Eon Energy Limited v Desnol Investments Limited & 4 others (Miscellaneous Application 281 of 2018) [2024] KEHC 15345 (KLR) (Commercial and Tax) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION 281 OF 2018

NW SIFUNA, J

NOVEMBER 21, 2024

BETWEEN

EON ENERGY LIMITED ..... APPLICANT

AND

DESNOL INVESTMENTS LIMITED ..... 1ST RESPONDENT

JOAN PRISCA ARUM ..... 2ND RESPONDENT

CLIVE OUKA NATOME ..... 3RD RESPONDENT

NOEL KAGAME NATOME ..... 4TH RESPONDENT

DESMA ADHIAMBO NATOME ..... 5TH RESPONDENT

RULING

1. The 1st to 5th Applicants/ Respondents filed a notice of motion dated 12th August 2021 seeking dismissal of the suit for want of prosecution under Order 17 Rule 2 (1) of the Civil Procedure Rules.

2. The grounds are on the face of the application, the supporting affidavit sworn on the same date and written submissions dated 4th May 2022. The grounds are that the Respondent/ Applicant filed this matter seeking injunctive reliefs against the Applicants and before the suit ended, the Respondent filed Misc. Case No. E074 of 2018 to enforce an arbitral award between the parties. The matter is still pending in Court and the Respondent has taken no action to prosecute it since 4th October 2018. The Applicants cannot access their assets or conduct its business as a result of the interlocutory orders issued upon them in this matter. The pendency of this matter is causing the Applicants embarrassment, anxiety and inconvenience that can only be mitigated by a dismissal of the suit.

3. The Applicants argued that there is nothing on record to show that the Respondent has offered any cogent explanation for the delay in prosecuting the suit. The Applicants highlighted that the suit has been dormant for nearly four years, arguing that the Respondent has not demonstrated how the Applicants' conduct or the present application is prejudicial to it. They submitted that the Respondent is required by law to satisfy the Court as to how the prejudice will occur, should the suit be dismissed for want of prosecution.

Response

4. In response, the applicant filed a replying affidavit sworn by Advocate Chrispin M. Bosire on 5th April 2022 and written submissions dated 17th February 2023. Its case is that the Respondent filed this matter seeking injunctive reliefs to preserve certain properties belonging to the Applicants pending the hearing and determination of arbitration proceedings. The Court granted the reliefs sought on 4th October 2018. Thereafter, the Respondent prosecuted the arbitral proceedings.

5. During the arbitral proceedings, the Applicants filed an Application dated 21st September 2018 in HC Misc Appl. No. E074 of 2018 seeking a stay of the arbitration proceedings and urging the Court to decide on the matter of jurisdiction as the sole Arbitrator amongst other orders. The Court dismissed the application for want of merit. Thereafter, the arbitral proceedings went on and the Arbitrator issued an Award dated 1st April 2020 in favour of the Respondent.

6. The Respondent suggested that instead of misleading the Court that this matter ought to be dismissed for want of prosecution when the substantive dispute has been prosecuted, the Respondents ought to have sought that the matter be consolidated with and heard alongside HC Misc Appl. No. E074 of 2018.

Analysis and Determination

7. I have considered the application, the grounds, the rival affidavits and submissions. The issue for determination is whether this suit ought to be dismissed for want of prosecution.

8. Order 17 Rule 2 of the Civil Procedure Rules 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 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."

9. In Argan Wekesa Okumu v. Dina College Limited & 2 others [2015] eKLR, the Court observed as follows:

   > " ...the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain rather than prematurely terminating the same."

10. The matter at hand was commenced by the Applicant through an application dated 22nd June 2018 seeking interim measures of protection pending arbitration proceedings. On 4th October 2018, the Court granted the following orders:

    1. That there be an interlocutory injunction against the Directors of Desnol Investments Limited, their agents and/ or servants restraining them from commencing, continuing and

concluding any transactions for the selling, transferring, leasing or utilizing the real, moveable and cash assets of the company including the land registered as KSM/Kochieng/4157 & KSM/Ojola/4393 without the authorization of the court and/ or the involvement of the Applicant pending the completion of the arbitral proceedings.

2. That there be an interlocutory injunction against the 3rd Respondent, his agents and/ or servants restraining them from commencing, continuing or concluding any transactions for the selling, transferring, leasing or otherwise disposing the lands registered as Nandi/Kapsengere/1257 without the authorization of the court and/or the involvement of the Applicant pending the hearing and determination of this Application.

3. That there be an inhibition against the lands registered as KSM/Kochieng/4157 & KSM/Ojola/4393 pending the completion of the arbitral proceedings.

4. That there be an inhibition against the land registered as Nandi/Kapsengere/1257 pending the completion of the arbitral proceedings.

5. That costs of the application be in the cause.

11. While it is palpable that there has been no prosecution of the matter since the orders were issued on 4th October 2018, it is also clear that the matter was solely intended to preserve the subject matter of the arbitration. In addition, the Respondent has demonstrated that it prosecuted the substantive dispute through arbitration. Therefore, I am not persuaded that the application for dismissal of this matter under Order 17 Rule 2 is justified.

12. This would defeat the purpose of the subsisting Orders of 4th October 2018 intended to preserve the subject matter of the arbitration. This would also prejudice the Respondent.

13. I shall now consider the Respondent's suggestion for consolidation of this matter with HC Misc Appl. No. E074 of 2018. It is established that the Court has the power to consolidate suits in appropriate cases. See the Supreme Court decision in Law Society of Kenya v. Center for Human Rights & Democracy & 12 Others [2014] eKLR.

14. The High Court set out the tests for consolidation of suits in Nyati Security Guards & Services Ltd v. Municipal Council of Mombasa (Civil Suit No. 992 of 1994) [2000] eKLR, as follows:

> " The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-
>
> 1. some common question of law or fact arises in both or all of them; or
>
> 2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
>
> 3. for some other reason it is desirable to make an order for consolidating them.
>
> The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.
>
> There are however situations where consolidation is undesirable like where in two action a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other. The other situation where consolidation is undesirable is where

the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer than take long and the purpose of saving time will be defeated."

15. In this matter, the 1st Applicant, Desnol Investments Limited and the Respondent, EON Energy Limited are the respective Applicant and Respondent in HC Misc Appl. No. E074 of 2018. The Respondent produced a copy of an application dated 21st September 2018 by the 1st Applicant it that matter together with the Court's Ruling dated 1st July 2019 in dismissing that application.

16. From my scrutiny of the application and the ruling, the two matters meet the tests for consolidation set out above. The consolidation will facilitate the just, efficient and expeditious disposal of the disputes as intended.

Final Determination

17. In the end, this Application dated 12th August 2021 lacks merit and is for dismissal. I therefore hereby dismiss it with costs.

DATED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2024.

PROF (DR) NIXON SIFUNA

JUDGE