



**Nakumatt Holdings Limited Under Administration v Southcoast Holdings Limited
(Environment & Land Case 235 of 2021) [2024] KEELC 3787 (KLR) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 235 OF 2021**

**AE DENA, J
MAY 6, 2024**

**BETWEEN
NAKUMATT HOLDINGS LIMITED UNDER ADMINISTRATION . PLAINTIFF
AND
SOUTHCOAST HOLDINGS LIMITED DEFENDANT**

RULING

1. The application subject of this ruling is dated 14/8/2019. The Applicant seeks for the following prayers before court;
 - a. The Plaintiff's suit be dismissed with costs.
 - b. Costs of this application be provided for.
2. The application is premised upon the following grounds;
 - a. The Plaintiff has neglected and/or otherwise failed to abide by the orders of this honourable court granted on 11th June 2019 and by so doing, the Plaintiff has neglected and/or otherwise failed to set down the suit for hearing.
 - b. The Plaintiff otherwise failed to take any steps to prosecute the same for a period of over twelve months.
3. The application is also supported by a supporting affidavit sworn by Sultan Khimji the director to the Plaintiff herein. The said party states that the court on 11/6/2019 while seated on an application dated 29/11/2018 by the Defendant, delivered its ruling ordering the Plaintiff to deposit security of Kshs 40 Million in a joint account to be opened in the names of advocates for both parties herein within 60 days from that date. 60 days from 11/6/2019 lapsed on 13/8/2019. That the Plaintiff appealed the said ruling before the Court of Appeal being COA Appeal No 104 of 2019 Nakumatt Holdings Versus



South Coast Limited. The Court of Appeal delivered its verdict on 4/11/2022 dismissing the appeal with costs.

4. It is further averred that the orders issued by the court on 11/6/2022 have to date never been set aside and are therefore enforceable. That since the Plaintiff has never bothered to abide by the same and further having failed to set this matter down for hearing, it is in the interest of justice that the suit herein be dismissed.
5. In response to the application the Plaintiff filed grounds of opposition before the court on 27/11/2019. The application is opposed based on the following verbatim grounds; -
 1. That the application is belated, ill conceived, misinformed and tainted with mala fides for the reasons that; -
 - i. It seeks orders that are untenable in the circumstances of this case.
 - ii. It is vexatious and does not meet the threshold requirements for grant of the orders sought.
 - iii. It is bad in law and an abuse of the court process in light of the rules of practice and procedure.
 - iv. It bears grounds not supported by any facts as deponed to in the supporting affidavit.
 - v. It is fatally defective.
 2. That the application is therefore grossly incompetent, fatally defective, frivolous, vexatious, wholly unmerited and ought to be struck out ab initio for being an abuse of the court process
 3. That it is therefore only in the interest of justice that the Defendants said application be dismissed with costs to the Plaintiff.
6. The Defendant further filed an affidavit in response to the motion. The same is sworn by Peter Obondo Kahi. The deponent states that he is the administrator of the Plaintiff herein pursuant to the administration order given on 22/1/2018 in Nairobi High Court Insolvency Petition No 10 of 2017. It is stated that the defendant was sued for damages for loss of fixtures and for illegal/unlawful eviction on title no Kwale/Diani Beach Block/818. On 12/11/2018, the court orders for deposit for security for costs of Kshs 20,000,000/=. That while the said orders were still in place, the court yet again issued contradictory orders on 29/11/2018 for deposit of Kshs 40,000,000/= as security for costs. Aggrieved by this, the Plaintiff lodged an appeal before the Court of Appeal at Mombasa being Court of Appeal Civil Appeal No 104 of 2019. The court is asked to refrain from making any decision with regards to the application before it, as the matter as to security to be deposited before court is pending before the court of appeal.
7. It is further stated that the issues raised in the instant application have already been adjudicated upon vide the Notice of Motion application dated 29/11/2018 and that it would be a great travesty of justice in the event that the court considers the prayers sought as the same would amount to giving the Defendant a second bite of the coveted cherry. The court is urged to dismiss the application for reasons stated above herein.
8. Parties were ordered to file submissions before court over the application. However, at the time of preparing this ruling, no submissions are on record by either of the parties. The court hereby proceeds to render itself regardless.



Determination

9. I cannot purport to ignore the fact that the Court of Appeal in Mombasa, vide Civil Appeal No 104 of 2019 dismissed an appeal preferred by the Plaintiff herein over a ruling dated 11/6/2019 rendered by Justice Omollo A. In the said ruling, the court had ordered for parties to make a deposit of Kshs. 40 Million in a joint interest earning account before the hearing and determination of the matter. Dissatisfied with the same, the Plaintiff appealed at the Court of Appeal which dismissed the appeal with costs to the Respondent/Applicant herein. According to the Applicant, the orders granted by Justice Omollo are still in place and have never been adhered to 5 years down the line. This informs the application subject of this ruling and which is to dismiss the suit herein.
10. Order 17 Rule 2(1) of the [Civil Procedure Rules](#), governs dismissal of suits for want of prosecution. 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."
11. Further Order 17 Rule 2(3) of the [Civil Procedure Rules](#), states thus:

"Any party to the suit may apply for its dismissal as provided in sub-rule 1"
12. The court considers the principles for dismissal of a suit for want of prosecution as enunciated in [Argan Wekesa Okumu vs Dima College Limited & 2 others](#) [2015] eKLR as follows: -

"The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of [Ivita -vs-Kyumbu](#) (1984) KLR 441_. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."
13. Further, the Court of Appeal in [Peter Kipkurui Chemoiwo -vs- Richard Chepsergon](#) [2021] eKLR restated the above principles to include 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.
14. I have perused the pleadings herein as filed by both parties. It is not in dispute that the suit was instituted vide a plaint dated 23/7/2018 which is six years ago. It is also not in dispute that the orders for deposit of security amounting to Kshs. 40 Million were made on 11/6/2019 and the same lapsed on 13/8/2019 as the deposit was to be made within 60 days. The provisions of Order 17 Rule 2 are that a matter should have been pending for 12 months before the court, when either on its own motion or on the application of a party, the court makes an order for its dismissal for want of prosecution. It is evident that the 12-month period has lapsed ever since the suit was filed and further the application. Indeed the Applicant is within the confines of the law in seeking for dismissal of the suit.
15. For avoidance of doubt, dismissal of suit for want of prosecution is in my opinion upon the discretion of the court. This is because circumstances in every suit differ. Looking at the response filed by the



Respondent, no plausible reason has been given as to why the suit should not be dismissed. If anything, in its response the Plaintiff is economical with the truth in stating that the Court of Appeal was yet to render its verdict over the appeal. The court has had the privilege of perusing the ruling of the Court of Appeal and can confidently state that a verdict was made, the Appellant and who is the Plaintiff herein lost the appeal. The Plaintiff did not adhere to the orders as granted by Justice Omollo and has moreover failed to state the reason why.

16. Backlog of cases is amongst the great hindrances towards achievement of the judiciary objectives in offering its services to the citizenry of this country. In my view, as a clear administrative tool, Order 17 is to aid in reduction of such backlog in order to avoid matters overstaying in court with no end to litigation. The Plaintiff's actions do not amount to anything close to a litigant with an intention to have the matter litigated upon. It is on this strength that the court finds the application by the Defendant merited. The court will not entertain parties dragging their feet in pursuing matters filed before it, that laxity is in itself a miscarriage of justice, justice delayed is justice denied.
17. The suit herein is hereby dismissed for want of prosecution with costs to the Defendant/Applicant. Orders accordingly.

RULING SIGNED DATED AND DELIVERED THIS 6TH DAY OF MAY 2024.

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A.E DENA

JUDGE.

No appearance for the Plaintiff

Mr. Muoka for the Defendant/Applicant

Mr. Daniel Disii – Court Assistant

