



**National Hospital Insurance Fund Board v Deposit Protection Fund Board (Liquidators of Euro Bank Limited in Liquidation) & 4 others (Commercial Civil Case 505 of 2003) [2021] KEHC 346 (KLR) (Commercial and Tax) (3 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 346 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE 505 OF 2003  
DAS MAJANJA, J  
DECEMBER 3, 2021**

**BETWEEN**

**NATIONAL HOSPITAL INSURANCE FUND BOARD ..... PLAINTIFF**

**AND**

**DEPOSIT PROTECTION FUND BOARD (LIQUIDATORS OF EURO BANK LIMITED IN LIQUIDATION) ..... 1<sup>ST</sup> DEFENDANT**

**EURO BANK LIMITED (IN LIQUIDATION) ..... 2<sup>ND</sup> DEFENDANT**

**SOLOMON BUNDI MUTHAMIA ..... 3<sup>RD</sup> DEFENDANT**

**JOHN PAUL WACHIRA MUNGE ..... 4<sup>TH</sup> DEFENDANT**

**FIRDOSH EBRAHIM JAMAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before the court for determination is the 5<sup>th</sup> Defendant's Notice of Motion dated 22<sup>nd</sup> June 2020 made, inter alia, under Order 17 Rule 2(3) and (5) of the *Civil Procedure Rules* ("the Rules") seeking to dismiss the Plaintiff's suit for want of prosecution. The application is supported by the affidavit of the 5<sup>th</sup> Defendant sworn on 22<sup>nd</sup> June 2020. It is opposed by the Plaintiff through the Grounds of Opposition dated 17<sup>th</sup> March 2021.
2. As the age suggests, this matter has had a chequered history. The Plaintiff filed this suit on 19<sup>th</sup> August 2003 against the Defendants where it claimed fraud and mismanagement of funds it had deposited with the 2<sup>nd</sup> Defendant ("the Bank"). It sought KES. 549,004,811.12 together with exemplary and/or punitive damages against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants who were at the material time the Bank's directors.



3. During the life of the suit, the various interlocutory applications were filed by the parties. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants application dated 27<sup>th</sup> November 2003 seeking to strike out the suit against them was allowed by the ruling dated 28<sup>th</sup> June 2013, leaving the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants to defend the suit.

#### The Application

4. The 5<sup>th</sup> Defendant contends that the Plaintiff has without any reasonable or just cause failed, refused or neglected to take any steps to prosecute this suit since 26<sup>th</sup> September 2014 and that this failure to prosecute the suit and the continued delay in fixing the matter for hearing is inordinate, inexcusable and prolonged and has continued to cause great injustice to him. He states that the last time this matter was in court was on 28<sup>th</sup> July 2014 when the matter came up for a ruling in respect of costs which had been awarded to the 6<sup>th</sup> Defendant in the original suit, Harry Mutuma Kathurima.
5. The 5<sup>th</sup> Defendant believes that the Plaintiff has been indolent and is not interested in pursuing the suit and it is unfair and unjust for him to be subjected to the anxiety of defending a suit that is not being prosecuted. He further depones that the main suit has been marred by endless, inexcusable and prolonged delays as is apparent from the court record and as a result it has never been set down for hearing. He laments that he has been seriously prejudiced by the delay and has incurred legal fees which has continued to damage to his professional reputation resulting in a serious loss of business.
6. The 5<sup>th</sup> Defendant submits that the ends of justice require that litigation must come to an end and that it is unfair, unjust and not in the interest of justice to keep this case in abeyance contrary to law principles of justice and Article 159(2)(b) and (e) of the *Constitution*. He further submits that the overriding objectives dictates that litigation must be disposed in just, expeditious and proportionate manner and it is in the interest of justice that this suit be dismissed.

#### The Plaintiff's Reply

7. The Plaintiff opposes the application. It submits that the 5<sup>th</sup> Defendant has overlooked, ignored and disregarded, the several applications filed in this suit that has led to the removal of the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants. As a result, the Defendants filed applications for costs that have had to be determined following comprehensive responses, thus the principle of inaction does not apply.
8. The 5<sup>th</sup> Defendant urges the court to consider that its advocate came on record in 2018 when during this time, the Plaintiff's senior staff were arrested and charged in Anti-Corruption Case 48 of 2018. Further that the Directorate of Criminal Investigation seized all documents from the Plaintiff's premises for the purpose of investigation, all essential material relevant to this suit were indeed unavailable to the Plaintiff's counsel to enable counsel comply with Order 11 of the Rules. It adds that during the period, the Plaintiff did not have a Chief Executive Officer who would give adequate instruction and provide the necessary documentation to facilitate prosecution of suit.
9. The Plaintiff now states that it ready and willing to proceed with the trial and that the that the 5<sup>th</sup> Defendant's has not demonstrated to the court how his application will further the cause of justice and submits that it should be dismissed.

#### Analysis and Determination

10. The central issue for determination is whether the Plaintiff's suit ought to be dismissed for want of prosecution. 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 want of prosecution as set out in *Ivita v Kyumba [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. I have gone through the court record and it is true that there was a plethora of applications and counter-applications by parties, which raised preliminary issues in nature and required comprehensive responses that evidently took up much of the court's time as the court had to set them down for hearing before resolving them. This included taxation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' bill of costs which the Plaintiff defended and was determined on 16<sup>th</sup> November 2017.
12. It is evident from the record that since the aforementioned ruling, there was little or no movement on the file save for the Plaintiff changing advocates on 21<sup>st</sup> September 2018. The Plaintiff has explained that it was in a management crisis at this time as its senior officers were arrested, essential documents material to the suit were carted away by investigative agencies and that there was no authorization entity in place to issue the requisite instructions to prosecute the suit.
13. I find that even though there has been a delay in prosecuting the case since 21<sup>st</sup> September 2018, the Plaintiff's for the delay is reasonable. I think the Plaintiff should be given an opportunity to prosecute its suit. Since most of the preliminary matters have been resolved and all that is pending determination is the 5<sup>th</sup> Defendant's own application for discovery dated 5<sup>th</sup> May 2006, I do not find prejudice will be occasioned on the 5<sup>th</sup> Defendant or the Plaintiff if the suit is allowed to proceed.

#### Disposition

14. I therefore dismiss the 5<sup>th</sup> Defendant's application dated 22<sup>nd</sup> June 2020 but make the following orders:
  - (a) The Plaintiff shall serve upon the Defendants on oath all the documents in its power and possession in relation to this suit within the next forty-five (45) days from the date hereof.\*\*
  - (b) The Plaintiff shall pay the costs of the application which I assess at KES. 50,000.00 to paid to the 5<sup>th</sup> Defendant within 30 days.
  - (c) In default of any of the orders, the suit shall stand dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Omondi instructed by Migos Ogamba and Company Advocates for the Plaintiff.



Mr Bowry instructed by Bowry and Company Advocates for the 5<sup>th</sup> Defendant.

