



**Cementers Limited v Multichoice Kenya Limited & 13 others (Civil Suit 307 of 2018)
[2024] KEHC 3465 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3465 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 307 OF 2018
DO CHEPKWONY, J
MARCH 1, 2024**

BETWEEN

CEMENTERS LIMITED PLAINTIFF

AND

MULTICHOICE KENYA LIMITED 1ST DEFENDANT

STEPHEN ISABOKE 2ND DEFENDANT

ALBERT VAN ROOYEN 3RD DEFENDANT

FELICINE NYAKSARIA ORIRI 4TH DEFENDANT

LUCKY LAVENDER WAINDI 5TH DEFENDANT

CONAPEX CONSULTING ENGINEERS LIMITED 6TH DEFENDANT

WILSON MUNYU KARABA 7TH DEFENDANT

INTERCONSULT ENGINEERS LIMITED 8TH DEFENDANT

KARIUKI MUCHEMI 9TH DEFENDANT

S.K.. ARCHPLANS 10TH DEFENDANT

STANLEY KEBATHI 11TH DEFENDANT

TITUS NYENDE 12TH DEFENDANT

ERIC ODIPO 13TH DEFENDANT

CHRISTOPHER KAMANDU 14TH DEFENDANT



RULING

1. On 23rd May, 2022 the court issued a Notice to Show Cause for want of Prosecution which was scheduled for mention on 23rd June, 2022. In response thereto, the Plaintiff filed Replying Affidavit sworn by Dipak Halal as its Director sworn on 20th June, 2022.
2. The Notice to Show Cause proceeded for hearing on 18th July, 2022, whereupon Counsel for the Plaintiff stated that it had filed an Affidavit sworn on 20th June, 2022 giving various reasons why the suit should not be dismissed.
3. In the Affidavit, the Plaintiff holds that it filed the suit on 30th July, 2018 together with Notice of Motion application against the Defendants over breach of contract seeking Anton pillar orders which the court granted on 1st August, 2018. He stated that the Defendants filed an application challenging the court's jurisdiction and in Ruling delivered on 22nd May, 2019, the court stayed the dispute as between the Plaintiff and the 1st Defendant and referred the same to arbitration.
4. According to the Plaintiff, its claim against the other Defendants is still active and it is willing to prosecute the same. The Plaintiff blames the delay in having the matter prosecuted to the Covid-19 Pandemic as it curtailed two applications which were pending at the time, being one by the Plaintiff dated 6th March, 2020 for the issuance of Summons and another by the 8th, 9th, 10th, 11th and 12th Defendants dated 24th October, 2019 seeking dismissal of suit against them from proceeding.
5. The Plaintiff holds that the Defendants were all aware of the suit and had filed responses so that it will be prejudicial to the Plaintiff if the suit is dismissed. The Plaintiff further holds that it was dissatisfied with the Ruling of the court of 22nd May, 2019 and it filed Notice of Appeal dated 3rd June, 2019 together with letters requesting for typed proceedings for purposes of filing an Appeal, which it is yet to obtain.
6. The Plaintiff contends that the court has inherent power to accord it a chance to prosecute the suit under Section 3A of the *Civil Procedure Act* and that it court should consider the reasons given for the delay. The Plaintiff further holds that it has actively participated in the case but court sessions were affected with the closure of the courts due to the Covid-19 Pandemic. It has urged that it has not lost interest in the case and implores the court to adopt the provisions Article 159 of the *Constitution* and allow it to proceed with the case.
7. In response to the Notice to Show Cause, the 6th and 7th Defendants filed their Replying Affidavit which was sworn by Rose N. Munyasi, it's Advocate on 18th July, 2022. They similarly gave a chronology of events in the suit as stated by the Plaintiff which the court shall not rehash to avoid repetition. They argue that the Plaintiff has failed to prosecute the matter for more than 2 years and 4 months which is causing great prejudice to them.
8. The Counsel stated that there are two applications pending in the suit being one dated 6th March, 2019 and another dated 24th October, 2019 which have not been prosecuted She has also stated that there was also a Notice of Appeal dated 3rd June, 2019 against a Ruling which had referred the matter to arbitration but no further step has been taken therein. They have urged the court to dismiss the suit for want of prosecution as the only intention of the Plaintiff was to have her client, the 7th Defendant herein arrested and charged in court.



9. When the matter came up in court for the parties to Show Cause why suit should not be dismissed for want of prosecution, the Plaintiff's Counsel reiterated his position as per its Replying Affidavit and urged the court not to dismiss the suit for want of prosecution.
10. The 1st Defendant's Counsel informed the court that his client was not a party to the suit since the claim between his client and the Plaintiff was referred to arbitration through the court's ruling of 23rd May, 2019. He stated that the suit can be dismissed for want of prosecution.
11. The counsel for the 14th Defendant stated that although they were not served with any Affidavit by the Plaintiff to the Notice to Show because it did not file any response, he equally supported that the suit should be dismissed with costs to the 14th Defendant.

Analysis and Determination

12. In considering the Notice to Show Cause why the suit should not be dismissed for want of prosecution, I have read through the records and the responses by either party(ies) and find the issue being whether the Plaintiff has shown any reasonable or substantive cause why the suit should not be dismissed for want of prosecution.
13. This court issued Notice to Show Cause pursuant to the provisions of Order 17 Rule 2 (3) of the [Civil Procedure Rules](#), which provide, inter alia, that:-
 - 1). "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.
 - 2).
 - 3). any party to the suit may apply for its dismissal as provided in Sub-rule 1".
14. It is trite law that in analyzing the provisions of Order 17 of the [Civil Procedure Rules](#), the court is required to balance the rights of all parties and the interest of justice. The court in the case of [Investment Limited v G4S Security Services Limited](#) (2015)eKLR held:-

"This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the [Constitution](#) of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "Sword of the Damocles". But in reality, should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the [Constitution](#) of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff."
15. In the instant case, the Plaintiff moved the court in 2018 and took active steps until 2019 or thereabouts. Since then no step has been taken to have the suit prosecuted further. The Plaintiff's reasons that there was Covid-19 Pandemic is not satisfactory since the courts resumed normal operations fully after the Pandemic. And even then the Plaintiff has not shown any efforts made through letters to request for the typed proceedings in the subsequent years to demonstrate that it has



been willing to prosecute the Appeal and the suit herein. There has been completely n activity on the file until the parties were awoken by the issuance of the Notice to Show Cause on 23rd May, 2022.

16. The court finds that it is prejudicial to the Defendants who were dragged to court in 2018 to be kept anxious with a suit hanging over their heads by a litigant who is not zealous of prosecuting, the same, an act that is against the overriding objective on expeditious disposal of suits.
17. In the circumstances the court finds the Plaintiff has failed to show cause why the suit should not be dismissed for want of prosecution. The court proceeds to dismiss the suit as against the Defendants for want of prosecution pursuant to the provisions under Order 17 Rule 2 of the [Civil Procedure Rules](#), with costs to the Defendants.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF FEBRUARY, 2024.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

ALFRED MABEYA

JUDGE

