



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 1596 OF 1998**

**MARGARET NJOKI NJUNGE.....1ST PLAINTIFF/APPLICANT**

**ESTHER MWAURA.....2ND PLAINTIFF/APPLICANT**

**VERSUS**

**AGA KHAN HEALTH SERVICES KENYA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DR. OUMA OBURA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DR. JARED MONIZ.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The undisputed background to the motion dated 21<sup>st</sup> June 2021 is that in 2007, **Dr. Ouma Obura** (2<sup>nd</sup> Defendant) successfully moved the court under Order X Rules 13,14,16,20 & 23 of the old Civil Procedure Rules for an order to compel the Aga Khan Health Services Kenya (1<sup>st</sup> Defendant and hereafter the 1<sup>st</sup> Respondent) to produce for his inspection certain records deemed critical to making his defence. The 1<sup>st</sup> Defendant did not comply, and the 2<sup>nd</sup> Defendant once more moved the court under Order X Rule 20 of the retired Civil Procedure Rules seeking that the 1<sup>st</sup> Defendant's defences in the matter be struck off. By a ruling delivered on 18.07.2021, **Nambuye J** (as she then was) allowed the motion. Aggrieved with the outcome, the 1<sup>st</sup> Defendant filed an appeal in the Court of Appeal, being Civil Appeal No. 259 of 2010. The appeal was dismissed vide the judgment delivered on 12.02.2016.

2. Subsequently, the 2<sup>nd</sup> Defendant (hereafter the 2<sup>nd</sup> Respondent) and Dr Jared Moniz (3<sup>rd</sup> Defendant, and hereafter the 3<sup>rd</sup> Respondent) filed separate motions in June and August 2017, respectively seeking the dismissal of the suit for want of prosecution. The motions were heard by **Kamau J** and dismissed on 25<sup>th</sup> January 2021 by two separate rulings. While the above motions were pending, **Margaret Njoki Njunge** and **Esther Mwaure** (the Plaintiffs, and hereafter the Applicants) had on 24<sup>th</sup> June 2019 filed their own motion dated 21<sup>st</sup> June, 2019. By virtue of the two rulings by **Kamau J**, the live prayers in the latter motion seek that judgment on liability be entered against the 1<sup>st</sup> Respondent and that the matter be set down for formal proof for the assessment of damages against the 1<sup>st</sup> Respondent. The motion is expressed to be brought under Section 1A & 1B of the Civil Procedure Act and Order 10 Rule 7 and Order 51 of the Civil Procedure Rules. On grounds, among others, that the Applicants' efforts to have judgment in default or consequential judgment entered administratively against the 1<sup>st</sup> Respondent have been unsuccessful.

3. The motion is supported by the affidavit sworn by counsel for the Applicants **Charles Njuru Kihara** in amplifying the grounds on the face of the motion. Setting out the history of the matter until the judgment of the Court of Appeal, the deponent further states that consequent thereto, a request for interlocutory judgment against the 1<sup>st</sup> Respondent dated 5<sup>th</sup> October, 2018 was lodged and filed on 8<sup>th</sup> October, 2018. That despite several visits to the Deputy Registrar and a reminder dated 7<sup>th</sup> November, 2018 requesting expeditious action the Applicants had neither received a response nor had their request been acted upon. He asserted that entry of judgment on liability is imperative to facilitate for formal proof of damages.

4. The 2<sup>nd</sup> Respondent supported the motion through an affidavit sworn by his counsel **Leo Masore Nyang'au**. Equally reiterating the history of the matter, counsel deposed that in the absence of defence on record, the Applicants are entitled to apply for judgment in default of defence; that pursuant to the provisions of Order X Rule 20 of the retired Civil Procedure Rules and Order 11 Rule 5(b) of the Civil Procedure Rules, 2010 the Court is empowered to enter default judgment against a party whose defence has been struck out on account of non-compliance with an order on discovery.

5. **Zul Mohamed**, counsel for the 1<sup>st</sup> Respondent swore the replying affidavit in opposition to the motion. He attacked the motion on grounds that it is incurably defective and should be struck out for the failure to properly describe the parties in the motion within title thereof, even though multiple parties were involved in the suit. Secondly, he asserted that the Applicants are caught up in laches because since 18<sup>th</sup> July, 2008 when the defence was struck out, they did not seek judgment against the 1<sup>st</sup> Respondent. He pointed out that nothing prevented them from applying during the pendency of the appeal in the Court of Appeal, as no stay orders were in effect. Further, he swore that Applicants' claim to have applied administratively subsequently are not supported evidence, save the belated request dated 8<sup>th</sup> September, 2018. Counsel took the position that notwithstanding the striking out of the 1<sup>st</sup> Respondent's pleadings, the said Respondent was entitled to participate fully at the hearing in order to cross-examine witnesses; that to the age of the matter it would be prejudicial, against the interest of justice and good conscience to allow judgment to be entered against the 1<sup>st</sup> Respondent at this stage. On behalf of the 1<sup>st</sup> Respondent, he invoked the provisions of Articles 25(c) & 50(1) of the Constitution and related provisions of the Civil Procedure Act.

6. The 3<sup>rd</sup> Respondent did not participate in the motion. The motion was canvassed by way of written submissions. The Applicants anchored their submissions on the provisions of Order 10 Rule 6 of the Civil Procedure Rules, and submitted that the 1<sup>st</sup> Respondent has no defence on record and the Applicants were entitled, as they had, to request the Deputy Registrar to enter interlocutory judgment and that though a formal motion was not necessary under Order 49 of the Civil Procedure Rules, in the circumstances of this case the Applicants had done so due to the failure by the Deputy Registrar to act on their request. The Applicants argued that delays in the prosecution of this matter were not of their own making and their claim cannot be defeated on account of alleged laches. They called to their aid the command of Article 159 (2) (d) of the Constitution for the just, efficient, and expeditious disposal of disputes. Also relied on was the decision in **Anglo Italian V Wells 38 LT 201** as cited with approval in **Kyeka Enterprises Limited v Tana and Athi Rivers Development Authority [2013] eKLR** for the proposition that the court has unfettered jurisdiction to enter judgment against a party whose pleadings have been struck out.

7. Concerning the objection concerning the motion title, the Applicants invoked Article 159 of the Constitution, Section 1A and 1B of the Civil Procedure Act and cited **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commissions & 6 Others [2013] eKLR** to assert that any misdescription of parties in this case caused no confusion as reliefs were granted correctly against the proper party, and the motion cannot be defeated on that account. The court was urged to allow the motion.

8. On the part of the 1<sup>st</sup> Respondent, it was argued on the authority of **Stanbic Bank Kenya Limited (2008) eKLR** and **Peter O. Ngoge T/A O.P Ngoge & Associates v Ammu Investments Co. Ltd [2012] eKLR** that the motion is fundamentally defective for failing to describe the parties appropriately and that the invocation of Article 159 of the Constitution of Kenya and Section 1A & 1B of the Civil Procedure Act offers no succour to the Applicants. Further, it was submitted that the Applicants are guilty of laches and have failed to satisfactorily explain the inordinate delay on their part. Counsel cited the case of **Daniel Kibet Mutai & Others v Attorney General (2019) eKLR**. Finally, counsel reiterated the 1<sup>st</sup> Respondent's right, notwithstanding the striking out of its defence, to fully participate in the hearing of the suit by cross-examining witnesses.

9. The court has considered the material canvassed in respect of the motion. First concerning the objection concerning the failure in the motion to appropriately describe the parties to the motion, it is the court's view that the omission is essentially a matter of form and not substance. Although it would have been desirable that the parties applying and the intended respondent are clearly described in the title of the motion, the omission in this instance is not fatal as it is possible to discern from a perusal who the parties thereto are. Because, in this case, there is not such a large number of parties as to portend confusion. Article 159 (2) of the Constitution and the overriding objective in Section 1A, 1B & 3A and of the Civil Procedure Act enjoin courts to expeditiously dispense substantive justice without being undue regard to procedural technicalities. Nothing turns on the 1<sup>st</sup> Respondent's objection, therefore. I am fortified in this regard by the words of the Court of Appeal in **Perera v Nation Media Group & 2 others (Civil Appeal 122 of 2016) [2021] eKLR** concerning the provisions of Article 159 (2) (d). The Court stated as follows: -

**“Case law on the invocation and application of the above principle now form a well-trodden path. We take it from the cases of Jaldesa Tuke Dabelo vs. IEBC & Another [2015]eKLR; Raila Odinga and 5 Others vs. IEBC & 3 Others [2013] eKLR; Lemanken Arata vs. Harum Meita Mei Lempaka & 2 Others [2014]eKLR; Patricia Cherotich Sawe vs. IEBC & 4 Others [2015]eKLR. The principles enunciated therein and which we find prudent to highlight are as follows: Rules of procedure are handmaidens of justice; a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case; the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice also that Article 159 (2)(d) of the Constitution is not a panacea for all procedural ills.”**

10. Concerning the application of Section 1A and 1B of the Civil Procedure Act by stating that:

**“Principles that guide the Court in the application of the above overriding objective principle also now form a well-trodden path. We take it from the case of Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010, stated inter alia as follows:**

**“It seems to us that in the exercise of our powers under the “02 principle” what we need to guard against is any arbitrariness and uncertainty. For that reason, we must insist on full compliance with past rules and precedents which are “02” compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the “02 principle” could easily become an unruly horse.”**

**Further in City Chemist (NBI) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli vs. Orient Commercial Bank Limited Civil Appeal No. Nai 302 of 2008 (UR No.199 of 2008) (unreported) the Court reiterated that:**

**“That, however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.”**

11. On the merits of the motion, the Applicants have invoked order 10 Rule 7 of the Civil Procedure Rules. It is pertinent that the defences of the 1<sup>st</sup> Respondent were struck out under Order X Rule 20 of the old Civil Procedure Rules, which provided that: -

**“Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect, and an order may be made accordingly.”**

12. In my view this would mean that pursuant to the wording of the above Rule, once the 1<sup>st</sup> Respondent’s defences were struck out in 2008 for failure to comply with an order on discovery, the position of the 1<sup>st</sup> Respondent was equivalent to that of a party who had not filed a defence and judgment in default of defence could be entered against it upon a request by the Applicants under Order IXA Rules 5 and 6 of the old Rules. Upon the adoption of the new Civil Procedure Rules in 2010, Order X of the old Civil Procedure Rules was subsumed in Order 11 of the 2010 Civil Procedure Rules. The closest equivalent of Rule 20 of Order X of the former is Order 11 Rule 5 of the latter which is to the effect that:

**“Where orders or directions are given at a case management conference —**

**(a) The judge or deputy registrar or magistrate or case management officer shall record the orders or directions and inform the parties thereof; and**  
**(b) where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit.**

13. Evidently, the Applicants did not move the court in this regard until after the appeal was determined. The 1<sup>st</sup> Respondent has asserted that the Applicants’ motion is caught up in laches. While it is true that there were no orders to stay the suit during the pendency of the appeal, it was obviously more prudent for the Applicants to await the determination of the appeal. Additionally, the court file was before the Court of Appeal and no proceedings could have been taken. As for delay in the period subsequent to the appeal, it is apparent that it took the Applicants about two years to request for judgment as the first request on the court file was filed on 8<sup>th</sup> October 2018.

14. That said, this court is reluctant to delve further into the question as the matter was substantially canvassed and determined in the two rulings of **Kamau J**. Suffice to say that although at the time the Applicants requested judgement against the 1<sup>st</sup> Respondent the new Civil Procedure Rules were in force, the position obtaining in respect of the 1<sup>st</sup> Respondent was as prescribed in Order X Rule 20 of the old Rules under which the striking out order was made in 2008. Neither the old Rules nor the 2010 Rules prescribe the procedure of seeking judgment after a pleading is struck out for non-compliance with pre-trial directions but in my view, the procedure in order 51 may be invoked in such a situation to achieve the overriding objective.

15. Rules 6 and 7 of Order 10 of the Civil Procedure Rules provide as follows:

**“6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.**

**7. Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.”**

16. The Applicants’ claim is based on negligence, and they seek pecuniary damages against the Respondents. In the circumstances, in absence of a defence by the 1<sup>st</sup> Respondent, judgment could be entered under the above Rules. In ordinary circumstances, this duty falls upon the Deputy Registrar by dint of the provisions of Order 49 Rule 2 Civil Procedure Rules which states that:

**“Judgment may, on application in writing, be entered by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, in the following cases:**

**(a) under Order 10: (consequence of non-appearance, default of defence and failure to serve);...**”

17. The convoluted circumstances preceding and following the request for judgment filed in October 2018 may well have occasioned

uncertainty hence the delay on the part of the Deputy Registrar to act on the Applicant's request. Given the pertinent history of the matter, this Court was also empowered to enter judgment in default, upon the 1<sup>st</sup> Respondent's failure to comply with the order on discovery. Indeed the 2<sup>nd</sup> Respondent's initial application determined in 2007 had sought such orders. Accordingly, the Court hereby allows the Applicant's motion and enters judgment against the 1<sup>st</sup> Respondent and further directs that in view of the age of the dispute, priority hearing dates be taken before any Judge in the Division for the assessment of damages. The costs of the motion are awarded to the Applicants and the 2<sup>nd</sup> Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 2<sup>ND</sup> DAY OF DECEMBER 2021.**

**C.MEOLI**

**JUDGE**

**IN THE PRESENCE OF:**

**MS. KARITA H/B FOR MR KIHARA FOR THE APPLICANTS**

**MR MOHAMED FOR THE 1ST RESPONDENT**

**MR MASORE NYANG'AU FOR THE 2ND RESPONDENT**

**MR OYOO FOR THE 3RD RESPONDENT**

**C/A: CAROL**