Habib Bank Limited v Fahari Trading Limited & 2 others; New Generation Self Service Stores Limited (Third party) (Civil Suit 22 of 2017) [2023] KEHC 20824 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20824 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 22 OF 2017

OA SEWE, J

JULY 19, 2023

BETWEEN

HABIB BANK LIMITED ..... PLAINTIFF

AND

FAHARI TRADING LIMITED ..... 1ST DEFENDANT

SHAHZAD YOUSUF ..... 2ND DEFENDANT

JAWAID ALI ..... 3RD DEFENDANT

AND

NEW GENERATION SELF SERVICE STORES LIMITED ..... THIRD PARTY

RULING

1. Before the court for determination are two applications. The 1st application is dated February 8, 2021. It seeks the dismissal of the suit including the defendant's Counterclaim for want of prosecution. The 2nd application was filed by the plaintiff for orders compelling the 1st defendant to provide security for costs pending the hearing and determination of the application. The two applications were canvassed by way of written submissions, pursuant to the directions given herein on November 23, 2021. I propose to handle them in that order, noting that no submissions were filed on behalf of the defendants.

The 1st Application:

2. The first application, dated February 8, 2021, was filed on behalf of the third party, New Generation Self Service Stores Limited, by the firm of M/s Muriu Mungai & Company LLP Advocates pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 17 Rule 2 of the *Civil Procedure Rules, 2010* for orders that:

(a) The Plaint dated February 28, 2017 and the Statement of Defence & Counterclaim dated June 1, 2017 be dismissed, or be declared to have been statutorily dismissed for want of prosecution.

(b) The costs of the application, suit and Counterclaim be awarded to the third party against the plaintiff and the defendants jointly and severally.

3. It was premised on the grounds that the plaintiff filed this suit on March 1, 2017 and was thereafter directed to provide authority for the institution of the suit and that although it was thereafter given leave to amend its Plaint, it did not comply with the order to provide authority to plead. It was further the contention of the third party that no action has been taken in the suit either by the plaintiff or the defendant since January 23, 2019 when the matter was adjourned to March 18, 2019. It was therefore contended by the third party that the pendency of the suit and the Counterclaim is greatly prejudicial to its interests for the following reasons:

(a) The sums in issue continue attracting interest at rates stated to be 25% per annum; and therefore any adverse decision against the third party will condemn it to pay inordinately huge sums as interest.

(b) The claim arises from facts stated to have happened in 2015. The third party's witness cannot be fairly expected to recall events that long ago. Its defence is therefore significantly prejudiced by the delay.

(c) There is significant anxiety by the very fact that a suit claiming colossal sums hangs over the third party's head.

(d) The 1st defendant's offices in Kenya are no longer operational. The 2nd and 3rd defendants are equally no longer resident in Kenya. The third party is therefore being dragged and forced to remain in court by parties whose business interests in Kenya ceased.

4. Accordingly, the third party posited that it is in the interest of justice and fairness that the suit and the Counterclaim be declared as having been automatically dismissed for want of prosecution as mandated by Order 17 Rule 2(5) of the *Civil Procedure Rules*. The application was supported by the affidavit of a director of the third party, Stephen Kaheni, sworn on February 8, 2021 in which the deponent averred that on February 15, 2018, the plaintiff obtained leave to amend the Plaint to reflect the acquisition by DTB Bank Limited; which amendment was effected on May 30, 2018. Mr. Kaheni further averred that the matter was last in court on January 23, 2019 and was adjourned to March 18, 2019 but the Court did not sit on that date. He therefore averred that, since then, the plaintiff has not taken any step whatsoever to provide the authority to plead or prosecute its suit.

5. In the same vein, the third party faulted the defendant for taking no step to prosecute its Counterclaim; and therefore that it is in the interest of justice that both the Plaint and the Counterclaim be dismissed for want of prosecution as mandated by Order 17 Rule 2(5) of the *Civil Procedure Rules.*

6. In response to the application, the defendants filed Grounds of Opposition dated November 2, 2021, contending that:

(a) The application is frivolous and lacks merit.

(b) The plaintiffs filed this suit on February 28, 2017. A Defence and Counterclaim, Third Party Notice, Witness Statements and Defence by Third Party have already been filed; and that the suit only awaits disposal through a fair trial process.

(c) That since February 28, 2018 the plaintiff has never attempted to set down the suit for hearing or for directions.

(d) The plaintiff is guilty of laches. The delay in setting down the suit for hearing is not reasonable or excusable.

(e) The 1st defendant is a company duly registered and incorporated in Kenya. The 2nd defendant is a shareholder director who operates both in Karachi Pakistan and Mombasa Kenya. The 3rd defendant is a shareholder director permanently resident in Mombasa Kenya and oversees the 1st defendant's operations.

(f) There is no legal requirement for a party to own assets for it to be granted a fair hearing in court. The application is an infringement of Articles 47, 50(1), 159 of *the Constitution* in that it seeks to fetter the defendant's rights to a fair hearing.

(g) Grant of the orders sought shall limit the fair trial of the suit in terms of the well founded and laid out Counterclaim against the third party by the 1st defendant.

(h) The 1st defendant has a bona fide Defence and Counterclaim which has not been challenged by the plaintiff.

7. In addition to their Grounds of Opposition, the defendants relied on the Replying Affidavit sworn on November 2, 2021 by the 3rd defendant, Jawaid Ali. He averred therein that he is a director of the 1st defendant; and therefore made the deposition not only on his own behalf but also on behalf of the 1st defendant. He pointed out that the 1st defendant's Counterclaim was active as there existed a Notice of Motion application dated January 21, 2019 filed by the third party which had been fixed for hearing on July 13, 2021, but which was later withdrawn. He posited therefore that the third party, in delaying the prosecution of that application, contributed to the overall delay in the prosecution of the suit.

8. The 3rd defendant further averred that the outbreak of the global Covid 19 pandemic also contributed to the delay in that the Mombasa High Court had to be shut down for a while, thereby paralyzing court operations. He added that the 1st defendant is still operational and that it is keen on pursuing its Counterclaim against the third party; and therefore urged for the dismissal of the 1st application with costs.

9. On behalf of the plaintiff, a Replying Affidavit to the 1st application was filed herein on September 19, 2022, sworn by the plaintiff's Debt Recovery Officer, Mr. Lwanga Mwangi. He thereby deposed that:

(a) The plaintiff applied for and obtained leave to amend its Plaint dated February 28, 2017; and that the amendment was necessitated by Gazette Notice No. 7257 issued on July 28, 2017 authorizing the acquisition of business, assets and liabilities of Habib Bank Kenya Limited by Diamond Trust Bank Kenya Limited.

(b) The plaintiff filed an Amended Plaint dated May 29, 2018 and the Authority to Plead was erroneously left out.

(c) The matter came up in court on January 23, 2019 and was adjourned to March 18, 2019 but the Court did not sit on that particular day; and that thereafter the file could not be traced in spite of numerous attempts by counsel on record for the Bank. A copy of a letter to the Deputy Registrar seeking for assistance in tracing the file was annexed to the plaintiff's affidavit as Annexure DTB-1. That great injustice will be occasioned upon it should its suit be dismissed as proposed, noting that it seeks the recovery of Kshs. 29,061,087/= from the defendants.

10. The third party thereafter filed a Supplementary Affidavit sworn by Stephen Kaheni on December 19, 2021. Mr. Kaheni reiterated that:

    (a) the existence of the third party's Notice of Motion dated January 22, 2019 could not stop the defendants from taking steps such as fixing a mention date for directions.

    (b) Nothing stopped the plaintiff from availing the Authority to Institute suit as ordered.

11. Accordingly, the third party prayed that the suit and the defendant's Counterclaim be dismissed to save the third party from the immense prejudice that the delay has and will continue to cause it.

12. In his written submissions dated March 22, 2022, Mr. Kongere for the third party proposed one issue for determination, namely whether the Plaint dated February 28, 2017 and the Counterclaim dated June 1, 2017 should be dismissed for want of prosecution. He relied on Order 17 Rule 2 of the *Civil Procedure Rules* and the cases of *Salkas Contractors Limited v Kenya Petroleum Refineries Limited* [2004] eKLR and *Kenya Railways Corporation v Harjot Singh Dhanjal* [2021] eKLR in urging the Court to find that there was inordinate delay for which neither the plaintiff nor the defendant offered a plausible excuse.

13. Counsel further urged the Court to disregard the explanation that the delay was attributable to the Covid 19 pandemic. He explained that the onset of Covid 19 pandemic in Kenya happened only in March 2020 and cannot therefore be a justification for indolence on the part of the plaintiff and the defendants in prosecuting this suit. He relied on *Kioko Muthoka v Kalembwani & Another* [2021] and *Kenya Railways Corporation* (supra) in which the same argument was dismissed. Counsel further pointed out that the third party stands to suffer immense prejudice by reason of the delay, granted the pleaded rate of interest of 25% per annum from the date of filing suit. He therefore urged the Court to find that the third party has made out a good case for the dismissal of the plaintiff's suit as well as the 1st defendant's Counterclaim.

14. Mr. Kariuki, learned counsel for the plaintiff relied on his written submissions filed on June 15, 2022. In his view, the Amended Plaint dated May 29, 2018 is not ripe for dismissal for want of prosecution; and therefore the third party has not satisfied the legal requirements set out in Order 17 Rule 2 of the *Civil Procedure Rules*. He relied on *George Gatere Kibata v George Kuria Mwaura & Another* [2017] eKLR for the proposition that after satisfying the one-year threshold, a party must show that there was inordinate and inexcusable delay as well as prejudice to be suffered if the suit were to be allowed to proceed to trial.

15. Counsel further submitted that if the Court takes into account that the file went missing during the period leading up to March 18, 2020 when the period of one year would have elapsed, the onset of Covid 19 pandemic around the same time and the filing of an application dated January 22, 2019 by the third party, it would find that the delay in prosecuting the suit is excusable. On prejudice, Mr. Kariuki submitted that no evidence was led by the third party to show that it stands to suffer any prejudice; and that if anything, it is the plaintiff that stands to suffer the greatest prejudice should the suit be dismissed as it will lose the monies advanced by it to the defendants; not to mention the likelihood of an award of costs to the defendant and the third party in such an eventuality.

16. On the failure by the plaintiff to file Authority to Sue, counsel submitted, on the authority of *Peeraj General Trading & Contracting Company Limited Kenya & Another v Mumias Sugar Company Limited* [2016] eKLR and *Eye Company (K) Limited v Erastus Rotich t/a Vision Express* [2021] eKLR that the failure does not necessarily invalidate a suit.

17. I have given due consideration to the 1st application together with the written submissions filed herein on behalf of the parties. There are two issues emerging therefrom for determination, namely:

    (a) Whether failure by the plaintiff to file Authority to Plead is fatal to the suit;

    (b) Whether sufficient cause has been shown for the dismissal of the plaintiff's Plaint dated February 28, 2017 as amended and whether the defendant's Counterclaim dated 1st June 2017 should be dismissed for want of prosecution.

18. It is indeed the case that in Order 4 Rule 1(4) of the *Civil Procedure Rules*, it is a requirement that:

> Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

19. Thus, in *Bugerere Coffee Growers Ltd v Sebaduka & Another* [1970] EA 147, it was held that:

> "When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings."

20. The rationale for the requirement was aptly capture by the Court of Appeal in *Spire Bank Limited v Land Registrar & 2 Others* [2019] eKLR thus:

> "It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.

21. In the case at bar, the plaintiff admitted that, thus far, it is yet to comply with this requirement. Consequently, the third party raised the issue as one of the grounds for challenging the validity of the suit. It was pointed out that on December 13, 2017 a specific order was made by the Court for compliance by the plaintiff by which the plaintiff was directed to provide authority for the institution of the suit. A perusal of the proceedings shows that the order counsel had in mind was made, not on December 13, 2017 but on May 31, 2018; and it was not specific to the authority to sue. The order simply required the plaintiff to "regularize the suit by filing all the prerequisites within 7 days" from that date.

22. In the premises, it should not be an issue at this point of the proceedings that the plaintiff is yet to file authority to sue; because it is now trite however that failure to file the authority with the Plaint is not necessarily fatal. (see *Peeraj General Trading & Contracting Company Limited Kenya & Another v Mumias Sugar Company Limited*, supra). In this respect, I am in total agreement with the position

taken by Hon. Odunga, J. (as he then was) in *Leo Investments Limited v Trident Insurance Company Limited* [2014] eKLR, that:

> "Clearly from the foregoing provision, nowhere is it required that the authority given to the deponent of the verifying affidavit be filed. The failure to file the same, in my view, may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which commonsense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit."

23. I therefore find no merit in the argument that the Plaint is incompetent for lack of authority to sue. On whether the suit should be dismissed for want of prosecution the third party has relied on Order 17 Rule 2 of the *Civil Procedure Rules* which provides 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) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

    (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

    (4) The court may dismiss the suit for non-compliance with any direction given under this Order.

    (5) A suit stand dismissed after two years where no step has been undertaken.

    (6) A party may apply to court after dismissal of a suit under this Order

24. A perusal of the proceedings in this case confirms that the last step taken was on the January 23, 2019 when the application by the third party dated January 21, 2019 was set for hearing on the March 18, 2019. The plaintiff's explanation for the delay was that the court file could not be traced. A letter to that effect was annexed to the plaintiff's affidavit to demonstrate that it made efforts to have the file traced and availed for action; and in particular to have the third party's application dated January 22, 2019 fixed for hearing and determination. The letter in question is dated March 9, 2021.

25. It is significant that the letter in question bears the received stamps of both M/s Opulu & Company Advocates and Muriu Mungai & Company LLP Advocates confirming receipt on March 10, 2021. Neither of them denied having received the letter or that the file was missing as alleged therein. In the premises, I am convinced not only that the delay is not inordinate, but also that a plausible justification has been given by the plaintiff for it. Indeed, I agree that, weighing the respective interests of the parties, the plaintiff stands to suffer the most prejudice should the suit be dismissed for want of prosecution as proposed.

26. Accordingly, in *Salkas Contractors Limited v Kenya Petroleum Refineries Limited* [2004] eKLR it was held:

> " The principle that pervades these decisions (Ivita v Kyumbu (supra) and Allen v Sir Alfred McAlpine (supra) is that the court has to be satisfied that the inordinate delay is excusable and if so satisfied, then the court has to consider whether justice can still be done to the parties notwithstanding the inordinate delay. If the court is satisfied that justice can still be done, then it will, in the exercise of its discretion, refuse the application for dismissal for want of prosecution. It follows that if the court is not satisfied that the inordinate delay is excusable, then it will, again in its discretion, allow the application and dismiss the suit for want of prosecution."

27. Similarly, in *Ecobank Ghana Limited v Triton Petroleum Co Limited & 5 others* [2018] eKLR the Court of Appeal reiterated its stance thus:

> "....it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay..."

28. In the result, and for the foregoing reasons, I am convinced that the justice of the case lies in the dismissal of the Notice of Motion dated February 8, 2021 no order as to costs.

The 2nd Application:

29. The 2nd application is dated July 16, 2021. It was filed by the firm of M/s Munyao Muthama & Kashindi Advocates on behalf of the plaintiff for orders that:

    (a) The 1st, 2nd and 3rd Defendants do deposit within twenty-one (21) days or such other period as the Court may order, the sum of Kshs. 2,000,000/= in a joint interest earning account in the name of the Plaintiff's and Defendant's Advocates as security for costs in favour of the plaintiff's advocates,

    (b) In default of compliance, the defendant's Defence dated June 1, 2017 be dismissed with costs to the plaintiff.

    (c) The costs of the application be borne by the 1st, 2nd and 3rd defendants.

30. It was premised on the grounds that the 1st defendant is no longer operating at the initial physical address known to the plaintiff, being the 3rd floor of Jubilee Building; and that the 1st defendant's physical address is no longer known to the plaintiff despite numerous attempts and efforts to establish the same. The plaintiff further contended that it has been unable to locate any known assets of the 1st defendant. In particular, the plaintiff pointed out that, in the Verifying Affidavit sworn by the 2nd Defendant on June 1, 2017, he deposed that he is presently resident in Karachi, Pakistan; and that the same could very well be the case with the 3rd defendant as he has no known physical address or assets in Kenya. The plaintiff is therefore apprehensive that in the event that it succeeds against the defendants it will be unable to reclaim the enormous amounts paid to their counsel to prosecute the suit herein. The plaintiff surmised that a party and party bill of costs for a claim of this nature attracts, roughly the sums of Kshs. 1,900,000/=; and urged that the application be allowed and the orders sought therein granted in the interest of justice.

31. The application was supported by the affidavit of Lwanga Mwangi sworn on July 16, 2021. He deposed that, at the request of the 1st defendant, the plaintiff advanced it a credit facility; and that due to the default of the 1st defendant in servicing the facility, the amount due and owing to the plaintiff as at December 31, 2016 was Kshs. 29,061,987.16. He further averred that none of the employees of the plaintiff knows the 1st defendant's physical address despite numerous efforts and attempts to establish the same. Thus, Mr. Mwangi averred that, in the likely event that the plaintiff succeeds in this suit against the defendants, it will be unable to reclaim the enormous amounts it has paid to its Advocates in prosecuting this suit.

32. In response to the application, the defendants relied on the Replying Affidavit sworn by Jawaid Ali on November 2, 2021. Mr. Ali averred that he is one of the two directors of the 1st Defendant and that the Company is still in business, though it had not made any shipments for about 3 years due to the Covid 19 pandemic. He further averred that he is a resident of Mombasa and that their operations are both in Mombasa and Karachi. Mr. Ali pointed out that the 1st defendant has made a Counterclaim against the 3rd party for over Kshs. 40,000,000/=; which Counterclaim has a high chance of success. Thus, he asserted that there is no imminent danger whatsoever to warrant the requirement for security.

33. The plaintiff's application was filed under Order 26 Rules 1 and 2 of the *Civil Procedure Rules, 2010* which provides:

    1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

    2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out the grounds of the defence together with a statement of the deponent's belief in the truth of the facts alleged.

34. To the extent therefore that the instant application for security has been filed by the plaintiff and not the defendant, it flies in the face of the clear provisions of Order 26 Rule 1 of the *Civil Procedure Rules*. I find succor in this posturing in the decision of Hon. Okwany, J. in *Sakafu Limited v Flowcrete East Africa Limited* [2019] eKLR, thus:

> " 14. My finding is that the provisions of Order 26 of Rule 1 Civil Procedure Rules are specific on which party may apply for orders for security for costs. In the case of Shah v Shah [1982] KLR 95, the court stated thus:
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> "The principle general rule is that security is normally required from plaintiffs resident outside the jurisdiction, however, a court has a discretion to be exercised reasonably and judicially, to refuse to order the security be given. The test on an application for security of costs is not whether the plaintiff has established prima facie but whether the defendant has shown a bona fide defence."
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> 15. The fact that it is a defendant who may benefit from the provisions of Order 26 Rule 1 is further confirmed by the provisions of Order 26 Rule 5 which stipulate that:
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> > "(1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit."

16. I therefore find that the instant application is misconceived in the sense that allowing it will give rise to the absurd outcome of benefitting the defendant through dismissal of suit should the provisions of Order 26 Rule 5 Civil Procedure Rules kick in upon the failure in upon the failure by the defendant to furnish the requisite security.

35. It is therefore my finding that the 2nd application as filed by the plaintiff is not only frivolous but is also misconceived and is therefore for dismissal.

36. In the light of the foregoing, it is hereby ordered that:

(a) The application dated February 8, 2021 by the third party lacks merit and is hereby dismissed with no order as to costs.

(b) The application by the plaintiff dated July 16, 2021, being misconceived, is hereby dismissed with costs.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JULY 2023

OLGA SEWE

JUDGE