



Ahero Supermarket Limited v Piedmont Investment Limited & 2 others (Environment and Land Case Civil Suit 837 of 2015) [2023] KEELC 19028 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19028 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 837 OF 2015**

**SO OKONG'O, J
JULY 27, 2023**

BETWEEN

AHERO SUPERMARKET LIMITED PLAINTIFF

AND

PIEDMONT INVESTMENT LIMITED 1ST DEFENDANT

HASSAN AHMED HAFEDH 2ND DEFENDANT

LAND REGISTRAR, KISUMU DISTRICT 3RD DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on February 11, 2009 seeking several reliefs. The plaintiff took no steps to fix the suit for hearing. On October 7, 2010, the 1st defendant filed an application for the dismissal of the suit for want of prosecution. When the application came up for hearing on November 22, 2010, the 1st defendant agreed to give the plaintiff time to file its bundle of documents and thereafter to fix the matter for hearing. The plaintiff was given 30 days to file the said bundle of documents. For about 6 years, the plaintiff took no steps with a view to having the matter heard. The plaintiff did not also file its bundle of documents as had been ordered by the court.
2. On December 5, 2016, the court issued a notice under order 17 rule 2 of the *Civil Procedure Rules* requiring the advocates for the parties to appear before the court on March 22, 2017 to show cause why the suit should not be dismissed. On March 22, 2017, the advocates for the plaintiff and the 1st defendant appeared before the court for the notice to show cause. The plaintiff's advocate told the court that they were unable to trace the file relating to the matter in their office and that was the reason why the matter had remained unprosecuted. On their part, the 1st defendant's advocate told the court that the matter had been pending since 2009 and that they had filed an application to dismiss the same but indulged the plaintiff when the application came up for hearing on November 22, 2010 and the plaintiff was given 30 days to file its bundle of documents. The 1st defendant's advocate told the court



that the plaintiff had not taken any action in the matter since 2010 and the court was urged to dismiss the suit for want of prosecution.

3. The court considered the arguments by the advocates for the parties and noted that the plaintiff had not taken any action in the matter since November 22, 2010. The court found that the plaintiff had not shown any cause why the suit should not be dismissed and proceeded to dismiss the suit with costs for want of prosecution. What is now before me is the plaintiff's application dated February 7, 2023 seeking to set aside the orders made by the court on March 22, 2017 dismissing the suit for want of prosecution. The application which was brought under Section 3A of the Civil Procedure Act and order 51 rules 1 and 4 of the Civil Procedure Rules was brought on several grounds. The plaintiff averred that the suit concerned a property whose value was in excess of Kshs 20,000,000/- and the plaintiff stood to lose the said amount if the orders sought were not granted. The plaintiff averred that following the dismissal of the suit, the plaintiff paid the 1st defendant's costs of the suit in full and as such, the 1st defendant would not be prejudiced if the suit was reinstated for hearing on merit.
4. The application was opposed by the 1st defendant through grounds of opposition dated March 15, 2023 and a replying affidavit sworn by Maxwell Otieno Odongo on the same date. The 1st defendant averred that the application was brought after inordinate delay and as such the plaintiff was guilty of laches. The 1st defendant termed the application an abuse of the process of the court. The 1st defendant averred that the plaintiff was given ample opportunity to prosecute its suit but failed to do so. The 1st defendant averred that the reinstatement of the suit would be prejudicial to it.
5. When the application came up for hearing on July 26, 2023, the advocate for the plaintiff relied entirely on the grounds on the face of the application and the supporting affidavit and urged the court to allow the application. The advocate for the 1st defendant also relied entirely on the 1st defendant's grounds of opposition and replying affidavit and urged the court to dismiss the application.
6. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition and the replying affidavit filed by the 1st defendant in opposition to the application. The plaintiff's application was brought principally under section 3A of the Civil Procedure Act which provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
7. The plaintiff's suit was dismissed under order 17 rule 2(1) of the Civil Procedure Rules. Before dismissing the suit, the court was satisfied that the plaintiff had not shown any cause why the suit could not be dismissed for want of prosecution. I am of the view that once the court made an order dismissing the suit, the order could only be set aside on an appeal to the Court Appeal or by this court on an application for review. What is before me is not an application for review. The application seeks to set aside the order that was made by the court on March 22, 2017 after hearing the parties on a notice to show cause. Order 17 rule 2 of the Civil Procedure Rules does not give this court power to set aside such an order. The court cannot also set aside the order under section 3A of the Civil Procedure Act since the Plaintiff has not persuaded me that setting aside the said order is necessary for the ends of justice to be met or to prevent abuse of the court process.
8. For the foregoing reasons, I find no merit in the notice of motion application dated February 7, 2023. The application is dismissed with costs to the 1st defendant.

DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY 2023



S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Ms. Nyangano for the 1st Defendant

N/A for the 2nd and 3rd Defendants

Ms. J.Omondi-Court Assistant

