



**Suleiman Enterprises Limited v Dubai Bank Kenya Limited (In Liquidation)
(Civil Suit 11 of 2019) [2024] KEHC 15513 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15513 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 11 OF 2019
SM GITHINJI, J
DECEMBER 6, 2024**

BETWEEN

SULEIMAN ENTERPRISES LIMITED PLAINTIFF

AND

DUBAI BANK KENYA LIMITED (IN LIQUIDATION) DEFENDANT

RULING

1. For determination is the application dated 18th July, 2024 brought under Article 25 (c), 48, 50 (2) and 159 (2) (d) of the Constitution, Order 8 Rule 5, Order 9 Rule 9 and Order 12 Rule 7 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following orders;
 1. Spent.
 2. That the Honourable Court be pleased to review and/or set aside the order made on the 10th day of July, 2023 dismissing the Plaintiff's suit.
 3. That the Honourable Court be pleased to reinstate the Plaintiff's suit commenced by way of Plaint dated 3rd October 2018 and be fully heard on merits between the parties herein.
 4. That the Honourable court be pleased to reinstate the order of injunction as issued by Hon. Justice P.J. O. Otieno on the 5th October, 2018 to its fullest extent.
 5. That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order of injunction to restrain the Defendant and/or its agents and proxies from appointing receivers over the plaintiff's property or interfering with the Plaintiff salt works business and undertaking, and the defendant from advertising, selling, disposing, transferring, trespassing into or in any other manner interfering with the said property, entering into selling or in any other manner whatsoever interfering with the plaintiff's management, undertaking, salt business and property.



6. That costs of this Application be provided for.
2. The application is supported by the grounds on the face of the application and the supporting affidavit sworn by Mohamed Ali, the Director of the Plaintiff Company on even date.
3. He deponed that the Plaintiff filed a suit vide the plaint dated 3rd October, 2018 seeking orders against the defendant for an injunction restraining the defendant from appointing receivers over the plaintiff's property and for a declaration that the purported transfer of charge by East African Development Bank to the defendant is null and void. That the attempted appointment of receivers was pursuant to an alleged charge issued by Kemusalt Packers Production Limited and which charge was guaranteed by the Plaintiff herein.
4. He also deponed that on 5th October, 2018, Hon. P.J.O Otieno issued an interim injunction barring the defendants from interfering with the plaintiff's management of undertaking salt business and the property. According to him, the Plaintiff took steps to have the main suit set down for hearing but it was informed that the suit had been dismissed on 10th July, 2023 for want of prosecution.
5. He contended that their advocate Messers Wagara Koyyoko had filed an application to cease acting which had not been served on the plaintiff. That the application was prosecuted without the plaintiff's knowledge and after the determination of the said application, the said firm of advocates kept updating the Plaintiff about the case. In fact, on the eve of the hearing on the 7th day of July, 2023, Messers Wagara Koyyoko wrote to the defendant's advocates intimating that they would request for an adjournment on the 10th day of July, 2023 when the suit was to come up or hearing.
6. In Response to that application the Defendant filed a Replying Affidavit sworn by John Ombasa, a Resolution Officer of the Kenya Deposit and Insurance Corporation. He stated that the present suit was initially filed in Mombasa as HCCC No. 79 of 2018 vide a plaint dated 3rd October, 2018 and later transfer to Malindi and allocated Malindi HCCC No. 11 of 2019.
7. He also stated that it is not true that the Plaintiff took progressive steps to have the main suit set down for hearing and determination. That the Plaintiff has to this date failed and/or neglected to file its witness statements in support of its claim and the record reflects that the Plaintiff was granted several chances to comply with pre-trial directions; on 8th March 2022 and 19th April, 2022.
8. That the Plaintiff's neglect and/or failure to file witness statements in support of its claim casts doubt on its assertion that it made progressive steps to have the matter heard. He also stated that contrary to the applicant's assertion that the notice to cease acting was prosecuted without the plaintiff's knowledge, Mr. Hassan Zubeidi, a director of the plaintiff company was present in court on 16th May, 2023 when Mr. Wagara Koyyoko informed the court of his intention to cease acting. He further stated that following the dismissal of the matter, the suit properties were sold via a public auction on 22nd September, 2023.

Analysis and Determination

9. I have considered the application by the Plaintiff dated 18th July, 2023, I have read through the pleadings, the written submissions, the cited authorities and considered the relevant provisions of the law in this matter. In order to arrive at an informed, just and fair decision the issue that sprouts for determination is: -

“Whether court ought to set aside the order that dismissed the suit for want of prosecution.”



10. The constitutional underpinnings on conclusion of matters in a timely manner is contained in Article 159 of the Constitution, which provides as follows:

“Judicial authority

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this Constitution shall be protected and promoted.

11. The factors taken into account on consideration for the purpose of reinstatement of suits are numerous, and were addressed in Ivita v. Kyumbu [1984] KLR 441 (Chesoni J), where the court stated:

“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.”

12. In James Mwangi Gathara & another v. Officer Commanding Station Loitoktok & 2 others [2018] eKLR (Nyakundi J), the Court said:

“Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the adjudication processes. In my assessment and based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point.”



13. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner and one of the issues that usually confront the courts in respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. I have considered the reasons for reinstatement of the suit advanced by the applicant. The applicant asserts that their advocate Messers Wagara Koyyoko had filed an application to cease acting which had not been served on the plaintiff. That the application was prosecuted without the plaintiff's knowledge and after the determination of the said application, the said firm of advocates kept updating the Plaintiff about the case. In fact, on the eve of the hearing on the 7th day of July, 2023, Messers Wagara Koyyoko wrote to the defendant's advocates intimating that they would request for an adjournment on the 10th day of July, 2023 when the suit was to come up or hearing.
14. The applicant has also sought for an order to reinstate the order of injunction as issued by Hon. Justice P.J. O. Otieno on the 5th October, 2018 to its fullest extent. I have considered the response by the defendant in form of an affidavit, the defendant has stated the suit properties which was the subject of the instant suit have been legally disposed of and are now in possession of third parties, an issue which the applicant has not denied. I have also noted that the Plaintiff/applicant has also avoided addressing the said issue of which they have sought in their own application.
15. In light of the foregoing, I am inclined to allow Prayer No. 2 to reinstate the suit for hearing on merit on condition that the Plaintiff moves the court for pre-trial hearing in the next 14 days, failure to which the suit stands dismissed. Prayers No. 3,4 and 5 are disallowed.

Cost be in the cause.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 6TH DAY OF DECEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the presence of; -

Mr Munya Ezekiel for the Plaintiff/Applicant

Mr Chepkwony for the Defendant/Respondent

Pre-trial on 13th February, 2025.

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S.M. GITHINJI

JUDGE

6/12/2024

