



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 295 OF 2008

MOHAWK LIMITED.....PLAINTIFF/APPLICANT

VERSUS

LEO INVESTMENT LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Through the application dated 6th November 2018, the applicant seeks orders to set aside, vary and/or vacate the court's orders of 24th September 2018 dismissing the plaintiffs suit for want of prosecution.
2. The application is supported by the affidavit of the applicant's advocate, Mr. Philip Kisaka, and is premised on the grounds that the plaintiffs numerous attempts to set down the suit for hearing have borne no fruits and that the applicant is still interested in the expeditious determination of the suit.
3. The applicants counsel avers that the suit was on or about 11th June referred to arbitration, by the consent of the parties and that the arbitral award in the sum of Kshs 21,747,764 was in 11th August 2011 made in favour of the plaintiff before the respondent filed an application on 4th October 2011 to set aside the said Arbitral Award.
4. He avers that the respondent did not take any steps to prosecute its application to set aside the arbitral award for over one year thereby prompting the applicant to file an application to dismiss it for want of prosecution which application the respondent successfully opposed.
5. Counsel states that the respondent subsequently failed to set its application to set aside the arbitral award for hearing and instead insisted that its application be heard together with a constitutional petition it had filed against the arbitrator being Petition No. 355 of 2013. It is the applicant's case that its attempts to fix the constitutional petition for hearing have not been successful as it is not a party to the petition and the two cases are distinct and filed before two separate court divisions. The applicant blames the respondent for frustrating its efforts to list down the matter for hearing.
6. At the hearing of the application, **Mr. Kisaka**, learned counsel for the applicant reiterated the contents of his affidavit in support of the petition and submitted that the applicant had established plausible seasons for seeking the orders to set aside the orders made on 24th September 2018. Counsel added that the plaintiff was not served with the notice to show cause or notice of dismissal of its suit.

Respondent's case.

7. The respondent opposed the application through the replying affidavit of its advocate **Miss Jackline Kendi** sworn on 13th June 2019 wherein she avers that the plaintiff has been indolent in prosecuting its case for a long period of time thereby precipitating the dismissal of the suit on 24th September 2018. She further states that the impugned orders of 24th September 2018 were rightfully made and should not be set aside.
8. At the hearing of the application, **Miss Kendi**, learned counsel for the respondent, submitted that the impugned orders were made after the applicant failed to attend court despite proper service with the notice to show cause.
9. Counsel further submitted that the applicant delayed in filing the instant application upon discovering that the suit had been dismissed thereby confirming the respondent's position that the applicant is not interested in prosecuting its case. Counsel argued that litigation must come to an end as was held in **Gideon Sitelu Konchella V Daima Bank Ltd** [2013] eKLR. It was further submitted that the respondent will

be greatly prejudiced by an order reinstating the case.

Analysis and determination.

10. I have carefully considered the application dated 6th November 2018, the respondent's response and the parties' submissions together with the authorities that they cited.

11. The main issue for determination is whether the applicant has made out a case for the granting of the orders to set aside the court's orders of 24th September 2018, dismissing the applicant's suit for want of prosecution. It is trite law that it is the primary duty of the plaintiff to list down his suit for hearing. (See *Utalii Transport Company Ltd & 3 Others –Vs- NIC Bank & Another* [2014] eKLR.

12. In the present case, I have perused the court file and I note that the last time the matter came before the court, before it was dismissed for want of prosecution, was 10th March 2014 when Havelock J. noted that Petition No. 355 of 2013 has a bearing in this case and directed that service of pleadings in the petition be effected on the applicant within 14 days and thereafter a hearing date be taken in the registry for hearing of the petition and the application.

13. A further perusal of the court file does not show if respondent complied with the directions of Justice Havelock or if any attempts were made to fix this matter and that the petition for hearing as the matter was subsequently dismissed for want of prosecution on 24th September 2018 as I have stated in this ruling.

14. I note there is an unexplained period of more than 4 years when neither the plaintiff herein nor the defendant fixed this matter and the petition for hearing. My take is that in the circumstances of this case, the delay in fixing the case for hearing cannot be attributed to lack of diligence on the part of the applicant alone as the defendant has similarly not explained if it complied with the court's directions of the 10th March 2014.

15. The applicant has however explained that it experienced challenges in fixing this case for hearing because of the courts directions that it be heard together with the petition that was pending before a separate division. This averment was not disputed by the respondent. I also note that the Notice of Dismissal dated 30th August 2018 was not served upon on the applicant prior to the dismissal of the suit.

16. Having regard to the fact that the applicant already has an arbitral award in its favour which award was pending the adoption by this court before the respondent filed the petition and application to set aside the arbitral award, I am of the view that it will only be fair and just to allow the instant application so as to grant the applicant the opportunity to conclude the legal process that it had initiated before this court and to actualize the Arbitral Award.

17. Consequently, I allow the application dated 6th November 2018 in the following terms:

a. That the orders of this court made on 24th September 2018 dismissing the plaintiff's suit for want of prosecution are hereby set aside.

b. That the respondent lists its application filed on 4th October 2011 for hearing within 30 days from the date of this ruling failure of which the said application shall be deemed as dismissed for want of prosecution.

c. The costs of this application shall abide the outcome of the application dated on 4th October 2011.

Dated, signed and delivered in open court at Nairobi this 6th day of February 2020.

W. A. OKWANY

JUDGE

In the absence of:

The parties and their counsels

Court Assistant – Sylvia