadership to transition the court business to online platforms, including the early adoption of the electronic filing system. Thus, although physical access to courts and registries was



indeed limited, parties could correspond with the court and file processes electronically. No evidence of the Applicants' availing themselves of the latter was evinced by the Applicants.

25. Despite the Applicants' attempts to explain the actions they took within the 90 days window through annexure BA-5 to BA-8 the record itself tells a different story regarding the fixing of the matter for hearing on 30.03.2020. There is no evidence of the above annexures on record to corroborate the claims. Thus, in as much as the Covid-19 Pandemic may have materially affected the prosecution of the suit, there was no proven attempt on record made by the Applicants to comply with the court's directive issued on 13.02.2020. Further to the foregoing, the instant motion was filed on 06.10.2021 and it was not until 02.11.2022 that the Applicant moved to set it down for hearing on 06.02.2023.
26. And as rightly argued by the Respondents, the Applicants took over a year to prosecute the motion, which delay is inordinate and unexplained in any event. A party seeking to vary, set aside an order and or reinstate suit must not be seen to presume on the Court's discretion. Good and sufficient cause have to be advanced whereas any delay has to be adequately explained to unlock the said discretion. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR addressed the question of delay as follows; -
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”
27. It is settled that cases belong to the litigants who lodge them in court, and in this instance, it is not available to the Applicants to blame the Covid-19 Pandemic, the Court, and the third-party advocate for their failure to take steps to progress their case. As rightly argued by the Respondents, the hiatus since the orders of this court on 13.02.2020, filing of the instant motion on 06.10.2021 and prosecution of the same, has not been adequately explained.
28. That said, and while such delay runs afoul of the overriding objective, the Applicants are entitled to be heard on the merits of their case. However, that cannot be at their leisure, and on their own terms, to the detriment of the parties they dragged to court, and in blatant violation of the overriding objective. At a time when courts are deluged with heavy caseloads, they cannot allow such luxury to a party who by her own slovenly conduct have squandered the opportunity to be heard. At the time of this ruling, the suit has been in court almost fourteen years, the cause of action arising some sixteen years ago.
29. Moreover, it is not lost on the court as observed in *Ivita's* case, delay may affect the likelihood of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. However, in that case the Court also stated 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.”
30. I agree with the Respondents that the Applicants' explanations for the delay appear specious and are barely convincing. The fundamental question to be considered, notwithstanding, is whether justice can still be done between the parties in the circumstances of this case. The parties have already exchanged pleadings and the documents they intend to rely on in compliance with Order 11 of the CPR, and there would be no plausible reason for further delay once a hearing date fixed. The court is alive to the overarching need for parties to be heard and the matter determined on its merit.



31. As the Court of Appeal reiterated in *Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR:

“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.”

32. Flowing from all the foregoing and considering the nature of the claim which involves a minor, the Court will most reluctantly allow the motion dated 6.10.2021. On condition that the Applicants shall fully prosecute this suit by end of February 2024 failing which, it will stand dismissed for want of prosecution. For this purpose, a hearing date shall immediately hereafter be fixed by the Court. The costs of the motion are awarded to the Respondents in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Aluo h/b for Mr. Angwenyi

For the 1st and 2nd Respondents: Mr. Waweru

For the 3rd Respondent: Ms. Achieng h/b for Mr. Okeyo

