Petromin Limited v Kenya Revenue Authority (Civil Suit 319 of 2010) [2024] KEHC 8897 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8897 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 319 OF 2010

JK NG'ARNG'AR, J

JULY 25, 2024

BETWEEN

PETROMIN LIMITED ..... PLAINTIFF

AND

KENYA REVENUE AUTHORITY ..... DEFENDANT

RULING

1. A Notice of Motion application dated 23rd February 2024 was filed by the Plaintiff pursuant to Articles 48, 50 (1), 159 (2) (a), (b), (d), and (e) of the *Constitution*, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 12 Rule 7, Oder 17 Rule 2 of the *Civil Procedure Rules* 2010 and any other enabling provisions of the law. The Plaintiff seeks that court sets aside and/or vary the orders of Hon. Justice Magare Kizito issued on 7th February 2024 dismissing the instant suit for want of prosecution and that court reinstates the suit for full hearing and determination on merit.

2. The application was premised on grounds on the face of the application and the Supporting Affidavit sworn by Peter Mwebi, the advocate for the Plaintiff that the court did not serve them with any Notice to Show Cause that purportedly came up for hearing on 7th February 2024. That the matter was active having been referred to mediation between 20th June 2022 and 16th June 2023, that it is in the interest of justice that the Plaintiff is given an opportunity to ventilate their claim and that no prejudice will be suffered by the Defendant if the orders herein are granted.

3. The Respondent through their Replying Affidavit sworn on 17th May 2024 by George Ochieng', the advocate in conduct of the matter on behalf of the Defendant averred that the Applicant does not attempt to explain the delay which led to the dismissal of the matter. That the matter was last before the mediator on 11th November 2022 when the court-annexed mediation collapsed and the matter was referred back to court for hearing. That this is the third time the matter is coming up for reinstatement and dismissal for want of prosecution. That there has been indolence on the part of the Applicant to move the court to have the matter heard which is indicative of a litigant who has lost interest in

prosecuting its claim. That no explanation has been given why it took the Plaintiff 1 year and 4 months since the mediation ended to place the matter for hearing.

4. The Respondent further maintained that the matter relates to imports that were made in 2007 and the Defendant might not be in a position to defend itself as most of the officers who handled the case are either dead left employment or retired by now making it difficult to trace them to attend court and fully articulate its case. That the Defendant stands to suffer prejudice in terms of time and extra cost of litigation if the application is allowed. The Respondent prayed that the application be dismissed with costs and should the court find in favour of reinstating the suit, then an order that any interest awarded run from the date of reinstatement of the suit.

5. The Respondent also filed Grounds of Opposition dated 20th May 2024 that there are no grounds set out in the application to warrant the grant of the orders sought, that the Plaintiff has not explained the circumstances leading to the delay, that the Plaintiff is guilty of laches, and that it is undeserving of the court's discretion in its favour, that the application amounts to an abuse of the court process, and that under the circumstances, the application is a misconception and ought to be dismissed with costs to the Respondent.

6. The application was canvassed by way of written submissions. The Applicant submitted that Notice to Show Cause was not served upon the Plaintiff and the Defendant, and both parties were not present in court on 7th February 2024 when the suit was being dismissed which is proof that the Notice to Show Cause was not brought to the attention of the parties. That the cardinal ground upon which justice is based is that a court cannot condemn a party unheard as was held in the cases of *Deposit Protection Fund Boards v Firdosh E Jamal* (2014) eKLR, *Peter Kiboi Willie v Family Bank Ltd* (2017) eKLR and *Mwangi S. Kimenyi v Attorney General & Anor* (2014) eKLR. The Applicant argued that the instant application demonstrated sufficient ground to warrant the setting aside of the orders of the orders of dismissing the case and they supported this position with the holding of Chepkwony, J. in *Petromin Limited v KRA* (2020) eKLR where there was determination of an application to set aside exparte dismissal orders and the application was allowed for the interest of justice.

7. The Respondent submitted that the test applied by courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and whether justice can be done despite the delay, according to the holding in *Markson Karani Muchunku v Joseph Ngari Gituku* (2021) eKLR. The Respondent maintained that the case had been dismissed for want of prosecution and reinstated three times. That this shows indolence on the part of the Applicant and the Respondent cited the case of *Savings and Loans Limited v Susan Wanjiru Muritu*, Milimani HCCC No. 397 of 2002 where it held that

> "..... it is trite that the case belongs to a litigant and not her advocate. A litigant has a duty to pursue his or her case ... she had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

8. The Respondent contended that failure of the Applicant on prosecuting the case for over 16 years has placed the Respondent in a position where it may not be able to defend itself as the officers have left its service, retired, died or the issue just forgotten. The Respondent prayed for dismissal of the application and that they be awarded costs of Kshs. 100,000 for defending and prosecuting the application.

9. This court has considered the application, the Replying Affidavit, the Grounds of Opposition and submissions and established that the issues for determination are whether court ought to set aside

and/or vary the order of 7th February 2024 for dismissal of the suit for want of prosecution, whether Plaintiff/Applicant is entitled to the reliefs sought and who should bear cost of the application.

10. The court has discretion to dismiss a suit where steps have not been taken to prosecute the matter for a period of one year. Order 17 Rule 2 (1) of the *Civil Procedure Rules* 2010 provides: -

> In any suit I 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. In *Investment Limited v G4s Security Services Limited* (2015) eKLR, the court held that: -

> " 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..."

12. Upon perusal of the court file, it is noted that indeed the suit was previously dismissed severally for want of prosecution, and there was reinstatement with sufficient reasons in all occasions. It is also noted that parties had complied with Order 11 of the *Civil Procedure Code* and requested for a hearing date but the matter was referred to the Court Annexed Mediation. The said mediation was conducted on 21st November 2022 but parties could not reach a settlement. On 16th June 2023, the matter came up for mention before the Deputy Registrar where there was appearance for the Plaintiff but the Defendant was absent. Court gave directions that the matter be mentioned on 3rd August 2023 before the Deputy Registrar and for the mention notice to issue. However, there was no appearance for parties on 3rd August 2023 and 30th August 2023 before the Deputy Registrar, and before Hon. Justice Kizito Magare on 20th November 2023 and 7th February 2024 when the matter was dismissed for want of prosecution.

13. It is therefore clear from the foregoing that one year had not lapsed since the matter was last in court. This court is also convinced by evidence on record that indeed court made an order on 20th November 2023 that the matter be listed for notice to show cause why it should not be dismissed. However, there is no evidence that parties were served with the said notice.

14. The court also has discretion to reinstate a dismissed suit as provided under Order 12 Rule 7 that: -

> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

15. Section 3A of the *Civil Procedure Act* also provides that: -

> Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

16. In *Ivita v. Kyumbu* (1984) KLR 441 it was held 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, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff 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."

17. The Respondent has cited that delay on the part of the Applicant to prosecute the matter will be prejudicial to them as they may not be able to defend themselves on grounds that officers have left its service, they are retired, dead or the issue is just forgotten. On the contrary, the record shows that before the matter was referred to Court Annexed Mediation, both parties appeared in court and indicated that they had complied with Order 11 of the *Civil Procedure Code* and they were ready to take a hearing date. Since mediation collapsed, it would be in the interest of justice that the matter goes back to court for hearing and determination of the suit and a hearing date is taken to avoid further delays.

18. In conclusion, this court allows the application dated 23rd February 2024 and sets aside the dismissal order of 7th February 2024. Costs be in the Cause. Parties do proceed to set down the case for hearing.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY, 2024

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Mogaka Omwenga and Mabeya Advocates for the Plaintiff- present

G.O. Ochieng Advocates for the Defendant

Court Assistant – Samuel Shitemi