



Gitere Kahura Investments Limited & another v Kenya Planters Co-operative Union Limited (in Liquidation) (Miscellaneous Cause E780 of 2022) [2024] KEHC 11938 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11938 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS CAUSE E780 OF 2022
JWW MONG'ARE, J
OCTOBER 4, 2024
IN THE MATTER OF KENYA PLANTERS CO-OPERATIVE UNION LIMITED (IN LIQUIDATION)
AND
IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE LAWS OF KENYA)

BETWEEN

GITERE KAHURA INVESTMENTS LIMITED 1ST APPLICANT

KENYA BOX BODY BUILDERS 2ND APPLICANT

AND

KENYA PLANTERS CO-OPERATIVE UNION LIMITED (IN LIQUIDATION) RESPONDENT

RULING

1. On 20th July 2023, the court dismissed the Applicants' application dated 1st November 2022 and suit for want of prosecution and directed that the file be marked as closed. The Applicants have now filed the Notice of Motion dated 20th March 2024 seeking to reinstate the application and suit, which Notice of Motion application is supported by grounds on its face and the supporting affidavit of Faith Mbirwe, an advocate in conduct of this matter on behalf of the Applicants, sworn on 20th March 2024. It is opposed by the Respondent through the Replying Affidavit of its Liquidator, Stephen Kamau Njoroge, sworn on 12th July 2024. The application was canvassed by way of written submissions which are on record.



2. The Applicants aver that the subject application was filed on the 1st November 2022 and served upon the Respondent who filed its response by way of a Replying Affidavit sworn by Stephen Kamau Njoroge on the 21st December 2022. That the application was fixed for mention for directions on the 31st January 2023 before the Deputy Registrar and the said dated, the court posted directions on the Kenya Law website through its daily cause list indicating that the Deputy Registrar, Hon. Claire Wanyama would be away from office from 23rd January 2023 up to 2nd February 2023 and consequently the matters listed for that period were rescheduled to the weeks beginning 6th and 13th March 2023.
3. The Applicants state that their advocates checked the daily Causelists for the said 6th and 13th March but the matter was not listed and that they were not aware that the matter was actually mentioned on the 14th March 2023 and they only learnt of the same at the e-filing system. The Applicants claim that they had further learnt that the matter was further mentioned on the 20th March 2023, 22nd May 2023 and 20th July 2023 yet no notices were ever served from the court for the said court attendance and that the matter was consequently terminated and/or dismissed by the court on 20th July 2023 and yet no notice to show cause was ever served upon the Applicants. The Applicants state that they were not aware that the matter would be mentioned on the said dates at all and were surprised to learn that it was mentioned and actually dismissed and/or terminated on the said 20th July 2023.
4. The Applicants contend that had they been aware of the said dates, they would have attended court as they are very interested in prosecuting the subject application to the end. That failure to attend court on 20th July 2023 and the previous dates before then as explained hereinabove was not intentional as the Applicants were not aware of the dates since the same was never communicated by the court either by message or by an email. The Applicants state that they stand to suffer substantial harm and loss if the suit is not reinstated and that it is therefore in the interest of justice that this application be heard and the Applicants are accorded an opportunity to ventilate their claim to avert a miscarriage of justice. The Applicants assert that they are ready and willing to prosecute this suit to its conclusion and that they did not exercise any negligence or inaction and nor could they have refused to attend the court had they been duly notified of the change in dates. The Applicants thus request the Court to reinstate this suit to enable them prosecute it which is their Constitutional right.
5. In response, the Respondent depones that the Applicants are undeniably not deserving of the orders sought, the genesis of which is their overwhelming indolence in pursuing their claim. That the reasons propounded as a basis for the application are not sufficient to warrant re-opening of the matter and that it is undoubtedly clear the Applicants have been lethargic in prosecuting their application, leading to the court dismissing the same. Ostensibly, that it is conclusive that the delay is prolonged and inexcusable and that the Applicants accede to having been aware pursuant to the courts directions that the matter was to be mentioned in the week beginning 13th March 2023 but that despite this knowledge, the Applicants nevertheless failed to attend court on 14th March 2023 when the matter was mentioned, and the same was allocated a subsequent date on 22nd May 2023.
6. The Respondent states that even in the event the non-attendance was an inadvertent mistake, almost 2 months later on the aforesaid date, the Applicants yet again inexcusably failed to attend court to prosecute their application despite the Applicants having been aware through the CTS portal that a mention date had been allocated. The Respondent claims that 2 subsequent months lapsed whereby the Applicants yet again did not bother to confirm whether their matter had a date from the CTS portal or from court, and as a result, when the application came before the court on 20th July 2023, the same was dismissed for want of prosecution. That as a further demonstration of their delay and indolence, this instant application was filed in March 2024, almost a year after their suit was dismissed



for want of prosecution and that from the foregoing, it is evident that the Applicants have exhibited a clear pattern of neglect, negligence and disdain for the sanctity of this Courts proceedings.

7. The Respondent contends that up until the instant application was filed a year after they filed their initial application for leave, the Applicants did nothing in pursuit of their suit, and actually acknowledge that it was only after the matter was dismissed that they realized the status by checking the CTS and the Respondent invites the court to appreciate the absurdity of such an averment. Be that as it may, the Respondent states that the Applicants have not provided an iota of evidence on the steps they took to ensure the matter was set down for hearing, or the slightest evidence on any follow ups done to the court or the Deputy Registrar on the position of their application. That based on the Applicants' averments, they simply filed the suit and left it pending merely as an unnecessary distress to the Respondent without any further action or subsequent follow-ups and it is on this basis that the Respondent maintains the Applicants are not at all deserving of this court's discretion.
8. The Respondent adds that this initial suit has been in court since 2016 when the Respondent was solvent, and after years, the company is now insolvent clearly evidencing how the circumstances in this matter have shifted. On the whole, the Respondent avers that the Applicants have not substantiated the basis of their delay of over a year to prosecute its suit, neither have they provided a reasonable justification to warrant this court exercising its discretion in their favour. As such, it urges the court to appreciate that litigation must come to a timeous conclusion and dismiss the instant application with costs and that it stands to suffer immense prejudice should the application be allowed.

Analysis and Determination

9. After careful consideration of the pleadings filed by the parties and their written submissions, I note that the main issue for the court's determination is whether the Applicants' suit should be reinstated. The parties agree in their submissions that in such an application, the Applicant must appeal to the discretion of the Court which discretion ought to be exercised in a just manner. In *Shah vs Mbogo & Another* (1967) EA 116 Harris J. stated that 'The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice'. In an application for reinstatement of a court process, there is need to balance the requirement as to whether reasonable grounds have been proffered for reinstatement and the prejudice to be suffered by the opposite party if such an order for reinstatement were to issue bearing in mind at the same time that dismissal is a draconian order that drives parties away from the seat of justice and should therefore be employed sparingly (See Nambuye JA., in *Ngugi v Thogo* [2021] KECA 88 (KLR)).
10. The guiding principles in an application of this nature have been articulated in several authorities. The Court of Appeal, in *Peter Kipkurui Chemoiwo v Richard Chepsergon* ELD CA Civil Appeal No. 58 of 2018 [2021] eKLR affirmed the principles and test to be applied in an application for reinstatement as set out by Chesoni J., (as he was then) in *Ivita v Kyumbu* [1984] KLR 441, where it was held as follows:

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.

11. The fact that there has been a delay in the prosecution of this suit is not in doubt. The question is whether the Applicants have advanced justifiable reasons to excuse the delay. The Applicants admit that this matter was rescheduled to be mentioned on the weeks beginning 6th and 13th March 2023 and that it was actually mentioned on 14th March 2023 and on further dates thereafter. However, they state that they were not aware of the same as no notices were issued by the court. Whereas this could be true, I note that since this matter was to be mentioned in the weeks beginning 6th and 13th March and it was actually mentioned on 14th March, I find that this first mention was as per the said notice. What the Applicants are not saying is that they did not check in with the court on that week hence they missed the mention. Nevertheless, I am inclined to agree that there was no rebuttal either by the Deputy Registrar of the court or the Respondent that the Applicants were ever served with the mention notices thereafter as stated by the Applicants. I am prepared to indulge the Applicants on this ground and find that indeed, they were never served with the subsequent notices and it is possible that they may not have been aware that this matter was proceeding on those dates. It is not the business of parties to keep checking in with the court to find out whether their matters have been given a date for mention or hearing. Accepting this would be admitting inefficiency of the Judiciary, which is not the case, as parties have a right to be informed of when their matters are scheduled to be mentioned or heard.
12. Therefore, I am satisfied that the Applicants have demonstrated sufficient and plausible cause for nonattendance to prosecute their application namely, nonservice upon them by the court's Deputy Registrar/court registry of the mention notices. I also find that no prejudice will be suffered by the Respondent if the application under consideration were to be relisted for hearing and disposal on its merits as the Respondent has already responded to the same.

Conclusion and Disposition

13. In conclusion I therefore find merit in the Applicants' application dated 20th March 2024. The same is hereby allowed with the court's order of 20th July 2023 being set aside and substituted with an order reinstating the Applicants' application dated 1st November 2022 for hearing and determination on priority basis due to the Respondent's current position of being in liquidation, and that the application's dismissal was inadvertent as it was wholly contributed to by the Court's Deputy Registrar/Court Registry. The costs of the application should abide the outcome of the reinstated application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF OCTOBER 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Mbirwe holding brief for AGN Kamau for the Applicant.
2. N/A for the Respondents
3. Amos - Court Assistant

