



REPUBLIC OF KENYA



KENYA LAW
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**Pembe Flour Mills Limited v Kamomoe & 4 others (Civil Case 518 of 2015)
[2022] KEHC 15118 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 15118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 518 OF 2015
DO CHEPKWONY, J
OCTOBER 28, 2022**

BETWEEN

PEMBE FLOUR MILLS LIMITED PLAINTIFF

AND

WILSON NDUNGU KAMOMOE 1ST DEFENDANT

MOHAMMED NASIR KHALIFA 2ND DEFENDANT

JOSEPHAT OKEO KEGENGO 3RD DEFENDANT

BENJAMIN MAILU 4TH DEFENDANT

DAVID MAINGI KOGI 5TH DEFENDANT

RULING

1. The instant Application is dated May 23, 2022 and is seeking for orders that;
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. The Plaintiff be granted leave to prosecute the cause.
 - e. Costs of this Application be in the cause.



Applicant's Case

2. The application is premised on the grounds on its face and the dispositions in the supporting affidavit of Brian Otieno sworn on May 23, 2022. It is stated therein that this matter was dismissed for want of prosecution on May 26, 2021.
3. The applicant goes on to state that the advocate handling the matter on behalf of the firm on record for the plaintiff, left the firm and the misalignment of file and dates led to the inordinate failure to diarize the matter and to attend Court on the May 26, 2021 and preceding dates.
4. Further, that the Defendant despite attending court and taking dates in the absence of the Plaintiff or its advocate, never served a mention notice or an invitation to fix a date but maliciously withheld this information to the detriment of the Plaintiff.
5. That the plaintiff acted swiftly and lodged this current application the moment it learnt of the error and the decision of the Court. That, it is on this basis that the plaintiff now makes this application in order to be accorded an access to the seat of justice and to Prosecute this cause. It is further argued that the mistake of an advocate should not be visited on an innocent litigant.
6. That the Applicant's Complaint, witness statements, list of witnesses and bundle of documents are properly on record and raise substantive issues on the cause that will have a bearing on this Honourable Court's decision.
7. That in the circumstances, it is in the interest of fairness, the rule of law and proper adherence to the principles of natural justice that the Plaintiff be accorded its day in court to prosecute this cause.
8. The Applicant relies on the provision of Article 48 as read with Article 159 of the Constitution which safeguard the Defendant's right to access the seat of justice without any regard to technicalities or procedure. Its argument is that this Honourable Court is enjoined to promote constitutionalism and the rule of law. That to allow this application would be in the interest of justice, so as to accord the Applicant a right to a fair hearing as envisaged under Article 50 of the Constitution of Kenya, 2010 by invoking this Honourable Court's inherent jurisdiction under Section 3A of the Civil Procedure Act, so as to meet the ends of justice.
9. Further, the applicant has deponed that it would be in the interest of justice for the applicant to be allowed to make representations in opposition to the cause as it stands to suffer irreparable loss should this application not be allowed yet that the defendants will suffer no prejudice at all if this application is allowed, since the prejudice is capable of being remedied through damages. Thus, allowing the Plaintiff its right to be heard, will enable this Honourable Court to hear and determine this matter on its merits.

Respondent's Case

10. The Application is opposed by the 4th and 5th defendants *vide* the replying affidavit of Benjamin Mailu sworn on June 8, 2022. It is stated that both the Application and the Affidavit are grounded on mere allegations and false averments.
11. According to the respondents, the applicant has not annexed to its Affidavit the order which it seeks to have set aside. They aver that the Applicant has not provided proof to this Honourable Court of who was previously in conduct of this matter and when did he/she leave the firm as alleged in the affidavit, thus, it is unfathomable that the applicant's firm of advocates of such standards and stature could fail to keep track of the file in its chambers or update its' client on the status of their matters before court considering that this matter was filed in 2015, almost 7 years ago.



12. The Respondents go on to state that the Applicant was directed by this Honorable Court to serve the Application upon the Respondents within 3 days from the date of the order but the 4th and 5th Defendants'/Respondents' advocates were only served with the Application on May 3, 2022, more than 8 days after the date that had been issued by the Court. That this is a clear indication of the conduct of the Applicant which is to file matters against the 4th and 5th Defendants but then fail to prosecute them on time or adhere to the timelines given by the Court.
13. It is the Respondents' contention that the late service of the Application by the Applicant is an attempt at stifling the 4th and 5th Defendants' right of reply and to be heard by this Honorable Court. Further, it is contended that the conduct of the applicant towards this honorable court and the 4th and 5th defendants herein is evidence of glaring disregard of the law on prosecution of suits by a litigant before this Court.
14. The Respondents depones that the decision of the Court to set aside its order entails an exercise of discretion in favor or against a party and which discretion cannot be exercised in favor of a person who has set out, through evasion or other conduct, to delay the course of justice the way the Applicant has done.
15. The Respondent described conduct of the Applicant before the May 26, 2021 as that of a litigant who went to sleep and was not interested in prosecuting its case since the last time the matter was in court was on June 20, 2019. It is stated that the applicant slept on its rights for a period of about two years, which actions prompted the court to dismiss the suit for want of prosecution. The applicant again went on to sleep on its rights for another one year after dismissal of the suit before filing the current application.
16. Subsequently, the respondent depones that the applicant herein does not stand to suffer any loss whatsoever as it has not demonstrated to this honorable court what loss, if any, it would suffer if the prayers sought are not allowed. And even if the Applicant were to suffer any loss, it is bound to suffer since it is as a result of the its indolence since it clearly slept on its rights and has not demonstrated to this honorable court why it should be indulged.
17. The Respondents submit that the Applicant is guilty of inordinate delay in filing the said application which application offends the maxim of equity which states that those who seek equity must be vigilant and must come to equity with clean hands. It is the 4th and 5th Respondents prayer that this Application be dismissed with costs.
18. On February 17, 2022, the parties were directed to canvass the application by way of written submissions. I have only seen the 4th and 5th respondent's submissions on record. I have read through the said submissions and they reiterate the grounds in the Replying Affidavit they filed.

Determination

19. In determining the application herein, I have read through the rival affidavits and submissions filed by the 4th and 5th Respondents. I have also taken due consideration of the law with regard to the prayers sought in the application. The issue that falls for determination from the 2nd prayer is whether the applicant/plaintiff should e granted leave to prosecutor its cause.
20. The court's unfettered discretion on such a matter is guided by grounds similar to those for dismissal of a matter for want of prosecution such as; the reasons for the delay; the period of delay, that is whether



the delay is prolonged and inexcusable and if justice can still be done despite the delay. This test was set out in the case of *Ivita –vs- Kyumbu* [1984] KLR 441. The same were set out as thus:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.

21. Similarly, the court in the case of *Savings & Loan Ltd –vs- Susan Wanjiru Muritu*, Nairobi Milimani HCC 397/02, held that ‘It is the client’s duty to pursue his case to completion’. The court observed that;

“A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”

22. The Applicant filed this suit on October 23, 2015 *vide* a Complaint dated September 21, 2015. The last time this matter was in court was on June 20, 2019 when it came up for a ruling on the Defendant’s Application seeking to set aside Judgment that had been entered in default of defence. The same was dismissed by this court on its own motion on May 26, 2021, which was about two years after it was last in court.

23. I have perused an email printout by this court showing that a Notice to Show Cause was served upon the Applicant by this court *vide* email address milimanicommercialhc@gmail.com to the Applicant’s advocates on anyexxx@saganabiriq.com on May 13, 2021. The Applicant did not appear on the date to show cause why the suit should not be dismissed and the same was accordingly dismissed.

24. This application was filed on May 23, 2022, which is one (1) year after the date of dismissal. The delay in bringing this Application has been attributed to an allegation that the counsel who was in the conduct of this matter left the office because of negligence. These are grave allegations against counsel who has not been identified to this court as to who it is. Clearly, this allegation cannot hold as a ground for delay in prosecuting the matter and even for bringing this application at this time. Even if the counsel in charge was negligent, what about the client, as the owner of this case? I find the client as a litigant is equally to blame by large for not following up with his matter, hence was indolent.

25. It will also be noted from the record of proceedings that when the applicant was directed to serve the respondents with this application within three days, it did not comply. Similarly, when parties were directed to file written submissions for and against the Application, only the 4th and 5th respondents complied. This is a clear indication that the applicant has not demonstrated interest in prosecution of this suit and has all along been indolent. It is therefore note-worthy of court’s discretion on equitable remedy. In view of the foregoing circumstances, this application has no merit and the same is dismissed with costs to the 4th and 5th Respondents.



It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI THIS 28TH DAY OF OCTOBER, 2022.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kibuko counsel for Plaintiff

Mr. Kariuki-Njiri counsel for 1st Defendant

Mr. Kibukosya counsel holding brief for Mr. Eshuchi counsel for 4th and 5th Defendants

No appearance for 2nd Defendant

Court Assistant - Sakina

