



**Century Cinemax Limited v Convex Commercial Logistics Ltd (Civil Suit E047 of 2018)
[2021] KEHC 383 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E047 OF 2018
EC MWITA, J
DECEMBER 16, 2021**

BETWEEN

CENTURY CINEMAX LIMITED APPLICANT

AND

CONVEX COMMERCIAL LOGISTICS LTD RESPONDENT

RULING

1. The applicant took out a motion on notice dated 29th November 2019, seeking to set aside the order made on 28th November 2019 dismissing its suit. The suit had been dismissed following the respondent's application dated 25th September 2019. According to the grounds in support of the motion, the suit was dismissed before its advocate who was then before another court arrived. The applicant stated that it was neither to blame nor its advocate for failing to be in court when the suit was dismissed.
2. The application was also supported by an affidavit by Eunice Mwangi, the applicant's advocate. According to counsel, the respondent's application to dismiss the suit had been opposed through a replying affidavit which had dully been filed and served on the respondent's counsel. She deposed that the advocate handling the matter was before another court, (Bor, J), where another matter had been listed for mention and which the advocate intended to deal with first before coming to attend to this matter. The application in this matter was however called out before the advocate arrived, heard and allowed dismissing the suit.
3. Se deposed that it is in the interest of justice that the dismissal order be set aside so that the matter can be determined on merit. According to the deponent, the respondent will not suffer any prejudice if the matter is reinstated. She also stated that a mistake by counsel should not be visited on the client.



4. The respondent filed a replying affidavit by David Chege, sworn on 5th February 2020. He deposed that the application is unmeritorious; that the suit was dismissed after the court established that the respondent's application for dismissal of the suit had merit and that the court had also considered the applicant's replying affidavit to that application before making its determination. He stated that the court was clear in its ruling that the plaintiff/applicant herein had not shown why it had not taken steps to set down the suit for hearing.
5. The deponent further stated that the applicant did not explain the delay to prosecute the suit which had obstructed or caused delay of justice in the matter. According to the respondent, reinstatement of the suit will cause untold suffering to it including extra legal costs, and that the applicant has not shown why this court should not exercise discretion in its favour. The respondent maintained that the applicant failed to set down the suit for hearing within twelve months after pleadings closed, a conduct that cannot be undone under the guise of interest of justice or the right to a hearing.
6. The applicant filed written submissions arguing urging the court to allow the application and reinstate the suit so that it can be determined on merit. The submissions mirrored the depositions in the supporting affidavit and the grounds on the face of the motion why the court should allow the application. It urged the court to set aside the dismissal order so that the suit can be hear on merit.
7. The respondent also filed written submissions and argued that its application dated 25th September 2019 was allowed after the court established that it had merit. The court also found that the applicant herein had not shown why the suit had not been set down for hearing after pleadings closed. The respondent further contended that the court considered the applicant's replying affidavit in that application and, therefore, the suit was not dismissed for non-attendance.
8. The respondent argued that there was no good reason for this court to exercise its discretion in favour of the applicant. According to the respondent, the applicant having failed to set down the suit for hearing, it cannot blame it for taking steps to have the suit dismissed.
9. The respondent relied on *Eric Oluoch Olele v Kenneth O. Obae [2013] eKLR*, to argue that although the court has discretion to reinstate a suit, such discretion cannot be exercised in a vacuum. It urged this court to dismiss the application with costs.
10. I have considered the application, the response and submissions by parties. I have also perused the record and in particular the court's ruling of 28th November 2019 dismissing the suit.
11. The court had been moved by an application by the respondent dated 25th September 2019, seeking to dismiss the suit for failure to take steps to have it set down for hearing. The application was duly served on the applicant and was set down for hearing on 28th November 2019. On that day, the respondent's counsel was in court but the applicant's counsel was not. The matter was called out and the respondent's counsel moved the motion. The court then made an instant ruling dismissing the suit. The applicant filed the present motion seeking to reinstate the suit.
12. I have carefully considered this application and perused the record. According to the record, after close of pleadings no action was taken by the applicant to set the suit for hearing. On 25th September 2019, the respondent filed its application to have the suit dismissed for want of prosecution. The applicant filed a replying affidavit opposing that application.
13. The matter came up before Odero, J on 28th November 2019 for hearing of that application. However, counsel for this applicant was not in court when the application was called out. The respondent's counsel moved the application and the court made a ruling dismissing the suit for want of prosecution.



The court stated that it had considered the replying affidavit and found no good reason why the suit had not been set down for hearing.

14. The applicant has argued before this court, that the suit was dismissed for non-attendance as its advocate was engaged before another court when the matter was called out and the application for dismissal of its suit allowed. However, the record is clear that the suit was not dismissed for non-attendance but for want of prosecution. It is also clear that the court considered the replying affidavit and concluded that there was no reason why the suit had not been set down for hearing after close of pleadings.
15. As it is, even though the applicant's advocate was not present in court at the time the application for dismissal of the suit was heard, the court considered the substance of the application and the response to the application before making its determination. The applicant has not shown that had its advocate been present in court, the outcome of that application would have been different.
16. I have carefully perused the application and more so the supporting affidavit. The applicant has not addressed the core issue that was raised in the application that was before the court on 28th November 2019, that is; why it had not taken steps to set down the suit for hearing. There was no explanation before Odero, J. and there is none before this court. The applicant has merely stated that the suit was dismissed in the absence of its advocate, but has not addressed the fundamental issue that made the court allow the application to dismiss the suit for want of action.
17. The law confers on this court wide discretion when it comes to setting aside its orders. Ordinarily, a court should act in favour of a party who wants to have his day in court. However, discretion must always be exercised judicially, taking into account the circumstances of each case.
18. Having considered the application, the response and the circumstances under which the suit was dismissed, and still there being no explanation why no steps were taken to have the suit set down for trial, I find no merit in this application.
19. Consequently, the application dated 29th November 2019 is declined and dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021

EC MWITA

JUDGE

