



REPUBLIC OF KENYA



**Simiyu & another v Cytonn Investments Management (Civil Case  
6 of 2020) [2023] KEHC 26085 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 26085 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL CASE 6 OF 2020  
REA OUGO, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JOHNSON MASINDE SIMIYU ..... 1<sup>ST</sup> PLAINTIFF**

**DANIEL NYAKUNDI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CYTONN INVESTMENTS MANAGEMENT ..... DEFENDANT**

**RULING**

1. Before me is an application dated the 22<sup>nd</sup> of May 2023. The application is brought under sections 1A and 3A of the *Civil Procedure Act* Cap. 21, Order 2 Rule 15, and Order 51 Rule 1 of the *Civil Procedure Rules*. The defendant/ applicant seeks to have the Plaintiff dated 27<sup>th</sup> July 2020 herein and the suit dismissed. That costs for and occasioned by the application and suit be borne by the plaintiffs/ respondents.
2. The application is supported by Antony N. Kimani the legal officer of the defendant/ applicant. The affidavit is quite detailed giving a history of the suit. The respondent has given details on how many times the matter came up for directions and confirmation on whether the plaintiffs had complied with the provisions of Order 11 of the *Civil Procedure Rules* (CPR). The applicant also contends that on the 6<sup>th</sup> January 2023 Justice Mabeya in *Cytonn High Yield Solutions (CHYS) vs Office of the Official Receiver* (Nairobi, Insolvency Petition E063 of 2021) placed Cytonn High Yield Solutions, the subject matter of this suit, under liquidation and directed that all related claims be registered with the Office of the Officer Receiver, an avenue that the plaintiffs/ respondents is legally required to explore. That as a result of the said order these proceedings are poised to ultimately become an academic exercise for this Court. The plaintiffs/ respondents are not without recourse as they have been invited to lodge their claims with the Official Receiver for determination and resolution and will not be prejudiced in anyway should the prayers sought herein be granted. That litigation must come to an end and the matter cannot be kept in abeyance indefinitely. That the orders sought to be granted.



3. The application was not opposed. The respondent was served with the application but filed no response.

### **Analysis and Determination**

4. I have considered the application. I have also perused the entire court record. In a ruling dated 30<sup>th</sup> July 2021, Justice Riechi directed that the suit be set down for hearing within the next 60 days from the said date. The plaintiff has not complied with the said order. This suit was filed on the 30<sup>th</sup> of July 2020 vide a plaint dated the 27<sup>th</sup> of July 2020. The defendant filed its defence on the 27<sup>th</sup> of August 2020. Thereafter the defendant sought vide the application dated 27<sup>th</sup> August 2020 to have the plaint struck out and the suit dismissed with costs to the defendant. This application was not granted in the ruling dated the 30<sup>th</sup> July 2021.
5. On the 9<sup>th</sup> November 2022 this court gave directions to the parties to comply with the provisions of Order 11 of the CPR. On 12 July 2023, the plaintiffs' counsel filed issues for trial and went quiet thereafter. Order 11 of the CPR gives a very elaborate procedure on what parties are to do during the pre-trial directions and conference. What was filed by the plaintiff were merely issues for trial and nothing more, the plaintiffs have not complied with the provisions of Order 11 of the CPR. The plaintiffs have not shown any interest in wanting to proceed with the suit. Order 7 rule 3 states as follows;
  - (3). Any party or his advocate who wilfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the Act and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise.
6. After considering the averments of the applicant, the conduct of the plaintiffs in the matter, and the provisions of Order 11 of the CPR, it is my view that the plaintiffs and their advocate have failed to comply with the provisions of the Order and have thus violated the overriding objective as stipulated in Section 1A and 1B of the Civil Procedure Act. The application has merit and the plaintiffs' suit is dismissed. The applicant is awarded the costs of the application and the application.

**DATED, SIGNED, AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER 2023.**

**R.E. OUGO**

**JUDGE**

In the presence of;

Miss Kamau h/b Miss Muriungi - For the Defendant

Plaintiff- Absent. Wilkister - C/A .

