



Huawei Technologies (K) Limited v Cannon Assurance (K) Limited & another (Civil Case 511 of 2010) [2024] KEHC 9204 (KLR) (Commercial and Tax) (30 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9204 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 511 OF 2010
JWW MONG'ARE, J
JULY 30, 2024**

BETWEEN

HUAWEI TECHNOLOGIES (K) LIMITED PLAINTIFF

AND

CANNON ASSURANCE (K) LIMITED 1ST DEFENDANT

MARTIN MBURU T/A LIGEN INSURANCE AGENCIES 2ND DEFENDANT

RULING

1. Judgment in this matter was delivered on 12th April 2017. The 1st Defendant then filed an application to stay execution of the judgment pending an appeal and by a ruling of the court dated 7th November 2017, the court ordered inter alia that the 1st Defendant pays the Plaintiff 50% of the decretal sum (to be determined by the parties) or based on the figure referred to in the application by the 1st Defendant within 30 days of the date of the order and that the balance of the decretal sum was to be paid into an interest earning account in a reputable Bank, held in the joint names of the Counsels of both Parties within 60 (sixty) days of the order. Failure to comply with these orders, the Plaintiff was at liberty to execute.
2. The 1st Defendant did not comply with the aforementioned orders and the same was affirmed by the court in its ruling of 18th June 2018. However, the court noted that a sum of Kshs.10,000,000.00/= was subsequently paid and it ordered that this money should be paid to the Plaintiff and the balance be deposited as earlier ordered. In default the Plaintiff was at liberty to proceed with execution but lawfully. The decree was also to be properly processed and in sum, the court held that the parties had been taken back to the 7th November 2017, ruling/orders. The execution was thus set aside accordingly. On 25th April 2023, the matter was mentioned and subsequently marked as closed after the Plaintiff's application was dismissed for want of prosecution.



3. The Plaintiff has now approached the court by way of the Notice of Motion dated 11th March 2024 under Order 12 Rule 7 of the Civil Procedure Rules where it seeks to set aside or vacate the orders of the court that marked this matter as closed and urges that the court orders the file to be re-opened to enable the Plaintiff proceed with execution of the decretal sum as ordered by the court on 7th November 2017.
4. The application is supported by the grounds on its face and the supporting affidavit of the Plaintiff's counsel on record, Wangalwa Oundo, sworn on 11th March 2024. The Plaintiff avers that on the date when the case was mentioned and closed, its advocate was not present in court as he was being evicted by their landlord and the carting away of the law firm files and equipment and as such the firm was unable to fulfill its obligations in relation to its court files. The Plaintiff states that its counsel was only able to have access to its files in the month of September when they managed to stabilize enough to get new premises. The Plaintiff states that its counsel then made attempts to reinstate the suit but the same was dismissed for want of prosecution. The Plaintiff contends that the failure to attend the matter when it was called on 5th March 2024 was not failure on the part of counsel but it was due to the Kenya Law website being down on internet technicalities which rendered the accessibility of the link and causelists impossible in the first instance. That failure on the part of the Plaintiff's counsel was in no way reflective of the nonchalance on the part of the Plaintiff but instead can be attributed to technological technicalities.
5. The Plaintiff is apprehensive that the 1st Defendant as the Judgment debtor will not satisfy the decree unless compelled by the court and that the Plaintiff is desirous of having the file reopened so that they can proceed with execution of the outstanding decretal sum in accordance with the orders of the court issued on 7th November 2017. It states that the 1st Defendant will suffer no prejudice if the orders sought in the application are granted and that it is in the interest of fairness and justice that the file is reopened for the Plaintiff to proceed with the execution of the outstanding decretal sum against the 1st Defendant.
6. Even though the 1st Defendant did not file a response, its counsel orally submitted that the application is an abuse of the court process.

Analysis and Determination

7. The Plaintiff simply seeks to reopen this matter which was otherwise closed as per the court's ruling of 25th April 2023. As stated, the application is premised under Order 12 Rule 7 of the Civil Procedure Rules which provides as follows:

‘Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.’
8. From the above, the court has discretionary and unconditional power to set aside any order/ruling that dismissed a case. Such a dismissal order arises when inter alia “If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.(Order 12 Rule 3(1)].
9. In this case, the Plaintiff did not attend court to which it gave reasons that its counsel was not available as his law firm was being evicted and that there were technological challenges in the Judiciary's e-filing system and the Kenya Law website so that the Plaintiff was not able to upload its submissions and access the court's causelist. I do not find these reasons to be sufficient reasons that warrant the court to reopen the case for a number of reasons.



10. First, there is no evidence that on the material day, the Judiciary's e-filing system and Kenya Law website was experiencing such downtime and intermittent challenges that parties were unable to access it or upload pleadings and submissions. If this was the case, then even the 1st Defendant and the court would not have accessed the same or conducted virtual proceedings on that day.
11. Second, it is not the presence of the plaintiff's advocate that is required. The advocate's presence is only important because he can offer or send another advocate to offer an explanation why the suit should not be heard on the day fixed by the court. That explanation offers the basis for a good cause not to have the suit dismissed recorded by the court (see Amos Munyi Njue v Denis Murithi Mutegi & another CHKA ELCC No. 639 of 2013 [2017] eKLR). That did not happen on the day this suit was dismissed by the court in as much as counsel was aware of the hearing date. Assuming that he was indeed indisposed due to an ongoing eviction, he ought to have at least called or made an effort to send someone to hold his brief in court.
12. Further still, I find that the Plaintiff has taken too long to approach this court to have it set aside the dismissal order (Just over one year) and I find this delay to be inordinate and unexplained. If it was indeed keen on executing its decree, such steps must have been taken earlier enough otherwise the court can only assume that the Plaintiff was resting on its laurels and was only awakened by its application being dismissed and the file closed. The Plaintiff can only have itself to blame.

Conclusion and Disposition

13. In the foregoing, I find that the Plaintiff's application dated 11th March 2024 has no merit and order that the same be dismissed with costs.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 30th DAY of JULY, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-_

N/A for the Applicant.

N/A for the Respondent.

Amos - Court Assistant

