



**Cape Suppliers Limited v Sinohydro Corporation Limited (Civil Case 848 of 2010)
[2022] KEHC 16878 (KLR) (Commercial and Tax) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 848 OF 2010
DAS MAJANJA, J
DECEMBER 21, 2022**

BETWEEN

CAPE SUPPLIERS LIMITED PLAINTIFF

AND

SINOHYDRO CORPORATION LIMITED DEFENDANT

RULING

1. The Plaintiff has moved the court by the Notice of Motion dated 29th September 2022 seeking an order that, “ this Honourable Court be please(d) to issue orders reinstating this suit.” The application is supported by the affidavit of the Plaintiff’s director, Kinaro Kibanya, sworn on the same date and a supplementary affidavit sworn on 15th November 2022. It is opposed by the Defendant through the replying affidavit of its Project Manager, Xia Anquan, sworn on 12th November 2022.
2. In the supporting deposition, the Plaintiff states that it has been keen on prosecuting the suit but due to the effects of the COVID -19 pandemic and directions downscaling court operations, it was unable to set down the matter for hearing. Mr Kibanya states that he only learnt that the suit had been dismissed when he was informed by the Bank of Africa on 28th February 2022 that the Defendant’s firm of advocates wished to transfer funds held in a joint account following dismissal of the suit for want of prosecution. The Plaintiff prays for reinstatement of the suit as it stands to suffer prejudice if the substratum of the suit is defeated.
3. The Defendant states that the suit was properly dismissed for want of prosecution on 22nd June 2022 and no explanation has been given for the delay in filing the application. Further, that the Plaintiff has not offered any viable grounds for reinstating the suit as it was duly notified on 6th June 2022 that the matter would come up for notice to show cause on 22nd June 2022. It also refutes the Plaintiff’s



contention that the suit could not be heard during the COVID-19 pandemic as cases were proceeding throughout this period.

4. The Defendant avers that the Plaintiff has been delinquent in prosecuting the matter as it previously filed an application dated 25th March 2019 to dismiss the suit for want of prosecution which was compromised. Further, the Plaintiff failed to comply with pre-trial directions and in particular, the court also issued a notice to show cause why the suit should not be dismissed for want of prosecution on 31st May 2021.
5. The Defendant contends that the Plaintiff is not entitled to the exercise of discretion in its favour because it failed to comply with the court orders issued on 30th May 2014 and 30th July 2016 in which the court ordered it to pay Kshs. 250,000.00 in monthly instalments in an escrow account until payment of the Kshs. 9,474,982.00. Despite indulgence, the Plaintiff has only deposited Kshs. 1,406,413.00 hence it is not entitled to any discretion.
6. In response to the Defendant's deposition, the Plaintiff states that the suit was in fact dismissed in the parties' absence and that there may have been confusion over the matter as its current advocates on record had taken over another firm of advocates. The Defendant denies that it has been delinquent as it complied with court orders including pre-trial directions. It states that it has shown good faith in depositing money in the escrow account and that it should be permitted to proceed with the case.
7. Whether the suit should be reinstated is a matter of justice and whether the court should do so depends on the facts and circumstances of each case. In considering whether to reinstate a suit dismissed for want of prosecution, the court may consider whether the delay leading to the dismissal was prolonged and inexcusable and whether it is in the interests of justice to reinstate the suit, the conduct of the parties and the prejudice that may result if the suit is reinstated and whether such prejudice may be ameliorated by an award of costs. The factors the court may take into account are not closed as the court is required to exercise its discretion to do justice.
8. I have also considered the fact that by a ruling delivered on 30th May 2014, the court set aside the default judgment on condition that the Kshs. 9,474,982.00 be deposited in an escrow account. The Plaintiff does not dispute the fact that it has only paid Kshs. 1,406,413.00 in the account to date despite being granted indulgence by the court from time to time. In its response, the Plaintiff says nothing about its failure to pay the amount ordered yet payment of this amount was a condition for it to defend the suit.
9. While I am prepared to exercise discretion in favour of the Plaintiff, the fact is that it has not complied with the fundamental condition imposed on it to defend this suit 8 years ago. Court orders are not flower bouquets. In the circumstances, I order as follows:
 - (a) The application dated 29th September 2022 is allowed and the suit reinstated on condition that the Plaintiff shall complete payment of the Kshs. 9,74,982.00 ordered by the court in the escrow account within thirty (30) days from the date hereof in default of which the suit shall stand dismissed with costs to the Defendant and the money held in the escrow account released to the Defendant without further orders of the court.
 - (b) Upon compliance with the order on payment the matter shall be placed before the Deputy Registrar for pre-trial directions on a date fixed.
 - (c) The Plaintiff shall pay costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER 2022.

D. S. MAJANJA



JUDGE

Court Assistant: Mr M. Onyango

Ms Olwe instructed by Okatch and Partners Advocates for the Plaintiff.

Mr Wanga instructed by Waweru Gatonye and Company Advocates for Defendant.

