



Officials of Mission in Action Nakuru Baby Orphanage v Rigiri & 3 others (Environment & Land Case E034 of 2023) [2024] KEELC 6904 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E034 OF 2023
MAO ODENY, J
OCTOBER 23, 2024**

BETWEEN

OFFICIALS OF MISSION IN ACTION NAKURU BABY ORPHANAGE PLAINTIFF

AND

**DAMARIS RIGIRI 1ST DEFENDANT
CYRUS KIVUTI 2ND DEFENDANT
LAND REGISTRAR, NAIROBI COUNTY 3RD DEFENDANT
KENYA REVENUE AUTHORITY 4TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated November 17, 2023 by the 1st and 2nd Defendants/Applicants seeking the following orders:
 - a. That the Honourable Court be pleased to declare that the suit herein extinguished and/or abated for failure by the Plaintiff to comply with the orders of the Ruling dated 26th October, 2023 requiring them to file an amended Plaint within 14 days of delivery of the said Ruling.
 - b. That the costs of this Application be borne by the Plaintiff/Deponent appearing on behalf of the Plaintiff.
2. The application was supported by the annexed affidavits of Damaris Rigiri and Cyrus Kivuti; the 1st and 2nd Defendants herein who deponed that the Plaintiff filed an application together with a suit dated 27th April, 2023 and that they raised a preliminary objection whereby the Plaintiff's application was struck out with costs on 26th October, 2023. The Applicants further stated that upon striking out the application, the court ordered the Plaintiff to amend and file their plaint within 14 days of delivery of the said ruling but the same was not complied with hence the suit has abated.



3. Slavica Summerscales an official of the Plaintiff filed a replying affidavit sworn on 13th February 2024 where she deponed that she was not aware of the ruling until 12th February, 2024 after the lapse of the 14 days and that she only became aware after the Defendants served the advocates on record on 30th January 2024 with an application dated 17th November, 2023.
4. She further deponed that she was on the link provided in the daily cause list together with her counsel on record on the for the better part of the day on the day the matter was scheduled for ruling, but there was no indication as to whether the trial court was sitting or not. She deponed that her counsel made all reasonable steps to secure the ruling from the registry and urged the court not to dismiss the matter without according her an opportunity to be heard on merit.

1st and 2nd Defendant/applicants' Submissions

5. Counsel for the Applicants filed submissions dated 29th March, 2024 and submitted that the Plaintiff's advocates are guilty of inaction that is not excusable and that it is the primary duty of the Plaintiff to take steps to progress their case since they are the ones who dragged the Defendants in court. Counsel submitted that the pendency of a case in court when it is obvious that the Plaintiff is not interested to prosecute her case causes mental anguish and costs time and money to the Defendants and relied on the case of *Tabelгаа Chepngeno Tele & 2 others vs John Kiprotich Ngetich & 5 others* [2022] eKLR.
6. According to counsel, the Plaintiff's deponent Slavica Summerscales was not within the Republic of Kenya as at the time she was executing her replying affidavit and there is no way she would have the said affidavit commissioned by a resident advocate here in Kenya since she was in Australia.
7. It was counsel's further submission that the replying affidavit is defective and ought to be struck out and that failure by the Plaintiff to comply with the orders of 26th October, 2023 meant that there was no competent suit against the Defendants and relied on the cases of *Board of Governors Changamwe Secondary School vs Commissioner of Lands & 2 others* [2018] eKLR and *Mwaro & another vs Charo & 5 others* [2022] KEELC 15473 (KLR).

Plaintiff's Submissions

8. Counsel for the Plaintiff filed submissions dated 22nd July, 2024 and identified the issue for determination as whether the suit extinguished and/or abated due to non-compliance with court orders. Counsel submitted that the failure to comply with the aforementioned court orders was not intentional and relied on Article 50 (1) of *the Constitution* of Kenya 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* and the cases of *Wachira Karani vs Bildad Wachira* [2016] eKLR and *Martha Wangari Karua vs IEBC Nyeri Civil Appeal No 1 of 2017*.
9. Counsel further submitted that if the instant application is allowed, the Plaintiff/Respondent will be driven away from the seat of justice and that the Plaintiff/respondent should not be punished for the mistakes of the law firm formerly on record for the Plaintiff.
10. Counsel relied on the case of *Philip Chemwolo & another vs Augustine Kubede* (1982-88) KLR 103 at 1040 and submitted that the instant application is misconceived as the right procedure to have the suit dismissed would have been the Court itself enforcing its order by issuing a Notice to Show Cause to the Plaintiff under Order 2 rule 15 of the Civil Procedure Rules.
11. Counsel relied on the spirit in Article 159 (2) (d) of *the Constitution* of Kenya and the cases of *James Mangeli Musoo vs Ezeetec Limited* (2014) eKLR, *Michael Osundwa Salewa vs Chief Justice and President of Supreme Court of Kenya & another*, *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* and *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium vs M.D Popat*



and others & another [2016], Mwangi S. Kimenyi vs Attorney General and another Misc Civil Suit No 720 of 2009 ,Anthony Murigi Kiarie vs Bidco Oil Refineries Limited [2020] eKLR and Kenya Bus Services Limited and another vs Minister of Transport & 2 others and urged the court to allow the plaintiff to prosecute her case and dismiss the application.

Analysis and Determination

12. The issue for determination is whether the plaintiff's suit has abated due to failure to comply with the orders of the Ruling dated 26th October, 2023 requiring them to file an amended Plaint within 14 days of delivery of the said Ruling. In the ruling the court issued the following orders:
 - a. That the application dated 27th April, 2023 is struck out with costs.
 - b. That the plaintiff shall amend its plaint to include its officials within 14 days of this order.
 - c. The costs of the application dated 27th April, 2023 shall be borne by the plaintiff.
13. In the case of Investment Limited v G4s Security Services Limited (2015) eKLR the court held that:

“...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...”
14. Similarly, in the case of Crescent Construction Co. Limited v Delphis Bank Limited [2007] eKLR the court held that:

“One thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”
15. The court record shows that an amended plaint dated 22nd July, 2024 has been filed by the Plaintiff. The court should sparingly use the draconian discretion to strike out pleadings, which essentially removes the parties from the seat of justice. It should also be noted that the court cannot shy away from exercising such discretion to strike out suits if they are an abuse of court process.
16. The court therefore exercises discretion in favour of the Plaintiff and gives her an opportunity to prosecute her case. The plaintiff to fix this case for hearing within 30 days from the date of this ruling, failure to which the suit stands dismissed. The application is hereby dismissed with costs in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

