



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 124 OF 2009

LS & KS (Suing as minors

through their next friend and guardian BS).....PLAINTIFFS/APPLICANTS

-VERSUS-

PROF. AGGREY WASUNA.....1ST DEFENDANT/RESPONDENT

DR. HEENA HOOKER.....2ND DEFENDANT/RESPONDENT

THE AGA KHAN HEALTH SERVICES

LIMITED.....3RD DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 18th December, 2019 the plaintiffs/applicants sought for the orders hereunder:

(i) Spent.

(ii) THAT this Honourable Court be pleased to set aside or vary its orders of 18th December, 2018 declaring that the suit stood dismissed for want of prosecution in the event that it was not prosecuted within 120 days.

(iii) THAT this Honourable Court be pleased to reinstate the suit and allow the same to proceed for hearing on its merits.

2. The Motion stands supported by the grounds presented on its face and the facts stated in the affidavit of their advocate, *Biko Angwenyi*.

3. The deponent contended in his affidavit that the delay in prosecuting the suit was occasioned by *inter alia*, health complications on the part of the applicants as well as factors beyond their control.

4. The deponent elaborated that following this court's order made on 18th December, 2018 directing the applicants to prosecute their case within 120 days therefrom, the applicants through their advocate fixed the suit for hearing at the registry on two (2) separate occasions but the suit was never heard, resulting in lapse of the 120 days.

5. It was the deponent's averment that should the suit stand dismissed, the applicants are guaranteed to suffer grave injustice in view of the nature of their claim.

6. The 1st and 2nd defendants/respondents answered with Grounds of Objection filed on 22nd January, 2020 raising the following grounds:

(i) No basis has been laid for the court to exercise its discretion in favour of the plaintiffs.

(ii) Prayer (ii) as framed cannot be granted as *inter alia*, it is being sought after the order crystallized.

(iii) This is an extremely old suit and litigation must come to a close.

(iv) The delay in prosecuting the suit has not been adequately explained.

7. The 3rd defendant/respondent also put in Grounds of Opposition dated 21st January, 2010 by and large reaffirming the grounds raised by the 1st and 2nd respondents. The 3rd respondent went a step further by putting in a replying affidavit sworn by its advocate *Kimathi Matimu Kinuthia* in which he stated that prior to the expiry of the 120 days, the said applicants did not take any steps towards extending the time despite having obtained a hearing date which fell outside the aforementioned timelines.
8. It was equally the deponent's statement that since the suit was last in court on 30th July, 2019 the applicants took no immediate action in pursuing its reinstatement and are only now seeking an order to that effect.
9. The deponent asserted that the 3rd respondent stands to be greatly prejudiced if the order for reinstatement is granted since its ability to defend the claim has been compromised overtime since the cause of action arose.
10. During oral arguments on the application, *Miss Mungai* counsel for the applicants reiterated the contents of the application. On behalf of the 1st and 2nd respondents, advocate *Mr. Itonga* stood with the Grounds of Objection on record save to submit that his clients stand to be prejudiced as they may not be able to secure the attendance of their witnesses. *Mr. Matimu* counsel for the 3rd respondent also relied on the documents filed on his client's behalf and further submitted that it is the applicants who are responsible for delaying the suit and not his client. In rejoinder, *Miss Mungai* while acknowledging the delay in prosecution of the suit, maintained that the delay has been adequately explained.
11. I have taken into account the grounds presented in the body of the Motion, the facts sworn in the affidavits supporting and resisting the Motion, the respective Grounds of Opposition and Objection, and finally the rival oral submissions.
12. The key issue requiring my determination has to do with whether the applicants have set out before me sufficient reasons to warrant the reinstatement of their suit.
13. The record shows that when the parties appeared before me for hearing on 18th December, 2018 counsel for the applicants disclosed that advocate for the 3rd respondent had earlier on sought his indulgence on adjourning the hearing so as to enable him acquaint himself with the matter since he had only recently taken over conduct of the suit from another firm of advocates, which position was confirmed by the 3rd respondent's advocate. The record also shows that none of the parties were opposed to the request for adjournment.
14. Suffice it to say that, I reluctantly granted the prayer for adjournment under strict conditions that the suit be prosecuted within 120 days otherwise it would stand dismissed. I also gave explicit directions that there would be no further adjournments to be considered at the behest of any of the parties.
15. It is apparent from the record that the applicants' advocates attended the registry on 23rd January, 2019 and fixed the suit for hearing on 14th March, 2019 which fell within the 120 days.
16. Going by the record, when the parties attended the hearing on the aforesaid 14th of March, 2019 the advocate for the applicants sought for an adjournment on grounds that their documents were yet to be cross referenced and paginated hence they required time to file a proper list and bundle. The respective advocates for the respondents did not object to the application for adjournment and the same was allowed by the court while the parties were directed to take a fresh hearing date from the registry on priority basis in view of the order of 18th December, 2018.
17. It is apparent from the record that the suit was fixed for hearing on 30th April, 2019 and placed before Honourable Lady Justice C. Githua but the same could not proceed as it was not listed before this court. Consequently, the Honourable Judge referred the parties to attend this court on 10th June, 2019 but on that date, this court was not sitting.
18. Subsequently, the suit was placed before me on 30th July, 2019 and in the absence of evidence to show that the respondents were served with a notice in that regard, I directed that the matter be taken out.
19. Be that as it may, going by my calculation of 120 days from 18th December, 2018 when I made the order on prosecution of the suit, the applicants were required to prosecute their case by 17th April, 2019. It is therefore apparent that by virtue of its non-prosecution by that date, the suit stood dismissed as at 17th April, 2019.
20. On the one hand, I cannot disregard the fact that when the applicants attended court on 14th of March, 2019 they made no reference to my earlier order of 18th December, 2018 stating that no further adjournments were available to the parties. Instead, they proceeded to seek yet another adjournment.
21. It is apparent on the other hand that all the parties in one sense or another contributed to the delay in prosecuting the suit. Going by the record, the parties have on previous occasions leading up to dismissal of the suit either sought for an adjournment or acquiesced to the granting of an adjournment. If at all the respondents stood to suffer prejudice owing to delay of the suit, they ought to have demonstrated this to the court in the course of their attendances. There is nothing to show that they did.
22. I am alive to the fact that this is a decade's old matter for which there has been a serious delay. Moreover, the applicants did not offer any explanation as to why they had to wait for eight (8) months since the dismissal order was made to bring the application for reinstatement, though I observed that they had previously filed a similar application on 18th October, 2019 which it would appear was later withdrawn.

23. Needless to say that I cannot ignore the facts on the record that between the order of 18th December, 2018 and the dismissal of the suit on 17th April, 2019, the applicants demonstrated some reasonable steps taken in prosecuting their case. Further to this, it is apparent that the delay in the suit cannot be solely attributed to the applicants but to the respondents too, as I have established hereinabove.

24. Upon my perusal of the record, I noted that the applicants have since filed their proper bundle of documents albeit after the suit stood dismissed. Overall, I have taken into consideration the claim which is in the nature of medical negligence, the explanation given by the applicant which I find to be reasonable in the circumstances and the lack of tangible evidence from the respondents to show the prejudice they stand to suffer. I am satisfied that the reasons given by the applicants are viable enough to convince me to exercise my discretion in their favour though under strict conditions.

25. The upshot is that the Motion is hereby allowed. Consequently, the orders made on 18th December, 2018 are hereby varied and substituted with an order requiring the applicants to prosecute their case within 90 days from this day, failing which the suit shall automatically stand dismissed with costs to the respondent.

Costs of the application shall abide the outcome of the suit.

Dated, signed and delivered at NAIROBI this 13th day of February, 2020

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiffs/Applicants

..... for the 1st and 2nd Defendants/Respondents

..... for the 3rd Defendant/Respondent