



**Khan v Imperial Bank Limited (Under Receivership) & another (Civil Suit 268 of 2015)
[2022] KEHC 11904 (KLR) (Commercial and Tax) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 268 OF 2015
A MABEYA, J
AUGUST 19, 2022**

BETWEEN

JAVAID IQBAL KHAN PLAINTIFF

AND

IMPERIAL BANK LIMITED (UNDER RECEIVERSHIP) 1ST RESPONDENT

KENYA DEPOSIT INSURANCE CORPORATION 2ND RESPONDENT

RULING

1. Order 17 rule 2 of the rules provides: -

“(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.”

2. In *Ronal Mackenzie vs Damaris Kiarie* (2021) eKLR, the court observed: -

“It is trite that the decision on whether the suit should be reinstated for trial is a matter of judicial discretion and it depends on the facts of each case. The principles that should guide the court when dealing with such an application were well laid out in the case of *Ivita Vs Kyumbu* [1984] KLR 441 which are; the reasons for the delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay.

...



“Though it has been deponed that the ‘rogue’ advocate clandestinely dealt with the file in a manner that the firm could not establish the status of the same, there is no mention of the plaintiff and the steps he took to follow up his matter. In the case of *Utalii Transport Company Limited & 3 Others Vs NIC Bank & Another* [2014] eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. I find that the delay was prolonged and inexcusable.”

3. This suit was dismissed on November 23, 2020 for want of prosecution. A notice to show cause had been duly issued to the parties. While the defendant’s advocate appeared, there was no appearance on behalf of the plaintiff on that day. The court therefore found that cause why the suit should not be dismissed had not been shown.
4. On 1/11/2021, the plaintiff took out a motion on notice under order 12 rule 7 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* seeking the re-instatement of the suit.
5. The grounds thereof were set out in the body of the motion and the supporting affidavit of Stephen Mwanza Gachie sworn on 1/11/2021. It was deposed that when the matter came up for dismissal on November 23, 2021, no notice had been served upon the firm of Gachie Mwanza & Company, Advocates for the plaintiff.
6. That the said firm had been in conduct of the matter since 11/9/2019. That the matter had not been active because the plaintiff was still waiting for a status of the 1st respondent who had been placed under receivership. Shortly after receivership, the Covid-19 pandemic hit the country paralyzing court business.
7. That when normalcy returned, the said advocates filed an application dated 27/9/2021 seeking leave to proceed with the suit against the defendants. The application was served for mention on October 18, 2021. It is on October 26, 2021 that they realized that the suit had been dismissed for want of prosecution on November 23, 2020.
8. That the plaintiff had not lost interest in the suit and was desirous to prosecute the suit. That the present application had been brought timeously. That no prejudice will be suffered by the defendants.
9. The defendants opposed the application vide the replying affidavits of Andrew Rutto and David Irungu both sworn on November 26, 2021. They deposed that the suit had been properly dismissed on November 23, 2020 as no action had been taken by the plaintiff to prosecute the suit ever since his application for injunction was dismissed in 2016.
10. That no good reasons had been advanced why no action had been taken to prosecute the suit. That the 2nd respondent had not been enjoined in the suit and it was therefore a stranger to the application. That in any event, the Covid-19 pandemic as well as the receivership of the 1st respondent was still subsisting. They urged that the application be dismissed.
11. The court has considered the opposing contestations and the submissions of learned counsel. This is an application for re-instatement of a suit that had been dismissed for want of prosecution. The plaintiff did not appear on the day of dismissal and the suit was dismissed in his absence.
12. The reason advanced was that his advocate was not served with the notice to show cause. The court has perused the record. It has seen a notice to show cause dated 3/11/2020. The same was served upon the said advocates on that day at 14:44 hours through the email supplied by the said advocates. There was no denial that the email used did not belong to the said advocates.



13. In view of the foregoing, I hold that there was no sufficient reason that was advanced why there was no appearance by the plaintiff on November 23, 2020 to show cause.
 14. Be that as it may, I will consider the application on its merit. The question is, does it show cause why the suit should not have been dismissed?
 15. The record shows that after the suit was filed in June, 2015, the plaintiff filed and prosecuted an injunction application. The same was however, dismissed on 23/2/2016 by Ogola J the same was appealed against and the appeal is still pending.
 16. The matter was next listed for dismissal for want of prosecution in September, 2019. At that time, the plaintiff indicated to court that, since the 1st respondent had been placed under receivership, he was unable to proceed with the suit. The matter was then ordered to be mentioned before the Deputy Registrar on November 19, 2019. On that date, none of the parties appeared.
 17. From then, the next time the matter was mentioned was on 2/11/2020 for dismissal. Then a notice to show cause was issued for November 23, 2020 which was not responded to.
 18. On record there are several notice to show cause. These are dated; 15/8/2019, 19/11/2019, 27/10/2020 and 3/11/2020. All these are shown to have been served upon the parties by the court.
 19. The inference to be made from the foregoing is that, after the dismissal of its application for injunction, the plaintiff went to slumber. The matter only came up in court at the instance of the court. It is the duty of every plaintiff to ensure that he takes steps to prosecute his/her case. The court is not a parking yard for disputes.
 20. The allegation that Covid-19 and the receivership of the 1st respondent prevented the prosecution of the suit does not lie. As I have already shown, at no time ever since March, 2016 ever the plaintiff take any step to prosecute the suit. The Covid-19 pandemic hit the country in March, 2020. Shortly thereafter in May – June, 2020, court business resumed.
 21. Another factor which shows that the twin excuses of Covid-19 are unsatisfactory is that, despite the suit being dismissed in November, 2020 when the court business had fully resumed, it took the plaintiff nearly a year to attempt to take a step to prosecute the suit. Not until 27/9/2021 that an application for leave to join the 2nd respondent and proceed with suit against the respondents was it filed.
 22. In view of the foregoing, I am satisfied that no good reason was advanced as to why the order of dismissal of suit for want of prosecution of November 23, 2020 should be set aside.
 23. Accordingly, the application dated 1/11/2021 is found to be without merit and is dismissed with costs.
- It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

