Asl Credit Limited v Bake 'N' Bite Limited & 2 others (Civil Case 403 of 2017) [2025] KEHC 2104 (KLR) (Commercial and Tax) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 403 OF 2017

A MABEYA, J

FEBRUARY 6, 2025

BETWEEN

ASL CREDIT LIMITED ..... PLAINTIFF

AND

BAKE 'N' BITE LIMITED ..... 1ST DEFENDANT

SEIF MOHAMED SEIF ..... 2ND DEFENDANT

FATIMA HUSSEIN TAIB ..... 3RD DEFENDANT

RULING

1. Before Court is an application dated 30/11/2023 brought under sections 1A, 1B, 3A and section 99 of the *Civil Procedure Act* CAP 21 Laws of Kenya, Order 45 and order 51 rule 1 of the *Civil Procedure Rules*. It sought the setting aside of the order dated 16/5/2023 which dismissed the suit for want of prosecution and that the suit be reinstated.

2. The application was predicated upon the grounds et out on the face of the Motion and the affidavit of WILFRED O. LUSI sworn on 30/11/2023. It was stated that the plaintiff had filed the suit seeking judgment against the defendants for a sum of Kshs 54,934,735.00 and late payment at the interest of 5%. That the Hon deputy registrar mentioned the matter on two occasions being 29/3/2023 and 24/4/2023, respectively.

3. That thereafter, the matter was listed for Notice to show cause on 16/5/2023 and the suit was dismissed for want of prosecution. It was contended that the Notice to Show Cause was not served upon the plaintiff and the counsel who had handled the matter resigned and failed to give a report on the same. That the new advocate followed upon the matter and that is when they established the correct state of affairs.

4. It was the plaintiff's case that this application was brought in a timely manner and that the plaintiff stands to lose a huge legal interest. Additionally, it was contended that an error of an advocate should not be visited upon the client.

5. The application was opposed by the defendants in a replying affidavit sworn by SEIF MOHAMED SEIF on 9/2/2024. He stated that the matter was dismissed for want of prosecution due to the plaintiff's non-attendance. That the plaintiff had not been vigilant in following up the matter and the reasons advanced were not sufficient to warrant the court to exercise its discretion. It was stated that no evidence had been provided in terms of letters requesting for a hearing date and therefore the plaintiff was guilty of indolence.

6. The application was canvassed by way of written submissions which the Court has considered. The main issue for determination is whether the plaintiff's suit should be reinstated.

7. The plaintiff's case was that the suit was handled by an advocate who resigned from the firm that was hitherto representing the plaintiff. Upon resignation, the plaintiff asked for a status report when it was discovered that the suit had been dismissed. It was argued that the outgoing advocate failed to alert the firm of the status of the file and thus the plaintiff was not aware of the Notice to Show Cause.

8. The defendants on their part contended that the plaintiff had not given sufficient reasons to warrant the orders sought. Further, that no evidence was provided to support the plaintiff's case.

9. In *MWANGI S. KIMENYI vs. ATTORNEY GENERAL & ANOTHER* [2014] eKLR, the court outlined the test to be considered in a case for reinstatement of suit. It was stated that: -

> " The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. See the case of IVITA Vs KYUMBU [1984] KLR 441, Chesoni J. (as he then was) that: -
>
> > '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.
> >
> > The defendant must however satisfy the court that he 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."

10. Order 17 rule 2 of the *Civil Procedure Rules* is clear that where no step is taken by either party for a period of 1 year, the suit then is ripe for dismissal. Reinstatement of a suit is discretionary and section 3A of the *Civil Procedure Act* gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. In exercising the discretion, the Court is called upon to act judiciously.

11. This was emphasized in the case of *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018] eKLR, where it was stated as follows:

> " It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private

affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

12. In the present case, the notice to show cause was issued on 16/5/2023. The plaintiff does not dispute not being present in Court. However, the plaintiff has demonstrated through evidence several correspondences between it and its counsel regarding the status of the file prior to the dismissal of the suit. These correspondences are from November 2022 to April 2023 just before the suit was dismissed.

13. In the circumstances, it cannot be said that the plaintiff was indolent. It is clear that it was following up on its case with its then advocate. It is clear that the mistake may have been on the part of the Counsel who failed to update the client and make the necessary steps to act on the case.

14. In *Philip & another vs Augustine Kibede* 1982-88 KLR 103, the court expressed itself thus: -

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline".

15. In an application such as this one, it is always important that the court should look at the prejudice to be suffered by either party by any order to be made. If the Court refuses to rei-instate the suit, the plaintiff will forever have the door to justice closed on it. If however, the re-instatement is ordered, the defendants will still have the opportunity of testing the plaintiff's case on merit. There was no irreversible prejudice that was alleged that is to be suffered by the defendants.

16. In the present circumstances, I am inclined to avail the plaintiff another chance to prosecute its case rather than having the case dismissed on grounds of omissions by its former advocates. I am also satisfied that the loss which the defendants might suffer as a result can be compensated by an award of costs.

17. In the upshot, I find merit in the application and I exercise my discretion and allow the same as prayed. Thrown away costs of Kshs.30,000/- be paid by the plaintiff to the defendants within 60 days of this ruling. The plaintiff is hereby ordered to set down the matter for hearing within 90days.

It is so ordered.

SIGNED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE