



**Cibiya Africa Limited v Greatwall Drilling Company Limited (Commercial Case 715 of 2012) [2025] KEHC 2458 (KLR) (Commercial and Tax) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2458 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 715 OF 2012  
AA VISRAM, J  
MARCH 10, 2025**

**BETWEEN**

**CIBIYA AFRICA LIMITED ..... CLAIMANT**

**AND**

**GREATWALL DRILLING COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. I have considered the Notice of Motion dated 6<sup>th</sup> February, 2024, seeking to re-instate the suit that was dismissed following a Notice to Show Cause on 27<sup>th</sup> September, 2023, together with the affidavit filed in support of even date, the reply sworn on 15<sup>th</sup> April, 2024, in opposition to the same, and the submissions of the parties and the applicable law.
2. The Court dismissed the matter due to non-prosecution by the Applicant on various instances and non-compliance by the Applicant to file the requisite documents during the provided timelines.
3. The background facts are as follows:- the Applicant herein instituted the reference seeking to set aside an arbitral award published by Stephen Gatembu Kairu, FCI Arb, on 14<sup>th</sup> September, 2012. Since then, the matter came up before the Court on several occasions at the instance of the Respondent who attended Court and served the Applicant with mention notices to attend Court.
4. Based on the Court record, the matter came up on various dates including 2<sup>nd</sup> May, 2019, 30<sup>th</sup> January, 2020 and 13<sup>th</sup> May, 2020, in which the Applicant was absent. Consequently, on 15<sup>th</sup> July, 2020, the case was closed. However, the matter was again in Court on 27<sup>th</sup> November, 2023, for a Notice to show cause (NTSC). The Applicant yet again failed to appear, and the suit was dismissed.



5. On 6<sup>th</sup> February, 2024, the Applicant brought the instant Application seeking to have the reference reinstated. The Respondent filed a replying affidavit dated 15<sup>th</sup> April, 2024, opposing the said Application.
6. The Applicant seeks the indulgence of this Court to set aside its orders and re-instate the suit. The power of the Court to set aside its orders is discretionary. However, the discretion must be exercised judicially considering all the circumstances of the matter. This was confirmed in *Wanjiku Kamau v Tabitha Kamau & 3 Others* [2014] eKLR where it was stated that:-

“The Court has the discretion to set aside judgment or order and there are no limitations and restrictions on the discretion of the judge except of the judgment or order is raised. It must be done on terms that are just.”
7. Considering the above, the main issue is whether the Application herein is merited. In addressing the issue, the Court takes note that the Application herein seeks to reinstate a reference seeking to challenge an arbitral award.
8. That reference was filed vide an Application dated 29<sup>th</sup> November, 2012, more than 13 years ago. Since then, the Application had not been determined and the suit was eventually dismissed.
9. The factors to be considered for the purpose of reinstatement were discussed in: *Ivita v Kyumbu* [1984] KLR 441 (Chesoni, J.) as he then was. The Court stated that the test, broadly speaking, was whether the delay was prolonged and inexcusable.
10. Similarly, in *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR, the Court stated that:-

“Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past...”
11. In the present matter, the length of delay in prosecuting the matter is over 13 years from the date of the award.
12. I find that the delay is prolonged. Further Counsel argued that the Application for reinstatement had been filed without delay. Counsel did not however explain the reason for the delay in prosecuting the Application to set aside the award for period of over 12 years.
13. As to whether the delay is excusable, Counsel submitted that the reason for delay was because the Applicant had not been served with a Notice to Show Cause, until after the hearing of the show cause. I am not persuaded by this. It does not address the pending Application to set aside. And further, the CTS reflects that the date was given an entry in the system, and the parties mapped to the cases are accordingly notified of the same automatically.
14. Further, looking at the record, in the present matter, the Applicant has been idle for over 13 years. Accordingly, Order 17 rule 2(5) of the Civil Procedure Rules is applicable. Based on the same, a suit stands dismissed where after two years no step has been taken. Therefore, in any event, service of Notice to the Applicant was not required. The Notice requirement is to my mind applicable under order 17 rule 2(1), in circumstances where no step has been taken for one year. The facts here are different, the Applicant was idle beyond two years and therefore, the suit stood dismissed after period of indolence of two years.



- 15. Based on the record before me, I do not see any reason why this Court ought to depart from the applicable section in the present circumstances. No sufficient explanation has been provided to justify the delay and the same is inordinate and inexcusable.
- 16. In *Thathini Development Company Limited v Mombasa Water & Sewerage Company & Another* [2022] eKLR, a party seeking to reverse the Court’s order of dismissal must explain sufficiently to Court the reason his Application is merited and persuade Court to exercise its discretion. This has not been done.
- 17. The Application is without merit. The same is dismissed with costs. The file is marked as closed.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 10TH DAY OF MARCH, 2025**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

.....Court Assistant  
.....for Claimant/Applicant  
.....for Respondent

