



REPUBLIC OF KENYA



**Mboe Sambu Resources Ltd v Paino & another (Civil Case
23 of 2018) [2023] KEHC 18287 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE 23 OF 2018
F GIKONYO, J
MAY 25, 2023**

BETWEEN

MBOE SAMBU RESOURCES LTD APPLICANT

AND

STEPHEN SAMUEL PAINO 1ST RESPONDENT

FRANCIS EDWARD STRANGE 2ND RESPONDENT

RULING

Reinstatement of sui

1. The Notice of Motion dated 24/11/2022 is seeking the setting aside of the ruling issued on 27th October 2022 and reinstatement of the substantive suit for hearing on merit. It also seeks for an order that costs to be in the cause.
2. The application is premised on Article 157 of the *Constitution*, Section 1A, 1B, 3, 3A and 80 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010.

The Applicant's case

3. The applicant is seeking the setting aside of the order dismissing the suit for want of prosecution given on 27th October 2022, and consequently, reinstate the suit.
4. The application is based on the grounds set out in the application and supported by the support affidavit of Stephen Kimanyi sworn on 24/11/2022.
5. The applicant alleged that it had filed an application dated 18/12/2020, to which neither the respondents had responded nor the court issued directions. The applicant argued it did file the said application, paid the filing fees and was issued with a receipt. The application is seeking to join more defendants in the suit. Yet, the application is pending directions from the court.



6. The applicant stated that, in the ruling, the court stated that it did not have on record the application dated 18/12/2020.
7. The applicant averred that in 2020 the court introduced online filing system hence the physical presentation of documents to the registry was halted. Therefore, the omission to place the said application in the court file cannot be premised upon the applicant herein, since it has no influence, or control over the process.
8. According to the applicant, the orders dismissing the suit herein has denied the applicant a chance to have the substantive dispute ventilated judiciously and has occasioned it prejudice.
9. The applicant argued that the respondents herein shall not suffer any prejudice if the order of dismissal is set aside as they shall be afforded an opportunity to test the evidence by cross examination and further present their defence.
10. The applicant therefore urged this court to set aside the orders of 27/10/2022 and reinstate the suit herein and allow it to proceed between the parties herein.

The 2nd Respondent's case.

11. The Respondent herein opposed the application vide the Replying affidavit of Francis Edward Strange sworn on 7/12/2022.
12. The deponent argued that the application is scandalous, frivolous, vexatious and otherwise an abuse of the court process of the court. That the application is an afterthought. That the application was filed on 29/11/2022 a day after the deputy registrar had heard the parties including the applicant's counsel and reserved her ruling on the respondent's bill of costs dated 1/11/2022 for 8/12/2022.
13. The 2nd respondent argued that the ruling of this court of 27/10/2022 was delivered in the presence of Mr. Kago counsel for the applicant. The applicant did not prefer any appeal or make any application for review.
14. The 2nd respondent denied being aware of the applicant's application dated 18/12/2020 as neither he nor his advocate was served with the said application. The applicant did not move the court on the said application for two years.
15. The 2nd respondent contends that he stands to be prejudiced if the application is allowed.

Directions of the court.

16. The Notice of Motion was canvassed by way of written Submissions. Both parties filed submissions.

The Applicant's Submissions

17. The applicant emphasized that the dismissal of the suit was premature as there was a pending application that was awaiting the directions of the honourable court which prevented the applicant from taking further steps in the matter.
18. The applicant submitted that the matter came before the court on 11/5/2022 and counsel for the applicant informed the court of the pending application and sought directions on how to dispose of the same.



19. The applicant submitted that the applicant filed a response to the application vide its replying affidavit sworn on 14/06/2022 by Mr. Stephen Kimanyi and sent to the court's email and paid for and a receipt issued.
20. But, again a perusal of the court file shows there is no such replying affidavit or a receipt of payment on the said date.
21. The applicant pointed a finger to the court registry and blames them for not printing documents filed and paid for.
22. The applicant submitted that it is keen on prosecuting the substantive suit as it pertains the theft of company property and equipment worth in excess of Kshs. 50,000,000. Further, that the defendants were convicted of the same in Kilgoris criminal case no. 48 of 2015.
23. The applicant relied on the following authorities;
 - i. Order 17 Rule 2(1) (3) of the *Civil Procedure Rules*.
 - ii. *Argan Wekesa Okumu v Dima College Limited & 2 Other* [2015] eKLR
 - iii. *CMA Holdings Limited v Nzioki* [2004] 1 KLR 173.
 - iv. *Nilesh Premchand Muuli Shah & Another T/A Ketan Emporium V M. D. Popat and Others & Another* [2016] eKLR.
 - v. *Naftali Opondo Onyango V National Bank of Kenya Ltd* [2005] eKLR.
 - vi. *Mwangi S. Kimenyi V Attorney General and Another* Misc. Civil Suit No. 720 of 2009.
 - vii. Article 159(2) of the *Constitution*.
 - viii. *Caliph Properties Limited v Barbel Sharma & Another* [2015] eKLR.
 - ix. *Belinda Murai & Others v Amoi Wainaina* (1978).
 - x. *Philip Chemwolo & Another v Augustine Kubede* (1982-88) KAR 103.
 - xi. Section 3A *Civil Procedure Act*.
 - xii. *Shah v Mbogo & Another* (197) EA 116 .
 - xiii. *Gold Lida Limited V NIC Bank Limited & 2 Others* [2018] eKLR

The Respondents' Submissions

24. The respondents reiterated the contents of the replying affidavit and added that the suit was dismissed because the applicant failed to provide plausible explanation for not taking steps to prosecute the suit.
25. The respondent relied on the case of *Jaldesa Tuke Dabelo Versus IEBC & Another*.

Analysis and Determination

26. I have read through the pleadings, the written submissions, the cited authorities and considered the relevant provisions of the law in this matter.

Issues

27. Accordingly: -



- a. Is there sufficient reason to set aside the dismissal order and reinstate this suit?
- b. If, so, on what terms should the order be set aside? and
- c. What about costs?

Setting aside order of dismissed of suit

28. The applicant has applied for review as well as setting aside of order dismissing suit for want of prosecution. Review of court decrees or orders under section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the Civil Procedure Rules may be done inter alia on sufficient reason.
29. But of pointed application here is Order 12 Rule 7 of the [Civil Procedure Rules](#) which provides that: -

“Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”
30. A just and fair decision in an application to set aside order of dismissal of suit for want of prosecution entails whether it is still possible to do justice despite the delay. But, justice shall be done to all parties (art. 159(2)(a) of the [Constitution](#)); the plaintiff and the defendant. On one hand, the plaintiff is championing for substantive justice; on the other, the defendant is crying prejudice caused by the delay in prosecuting the case is an affront to justice. Therefore, necessary to entertain a fine balance, taking into account prejudice to either party as well as to the administration of justice, and the parties’ statutory obligation to assist the court to deliver on the overriding objective; i.e. a fair, just, affordable, proportionate and expeditious resolution of disputes, which are amongst the major and relevant considerations here.
31. As a principle of justice, litigation must be concluded without unreasonable delay by parties who come to court seeking for justice. Expeditious disposal of cases is not at personal desire but a constitutional principle of justice (art. 159(2)(b) of the [Constitution](#)) as well as a statutory obligation of the court, the parties and their legal counsel or authorized agents. See also the overriding objective of the law in section 1A of the [Civil Procedure Act](#). These provisions and legal imperatives help the cause of justice and clearing of backlogs in the courts which in turn restores public confidence and trust in the judiciary.
32. Here, the exposition in [Investment Limited –Versus - G4s Security Services Limited](#) (2015) eKLR is relevant where court held: -

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the [Constitution](#) of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. 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.
33. Applying the test...Is the Applicant is entitled to the relief sought.?



34. The suit was filed on 8th November 2018. The suit was spared the hangman's noose for vide the ruling delivered on 15/10/2020 by Bwonwong'a J on an application for dismissal for want of prosecution. The applicant was granted more time to prosecute its case.
35. Subsequently, another application was filed by the 2nd respondent seeking dismissal of the suit. This court rendered its decision vide the ruling dated 27/10/2022, allowed the application and dismissed the suit under Order 17 Rule 2 of the CPR.
36. The Applicant argued that it had filed an application which was pending at the time the suit was dismissed and also that the applicant responded to the application for dismissal but the replying affidavit was not placed in the file. I note that the receipt for payment of the joinder application dated 18/10/2020 attached to the application herein was issued on 2022-02-09 20:33:17. Nothing shows the receipt has any relation to the application filed on 18/10/2020.
37. I have perused the record of this court and I find that the proceedings of 11/5/2022, the matter was for hearing of the application dated 9/2/2021 for dismissal for want of prosecution and Mr. Kiogothi stated that they have also applied to join more parties. The court allowed the plaintiff 7 days to respond to the application for dismissal.
38. The applicant did not move the court on its application for joinder. Counsel for the applicant merely mentioned about the application but did not move the court for directions or anything towards progressing it.
39. Although courts should strive to serve substantive justice, it is not a preclusion creed from dismissing suits for want of prosecution where the only just course is to dismiss the suit due to the prejudice the pendency of the suit causes upon the respondent and the general disposal of cases.
40. The court has been called upon to exercise its wide discretion to set aside an order for dismissal; but it ought to be exercised judiciously. The party seeking to reverse the dismissal order must explain sufficiently to court as to why his suit should be reinstated. The reason advanced by the Applicant that it had filed an application cannot be reason enough as to why it did not take steps to prosecute the application and move the suit forward.
41. From the court proceedings, the Applicant has never visited the court registry even once to fix the matter for mention or for any other purpose necessary to move the suit forward. The excuse that the application is pending is not supported by evidence, and is insufficient.
42. The Applicant has not taken any significant step to prosecute the suit in more than four years. There are no sufficient grounds to review the orders issued by this court on 27/10/2022.
43. I find the motion is not merited and I hereby dismiss it with costs to the respondents.
44. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 25TH DAY OF MAY, 2023.

.....

F. GIKONYO M.

JUDGE

IN THE PRESENCE OF:

1. Mr. Kasaso – CA



2. M/s Wairimu holding brief for Kago for applicant

3. Anyona for Respondent

