Harleys Limited v Metro Pharmaceuticals Limited (Civil Suit 2021 of 2001) [2024] KEHC 802 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 2021 OF 2001

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

HARLEYS LIMITED ..... PLAINTIFF

AND

METRO PHARMACEUTICALS LIMITED ..... DEFENDANT

RULING

1. The history of this matter and events leading up to this ruling are as follows. Harleys Limited, (hereafter the Plaintiff) filed this suit against Metro Pharmaceuticals Limited (hereafter the Defendant) on 22.11.2001, seeking general damages for defamation. The Defendant filed a statement of defence dated 10.01.2002 which was later amended. The Plaintiff's case partly proceeded to hearing on 28.09.2011 and 17.09.2012 before two (2) separate judges. During the evidence-in-chief of the Plaintiff's witness, on the latter date, counsel for the Defendant raised an objection concerning the admissibility of certain documents relied on by the Plaintiff. Mbogholi, J (as he then was), then the trial Judge who had taken over the matter from the preceding judge, delivered a ruling dismissing the Defendant's objection on 19.03.2015.

2. Between the latter date and 17.07.2017, the suit did not proceed further. During the hiatus, the Defendant amended its defence as parties exchanged documents, resting with the document filed on 17.08.2017. No hearing date or step was taken thereafter, and on 10th May 2019, the court issued a Notice to Show Cause (NTSC) why the suit should not be dismissed for want of prosecution, scheduled for 24.05.2019. The NTSC was listed before Sergon, J, who having considered the reasons advanced by the Plaintiff's advocate sustained the suit but directed that the suit be set down for hearing within ninety (90) days, failing which the suit would stand dismissed for want of prosecution. The suit was eventually scheduled for hearing on 18.07.2019 but on that date was adjourned at the behest of

counsel for the Plaintiff. A further date was fixed in November 2019 for April 2020, but no hearing was held, and no further step was taken by the Plaintiff.

3. Eventually, prompted by action by the court, the parties appeared before this court on 15.06.2023. Counsel for the Plaintiff indicated that the suit was part-heard and sought a hearing date. On his part, the defense counsel contended that the last step in the matter was way back in 2019 and by virtue of the provisions of Order 17 Rule 2(5) of the *Civil Procedure Rules*, the suit stood automatically dismissed for want of prosecution. This court subsequently directed that the Plaintiff and Defendant file affidavits on the point after which oral submissions were to be made.

4. Pursuant to the foregoing directions, the Plaintiff through Grace Wangui Koech, counsel on record for the Plaintiff, filed an affidavit dated 20.07.2023. The affidavit restated the history of the matter since inception and explained that delay in progression of the suit was occasioned by the Defendant's move to amend their defence after the March 2015 ruling of Mbogholi J, request for certified typed proceedings, election petitions filed in the aftermath of the 2017 General Elections, and difficulty in obtaining a hearing date in the years 2017 – 2018. Following which the matter was eventually scheduled to proceed for hearing on 18.07.2019 but could not be reached, and another hearing date was fixed 23.04.2020 which coincided with onset of the Covid-19 Pandemic, when as court operations were paralyzed.

5. She further swore that between 2021 and 2022, most judges in the Civil Division of the High Court were on transfer, further compounding delay in prosecution of the matter, and that the Plaintiff was ready and willing to set the matter down for hearing. She asserted that the Defendant's application to have the suit marked as dismissed by dint of Order 17 Rule 2(5) of the *CPR* is incompetent, bad in law and an attempt to subvert justice, to the detriment of the Plaintiff.

6. The Defendant eschewed filing an affidavit. Oral submissions were made in respect of the issue at hand. On behalf of the Defendant, counsel clarified that the Defendant had not applied for dismissal of the suit on 15.06.2023 but rather asserted that pursuant to Order 17 Rule 2 (5) of the *CPR*, the suit stood dismissed for want of prosecution, given that two (2) years had lapsed before any step was taken in respect of the suit. That the suit having been filed in 2001, it was not being in the interest of justice or overriding objective to sustain it when it already stood dismissed. Counsel further pointed out that the Plaintiff's affidavit did not explain why for two (2) years prior to dismissal of the suit they had not listed the matter for hearing.

7. Here, counsel stressing that an affidavit whose contents were similar to the one filed pursuant to this court's orders, had earlier been sworn in respect of the NTSC heard on 24.05.2019, when the Plaintiff was granted ninety (90) days to prosecute the suit. It was further submitted that even if any suit subsists, the delay is unexplained, hence the court ought to find that the suit has been dismissed by operation of Order 17 Rule 2(5), for the litigation to come to an end.

8. In response, counsel for the Plaintiff argued that delay between 2021-2022 was explained in the Plaintiff's affidavit material. Relying on the decision in *Mwangi Kimenyi v AG* [2014] eKLR and the of-cited decision in Ivita v Kyumba as captured in *Invesco Insurance v Oyange Barack* [2018] eKLR, she contended that delay alone ought not to defeat a suit; that the Plaintiff will suffer prejudice if not accorded an opportunity to prosecute the suit. That the Plaintiff has always been ready to prosecute the suit including. The court was urged to consider the circumstances obtaining in the period between 2020-2023 and that the matter is partly heard.

9. In a brief rejoinder, counsel for the Defendant contended that the authorities relied on by the Plaintiff were rendered prior to enactment of Order 17 Rule 2(5) of the *CPR* as such have no bearing on the issue at hand. It was further submitted that the Defendant does not need to establish the prejudice

likely to be occasioned, and that the suit having been dismissed by operation of the law, it will be unjust to the Defendant for the court to hold otherwise. Lastly, it was asserted that no attempt has been made by the Plaintiff to reinstate the suit to date.

10. The court has perused the entire court record and considered the material canvassed in respect of the Defendant's position. The long history of this suit has been captured elsewhere in this ruling and the parties' respective material. The record of more recent events shows that when the matter came up on 15.06.2023, the defence counsel contended that pursuant to Order 17 Rule 2 (5) of the *CPR*, the suit stood dismissed for want of prosecution given that two (2) years had lapsed before any step was taken in respect of the suit.

11. Order 17 Rule 2 of the *CPR* echoes and gives effect to the constitutional injunction in Article 159(2)(b) and the overriding objective in Section 1A and 1B of the *CPA*, both which command the expeditious dispensation of justice. Order 17 Rule 2 of the *CPR* provides that:

> "(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> (5) A suit stands dismissed after two years where no step has been undertaken.
>
> (6) A party may apply to court after dismissal of a suit under this Order."

12. Rules 2(5) and 2(6) above were included in the *Civil Procedure Rules* of 2010, vide Legal Notice No. 22 of 26th February 2020. The self-evident objective being to curb delay occasioned by lethargy on the part of litigants. This, in keeping with the overriding objective. What falls to be determined here is whether the Plaintiff's suit stands dismissed by operation of the law.

13. The record shows that following adjournment of the hearing by the Plaintiff on 18.07.2019, a date taken pursuant to the order of Sergon J of 24.05.2019, a hearing date for 23.04.2020 was on 12.11.2019 taken in the registry. Although it is true that the date of hearing thus taken fell during the COVID-19 pandemic, no action was taken in the matter by the Plaintiff thereafter. Almost three years later, and long after the courts had resumed normal operations on the on-line platforms, it took the court registry, acting on its own motion on 14.09.2022 to set down the matter for mention before the on 4.05.2023 Deputy Registrar who directed that the suit be placed before a Judge for directions.

14. From the foregoing it is not in dispute that after surviving the NTSC in May 2019, the last time that the matter was before a Judge for hearing was on 18.07.2019 when a counsel holding brief for Ms. Koech in adjourning the matter, told the Court that Ms. Koech "was before J. Okwany. Seeks adj(adjournment) to another date", which date was taken 4 months later, on 12.11.2019. Since 12.11.2019, and even after the date intended for hearing on 23.04.2020 had passed, no action was taken by the Plaintiff. This, despite the fact that the Judiciary leadership had, at the onset of the COVID-19 pandemic, promptly issued practice directions 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. The Plaintiff was only jolted from slumber by the proactive action of the registry on 14.09.2022, over two years since the last scheduled hearing date of 23.04.2020.

15. In the court's view, given the history of the suit, the lengthy explanations now proffered by the Plaintiff ring hollow and are merely excuses for a cumulative delay of 22 years. The Plaintiff's advocate appeared by her affidavit and material to advance the view that Rule 2(5) is not automatic and leaves room for the court's discretion. Even if the Court had any discretion to exercise under Order 17 Rule 2(5) of the *Civil Procedure Rules*, the delay here is inordinate and not satisfactorily explained. Secondly, in the court's reading, the Rule requires no formality to take effect, and although it may be desirable for an entry to be recorded in the file to mark the dismissal, to impose such formality as a condition for deeming the suit dismissed would take the sting out of, and possibly defeat the very object of the Rule as well as the overriding objective.

16. Significantly, the language employed in Rule 2(5) is dissimilar to the permissive language marked by the constant use of the word "may" in Rules 2(1) to 2(4) of Order 17. The injunctive purport of Rule 2(5) is clear that by operation of the law, a suit stands automatically dismissed after two years where no step has been undertaken. Therefore, the reasons for lack of action by the affected party cannot in any way hinder the automatic effect of the Rule, as long as two years have passed without an action being undertaken in a matter. Such reasons would only be relevant where such party is applying under Rule 2(6) concerning such dismissal.

17. In the court's considered view, Order 17 Rule 2(5) cannot be read in isolation from myriad court pronouncements on the need to curb delay in the prosecution of cases. As observed in *Ivita v Kyumbu* (1984) KLR 441, extended delay adversely impacts the possibility of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. Not to mention escalation of litigation costs. The cause of action in this case arose in 2001, and 22 years later, the Plaintiff's case is yet to be concluded. This is a classic case of the kind of delay contemplated in Ivita (supra).

18. Also pertinent in the application of Order 17 Rule 2(5) is the duty of the Court under Section 1A and 1B of the *Civil Procedure Act*- the overriding objective. At a time when the courts are deluged with heavy caseloads, they must firmly discharge their duty under the overriding objective and refuse to allow slovenly parties the costly privilege of litigating at their own leisure.

19. In *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal had the following to say concerning the application of the overriding objective in section 1A and 1B of the *Civil Procedure Act*:

> " The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court..." (emphasis added).
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> See also: *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR.

20. Flowing from the foregoing, it is clear that pursuant to the provisions of Order 17 Rule 2(5) of the *Civil Procedure Rules*, the Plaintiff's suit stood dismissed for want of prosecution after 13.11.2021 and

the action of registry staff on 14.09.2022 did not and could not turn back the clock. All that remains is the awarding of the costs of the dismissed suit to the deserving Defendant who, having been dragged to court has been held hostage for 22 years. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Ndegwa h/b for Ms. Koech

For the Defendant: Mr. Aluoch h/b for Mr. Mogere

C/A: Carol