



Macharia v Mutubwa & Company Advocates & 3 others (Miscellaneous Application 003 of 2022) [2022] KEHC 16094 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)

Neutral citation: [2022] KEHC 16094 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 003 OF 2022
DO CHEPKWONY, J
SEPTEMBER 23, 2022**

BETWEEN

ANN MUTHONI MACHARIA APPLICANT

AND

MUTUBWA & COMPANY ADVOCATES 1ST RESPONDENT

LUCIUS NJAGI KAMWARIRIE 2ND RESPONDENT

AUGUST NJAGI 3RD RESPONDENT

I & M BANK LIMITED 4TH RESPONDENT

RULING

1. The applicant moved this court by way of an originating summons dated April 21, 2021, brought under sections 12(5) and 17(6) of the *Arbitration Act*, order 37 rule 3 and 4 of the *Civil Procedure Rules* and article 165(6) and (7) of the *Constitution* seeking for the following orders;
 - a. Spent;
 - b. As a matter of utmost urgency this honourable court be pleased to stay all further proceedings being conducted by Wilfred Mutubwa as Sole Arbitrator of the unnumbered claim filed before him on August 4, 2020 by Lucius Njagi Kamweririe and August Njagi.
 - c. This honourable court be pleased to revoke or set aside the appointment of Wilfred Mutubwa as the Arbitrator in the dispute filed by the 2nd and 3rd respondents herein on August 4, 2020 between Lucius Njagi Kamweririe and August Njagi –v-s Anne Muthoni Macharia and I & M Bank Ltd.



- d. By way of alternative prayer, this honourable court be pleased to exercise its supervisory jurisdiction under article 165 of the Constitution by calling for and examining the record of Wilfred Mutubwa, the Sole Arbitrator in the matter filed before him on August 4, 2020 by the 2nd and 3rd respondents herein in order to satisfy itself of the legacy of his appointment, jurisdiction of competence and whether the applicant's constitutional rights have been infringed by his appointment and that this honourable court be pleased to revoke the said appointment and quash any proceedings being conducted by him in the event the court finds the first respondent lack competence and jurisdiction and there is infringement of the constitutional rights of the applicants on fair hearing.
- e. This honourable court make any other orders or give such other directions as may serve the interest of justice.
2. The application is supported by several grounds on the face of the summons and further supported by what is deponed in the annexed affidavit of Ann Muthoni Macharia of even date.
 3. This matter came up for mention for directions on July 19, 2022. Only counsel for the 2nd and 3rd respondents was present but there was no appearance for counsel for the other parties.
 4. Counsel stated that the matter was coming for directions on applicant's application dated April 21, 2021. She submitted that the last time the matter was slated for hearing of the application the court directed them to serve the other parties with a hearing notice which was indeed served.
 5. It is quite evident from the record that the applicants never attend court whenever the matter is to be mentioned. She has also never attended the arbitration proceedings yet and the application seeks to revoke the appointment of the Arbitrator. Clearly, the application is being used to frustrate the arbitration process and its pendency is prejudicial to the respondents.
 6. Upon listening to counsel for the 2nd and 3rd respondents on the alleged day, I also perused the record and found that it was the third time the matter was coming up for mention for the parties to take directions. Counsel for the 2nd and 3rd respondents confirmed that they had filed an affidavit of service to confirm service upon the applicant's counsel. In the circumstances hearing of the application dated April 21, 2021 was fixed for hearing on September 19, 2022.
 7. Again on September 19, 2022 when this matter was slated for hearing, counsel for the 2nd and 3rd respondents appeared but there was no appearance for the applicant and the 1st respondent. Counsel for the 2nd and 3rd respondents urged that the last time the matter was in court was directed to serve a hearing notice on the other parties which was complied with and an affidavit of service sworn on September 10, 2022 was filed.
 8. Counsel raised concern over the indolence of the applicant in prosecuting this matter because ever since the applicant filed the originating summons application she has never attended court in this matter whether for mention or hearing. It was submitted that, each time parties appear before the arbitration, the applicant often gives the excuse of this pending application in court as a reason of adjourning or objecting to the continuation of the arbitration proceedings.
 9. Counsel for the 2nd and 3rd respondents urged that having complied with directions on serving the applicant and the other respondent, sought this court to have the application dated April 21, 2021 dismissed and parties directed to proceed with the arbitration.



Analysis and Determination

10. I have considered the application dated April 21, 2022 and the oral submissions by counsel for 2nd and 3rd respondents. The only issue for determination herein is whether the application should be dismissed for non-attendance.
11. In my determination, I will begin by outlining the relevant provisions of the law which governs the dismissal of suits. Order 12 rule 3(1) of the [Civil Procedure Rules](#) provides that;

“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.”
12. In addition order 17 rule 2(1) of the [Civil Procedure Rules](#) provides for dismissal of suits for want of prosecution and it provides as follows;

“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.”
13. This matter has come up for hearing on several occasions and in all the instances the applicant has always been absent despite being served and affidavit of service being filed. From such conduct, it is clear that the applicant has lost interest in prosecuting the application.
14. In the case of [Ivita –vs- Kyumba](#) (1984) KLR 441 which was cited in the above mentioned case of [Peter Kipkurui Chemoiwo –vs- Richard Chepsergon](#) [2021] eKLR, the court held that;

“...the test to be applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether the delay could be excused and justice can be done despite the delay.”
15. It is worth noting that article 48 and 50 of the [Constitution](#) guarantees every Kenyan the right to access justice and fair hearing. This position applies to both parties to a suit and the indolence by the applicant in prosecuting the application amounts to a breach of the aforementioned provisions of the law as against the 2nd and 3rd respondents who have religiously attended court through their Counsel on record.
16. Although dismissal of suits is a draconian mechanism which should only be exercised sparingly with caution and in very clear cases, I am convinced that the absence of the applicant in court on the several occasions as indicated despite evidence of service, deserves nothing better than dismissal of the pending application.
17. As aforementioned above, under order 17 rule 2(1) of the [Civil Procedure Rules](#), this court on its own motion can dismiss an application for want of prosecution if no step is taken for more than one year in prosecuting an application. The application herein does not qualify dismissal under the said provisions. However, section 12 rule 3(1) of the [Civil Procedure Rules](#) is the best provision to be relied on in dismissing the said originating summons.
18. Having been satisfied that the applicant was properly served with the hearing date and in light of the foregoing reasons, I dismiss the application dated April 21, 2022 for non-attendance under order 12 rule 3(1) of the [Civil Procedure Rules](#) with costs to the 2nd and 3rd respondents.



It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Kwanga counsel holding brief for Mr. Ngatia counsel for Respondent

No appearance for Applicant

Court Assistant - Sakina

