



Wairimu v Xplico Insurance Company Limited; JN (Suing as the Mother & Next Friend of MN) & 10 others (Interested Parties) (Civil Suit 30 of 2020) [2023] KEHC 22453 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 30 OF 2020
SM MOHOCHI, J
SEPTEMBER 22, 2023**

BETWEEN

ROSE WAIRIMU PLAINTIFF

AND

XPLICO INSURANCE COMPANY LIMITED DEFENDANT

AND

JN (SUING AS THE MOTHER & NEXT FRIEND OF MN) INTERESTED PARTY

JNK (SUING AS THE NEXT FRIEND OF SK) INTERESTED PARTY

GWK (SUING AS THE MOTHER & NEXT FRIEND OF MM) INTERESTED PARTY

JNK (SUING AS THE MOTHER & NEXT FRIEND OF FW) INTERESTED PARTY

GLADYS WANJIRU KIMONDO INTERESTED PARTY

GEOFFREY KABUI KANYI INTERESTED PARTY

CHARLES WERU INTERESTED PARTY

DIVINA KERUBO INTERESTED PARTY

JOSEPH KIMANI KARIUKI INTERESTED PARTY

SARAH WANJIKU KAMAU INTERESTED PARTY

JOSEPH KARIUKI MAINA INTERESTED PARTY



RULING

1. Beforecourt for determination is a notice of motion application dated February 9, 2023filed under Order 17 Rule 2(1) & (3), Order 51 Rule 1 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act by the interested parties whereby they are seeking the following orders:
 - i. Spent.
 - ii. That this honourable court be pleased to dismiss the suit with costs for want of prosecution.
 - iii. That costs of the application be borne by the plaintiff/respondent.
2. The Application is premised on the grounds that respondent has failed to prosecute her suit and has not never taken action to set down the matter for hearing.
3. There is an affidavit in support of the Application sworn by Nancy Njoroge dated February 9, 2023. She deponed that the respondent filed this suit on vide Plaint dated June 30, 2020on July 29, 2020. That the respondent is not interested in pursuing the suit and that in the interest of justice litigation should come to an end. That it is now more than 1 year 8 months following the Ruling by Justice Mumbua T. Matheka dated June 14, 2021that the plaintiff obtained interlocutory orders which work against the applicants occasioning them to suffer injustice.
4. The respondent opposed the Application and filed the replying affidavit dated February 9, 2023sworn by Paul Murimi Kongo who stated immediately after the ruling issuing interlocutory orders he wrote to the Deputy Registrar vide a letter datedJune 14, 2021to place the matter before a judge for purposes of fixing a hearing date. That physical access to court was restricted in the better part of 2021 and 2022 by the COVID 19 pandemic thus the reason the matter was never fixed for hearing. That Order 17 2(1) & (3) are not available for the interested party but only to the defendant.
5. The Application was canvassed by way of written submissions. The applicant's filedtheir submissions dated March 21, 2023.
6. The applicants submitted that the respondent has not prosecuted the suit because she has in her favour stay orders which placed her in a position of comfort. That the delay occasioned was not inordinate and also not excusable. That the Interested Parties are prejudiced by the stay orders.
7. I have carefully considered the Application, the affidavits and the written submissions by counsel. The Application herein raises only one issue for determination. Whether the suit should be dismissed by want of prosecution?
8. 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.”

9. Balancing the positions of the two parties, I take the view that delay of almost two years in prosecuting a matter is inordinate and unreasonable and occasioned prejudice on the Part of the Interested Parties. I note that the COVID-19 pandemic hindered a lot of court activities but I am not convinced that once normalcy resumed the respondent was not able to set a date for hearing.
10. The letter attached directed to the Deputy Registrar is not stamped or received by court. I agree with the applicants that while court access may have been hindered, communication to court and from court were being done via email. The respondent has not advanced any evidence to being vigilant in prosecuting the suit. It would appear that had this Application for dismissal not been made the respondent would have continued being indolent.
11. In *Investment Limited v G4s Security Services Limited* [2015] eKLR Court held: -

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of article 159 of the *Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”.

But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under article 159 (2) of the *Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the plaintiff.
12. In *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR (Warsame J) it was held:

“I must say that the courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”
13. I have perused the Plaintiff and the Defence and the supporting documents as well as the attached pleadings in CMCC No 384, 386, 389, 390,391,392,393 and 394 of 2019. I have also read the Ruling of 30th March, 20121 and delivered on 14th June, 2021.
14. It is true the respondent has been riding on the Orders issued on 14th June, 2021. There is however one redeeming aspect of the suit. I have noted that the issues raised in the Plaintiff are quite substantial and should clearly be ventilated and that aspect can only be established if Parties canvass the issues in a full hearing.
15. In the circumstances,
 - a. I disallow the Application dated February 9, 2023;
 - b. respondent is granted a second opportunity at redeeming herself and has thirty (30) days, within which to prosecute the suit;



c. The applicants shall have costs of this Application at Kshs, 30,000/- to be paid within thirty (30) days from this date herein; and

d. In the event default of (b) and (c) above, this Suit shall stand dismissed upon the expiration of that period.

It is so Ordered.

DATED, SIGNED AND DELIVERED IN NAKURU ON THIS 22ND DAY OF SEPTEMBER, 2023

MOHOCHI S.M

JUDGE OF THE HIGH COURT

