

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL COMMERCIAL SUIT NO. E003 OF 2024

MEDIHEAL HOSPITAL & FERTILITY CENTRE LTD.....

PLAINTIFF VERSUS

NCBA BANK.....1ST
DEFENDANT

PHILIPS INTERNATIONAL AUCTIONEERS.....2ND
DEFENDANT

Coram: Before Justice R. Nyakundi

M/s Aloo Romanus & Co. Advocates

M/s Mburu Maina & Co. Advocates

RULING

1. The Applicant filed and Application under certificate of urgency dated 6.5.2024 seeking the following orders;
 - a. Spent
 - b. That a temporary injunction do issue to restrain and prevent the Respondents by themselves and/or their agents servants, employees, assigns or otherwise howsoever from interfering with the Applicant's quiet possession of the attached hospital machines and/or any other property belonging to the applicants and/or equipment in possession of the Applicant herein or in any manner exercising or continuing to auction the said properties or any thereof pending the hearing and final determination of this application interparties
 - c. That a temporary injunction do issue to restrain and prevent the Respondents by themselves and/or their agents, servants, employee, assigns or otherwise howsoever from interfering with the Applicant's quiet possession of the attached hospital machine. and/or equipment in possession of the Applicant and/or any of the Applicant's property herein or in any manner exercising or

continuing to auction the said properties or any thereof pending the hearing and final determination of the main suit.

d. That the Costs be provided for.

2. The Application is made on the following grounds;

a. That the applicant is a renowned medical facility with its services rendered to the members of public in major parts of the Republic of Kenya.

b. That the applicant do acknowledge that it entered into a loan agreement with the 1st respondent and they have been servicing the same without fail.

c. That the Respondents have commenced the process of proclamation of attachment of movable property as against the applicant herein and to that effect, the 2nd respondent has proclaimed vital hospital machines and/or equipment as per the instructions of the 1st Respondent.

d. That the proclamation on the basis of the said repossession is due to expire on or before 6th may, 2024 by when this application and the entire suit shall be rendered nugatory.

e. That the properties attached by the respondents do not belong to the applicant since they were leased from a third party, i.e. Jamii Bora Leasing Limited.

f. That it is therefore only fair that the execution is halted until the legality of the same is determined. Secondly, the Respondents are acting per incarium the law because it is only from a court order that they can attach an alleged civil debt hence the urgency of the stay order.

g. That the intended proclamation and/or auctioning of the said properties is therefore illegal and ought to be declared null and void ab initio;

h. That the proclaimed machines and/or equipment are crucial to the running of the Hospital and some are necessary for the provision of vital services to innocent.

- i. That the Applicant stands to suffer substantial loss and irreparable damage if the interim orders sought are not granted.
 - j. That it is in the interest of justice that the orders sought be granted;
 - k. That the respondents will not suffer any prejudice if the orders sought are issued; and
 - l. That unless this application is heard urgently and orders sought thereof granted, the applicant is doomed to suffer irreparable loss and damage and the entire application herein rendered nugatory.
3. In response to this Application an objection was raised in the form of a Notice of Motion dated 24th May 2024 which provides as follows;
 - a. Spent
 - b. That this Honorable Court be pleased to stay further proceedings in this suit pending the hearing and determination of this application interparties
 - c. That the intended Interested Party/applicant herein be joined into the proceedings herein as the 3rd defendant for purposes of this application and the entire suit.
 - d. That the Plaintiff/Respondent be directed to amend the Plaint to incorporate the Interested Party as the 3rd defendant in the suit.
 - e. That this Honorable court be pleased to set aside the Interim orders issued on 8th May, 2024 and the Intended interested party/applicant be granted adequate time to file and serve its replying affidavit to the Plaintiff's application dated 6th May, 2024 and defence to the main suit.
 - f. That the Honorable Court be pleased to make any other order as it may deem necessary to achieve the ends of justice.
4. The Application is made on the following grounds;
 - i. That the Intended Interested Party is the absolute proprietor of the Equipment held by the Plaintiff under a Master Lease Agreement in its premises and which equipment is the subject of this suit and as such.

- ii. That the Intended Interested Party/Applicant has an identifiable stake in the outcome of the proceedings herein by virtue of its proprietorship of the equipment and its contractual right to repossess the same upon termination of the Master Lease Agreement.
- iii. That the master lease Agreement has since been terminated by the Intended Interested Party for breach by the Plaintiff of its Monthly
rent payment obligations and as such, the Interested Party's right to repossess the equipment has legally and contractually crystalized.
- iv. That the Plaintiff has without any lawful or reasonable justification refused to return the lease equipment to the Intended Interested Party thus necessitating the use of the 2nd Defendant's services.
- v. That the Plaintiff is fully aware of the extent of its arrears and the termination of the Master Lease Agreement but has deliberately failed to settle the arrears thus exposing the Intended Interested Party to irreparable loss and damage.
- vi. That undertook with the the Plaintiff is fully aware of the contractual engagements it Intended Interested Party but has for ulterior motives deliberately failed to disclose this material fact to the Court.
- vii. That there is therefore need for the Intended Interested Party/Applicant to be enjoined to the proceedings to enable it defend itself in the suit to avert the issuance of orders that will be prejudicial to the Intended Interested Party/Applicant's interests.
- viii. That the joinder of the Intended Interested Party/Applicant in the suit is necessary to enable the Court effectually and completely adjudicate upon and settle all questions relating to the subject matter.
- ix. That the interests of the Intended Interested Party/Applicant will not be well articulated unless it appears in these proceedings and champions it cause.

- x. That any decision made by the Court will adversely affect the Intended Interested Party's Rights and the interest that it holds in respect to the Equipment subject to this suit in view of what has been stated in the preceding Paragraphs.
 - xi. That this court has the jurisdiction to order the joinder of parties at any stage of the proceedings.
 - xii. That the Intended Interested Party's claim is legally meritorious to enable its inclusion in the suit.
 - xiii. That new and important facts and evidence exists to warrant the court to review, stay and or set aside the orders that have been issued so far
5. The Application is supported by an Affidavit sworn by David Khisa who deponed as follows;
- i. *That I am a male adult of sound mind and the Intended Interested Party's Asset Manager, conversant with the facts pertaining to this matter, duly authorized and competent to make and swear this affidavit.*
 - ii. *That the Intended Interested Party is a duly incorporated subsidiary of NCBA Group PLC with the capacity to sue and be sued in its own name. Annexed and marked DK-1 (a) & (b) are copies of the Certificate of Incorporation of a Limited Liability Partnership, Certificate of Change of Name.*
 - iii. *That the Intended Interested Party is the sole and absolute proprietor of the Equipment subject to these proceedings which Equipment was supplied to the Plaintiff pursuant to a Master Lease Agreement entered into by the Parties on 9th August 2018. Annexed and marked DK-2 (a), (b) & (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q) & (r) are copies of the Plaintiff's Board Resolution, Facility Application Request and the Letter of offer, Master Lease Agreement, Lease Schedules and Letters of Extension of the Master Lease Agreement.*
 - iv. *THAT I am also aware that pursuant to the aforesaid*

Master Lease agreement, the Intended Interested Party through its Suppliers Medivision Equipment Limited, Sciencescope Limited, and Meditec Systems Limited delivered the agreed Equipment now subject to this suit to the Plaintiff who acknowledged receipt of the same in good order and condition 5. 6. 7. 8. 9. 10. as the Lessee. Annexed and Marked DK-3 (a), (b), (c), (d), (e), (f), (g), (h) & (i) are copies of the Delivery notes duly received by the Plaintiff.

- v. THAT at the time of leasing the equipment to the Plaintiff, the Intended Interested Party obtained Letters of Exclusion of the equipment from the Plaintiff's financiers who held a Debentures over the Plaintiff's Assets and the party known as Jamii Bora Leasing who is alleged to be the proprietor of the Equipment subject to this suit did not exist as one of the Plaintiff's debtors. (Annexed and marked DK-4 (a), (b) & (c) are copies of the Letters of exemption.)*
- vi. THAT I am aware that the Intended Interested Party fully settled the invoice demands made by its suppliers and it therefore remains the absolute proprietor of the Equipment subject to this suit to the exclusion of the Plaintiff, Jamii Bora Leasing Limited or any other creditor to the Plaintiff. Annexed and marked DK-5 (1), (b), (c), (d) are copies of the Invoices and ETR Payment receipts.)*
- vii. THAT I am also aware that that upon commencement of the Master Lease Agreement, the Plaintiff issued the 1st Defendant with clear instructions and undertakings to directly debit specific amounts from its accounts in settlement of the agreement monthly lease amounts in favor of the Intended Interested Party. Annexed and marked DK-6 (a), (b) & (c), (d), (e), (f), (g), (11), (1), (j), (k), (1) are copies of the Letters of undertaking.*
- viii. THAT in breach of the undertakings issued to the 1st Defendant and the Intended Interested Party, the Plaintiff blatantly breached its payment obligations and is currently in arrears of Kes.*

29,335,224/= which amount cannot be directly debited from the Plaintiff's accounts as previously instructed for lack of sufficient funds. (Annexed and marked DK-7 is a copy of the arrears schedule/statement.

- ix. THAT I am aware that as a result of the Plaintiff's breach of the Master Lease Agreement, Demand Notices detailing the nature and extent of its arrears were issued but unfortunately, the Plaintiff is yet to settle the arrears that continue to accrue interest. Annexed and Marked DK8 (a) and (b) are copies of the Demand Notices.*
- x. THAT the Plaintiff's suit is therefore misleading and brought with unclean hands as the Plaintiff has deliberately failed to include the Intended Interested Party in the suit and further, the allegations that the Equipment belongs to Jamii Bora Leasing Limited and that the Plaintiff has been diligently paying the lease consideration are not true.*
- xi. THAT it is the Intended Interested Party and not the 1st Defendant that instructed the 2nd Defendant to repossess the said Equipment and to deliver the same to its storage facility after the Plaintiff's failure to return the Equipment as provided for under the Master Lease Agreement.*
- xii. THAT the intended repossession is legal and necessary as the Plaintiff/Applicant is and continues to be in arrears which arrears continue to attract interest at contracted rates and that the Intended Interested Party is only interested in repossessing its Equipment clearly identifiable from its tags and through other identification particulars contained in the schedule handed to the 2nd Defendant to assist it identify the items to be repossessed. Annexed hereto and marked DK-9 (a), (b) & (c), (d), (e), (f), (g), (h) & (i) are copies of the Repossession Notices, proclamation notices and Equipment Schedule and Termination Notice.*

xiii. THAT despite receipt of the Termination and Repossession Notices, the Plaintiff declined to deliver the Equipment or allow their collection from its premises and as such, the 2nd Defendant has been forced to obtain a Court order for provision of security during the exercise. See the order annexed and Marked JN-10.

xiv. That as a result of the aforesaid Intended Interested Party's proprietorship of the Equipment subject to this suit and the breach of the Master Lease Agreement by the Plaintiff, it is prudent and in the interest of justice that the Intended Interested Party be enjoined to the suit herein to enable it prosecute its interests against the claim by the Plaintiff.

xv. That I am aware that the Plaintiff is indebted to other creditors who are also seeking to attach its assets and there is a real risk that the Intended Interested Party's Equipment may be attached by the said creditors to the prejudice of the Applicant. See the Public Auction

Notices annexed hereto and marked DK-11 (a) & (b)

xvi. THAT the Intended interested party has been highly prejudiced and inconvenienced by the orders issued by this Honourable Court on 8th

May 2024 as it has been unable to assume possession of its property. xvii. THAT it is therefore prudent and in the interest of justice that the Intended Interested Party be enjoined to the suit herein to enable it prosecute its interests against the claims by the Plaintiff as it has a Defence that raises triable issues warranting determination by this

Honourable Court. (See the Draft Defence annexed and marked DK-

11) xviii. THAT the Plaintiff is aware of the intended interested party's claim in the suit property but has in bad faith deliberately omitted, failed to move the Court to have the Intended Interested Party joined in the proceedings in a bid to hoodwink the Court into granting the orders of injunction sought.

xix. *THAT this application has been brought without undue delay.*

xx. *THAT it is necessary to include the intended interested party as a 3rd Defendant in the suit as it is evident that it has a legal interest in the subject matter and that the Plaintiff did not approach this Honourable Court with clean hands.* xxi. *THAT this application is made in good faith and it is fair and just that it should be allowed.*

xxii. *THAT I do make this oath conscientiously believing the deposed particulars to be true to the best of my knowledge, information and belief*

6. This is the background information in the form of applications and affidavit evidence which have been placed before this court without appropriate steps being taken to have the matter concluded. The operative provisions to be invoked by the court include but not limited Section 1A, 1B, 3 and 3A of the Civil Procedure Act as construed with Order 17 Rule 1 & 2 of the Civil Procedure Rules.
7. What is at stake in terms of the law is for this court to focus on the Plaintiff's inaction, advocate delays and the balancing act between clients rights and the Plaintiff's duty to prosecute his or her claim within a reasonable time. A party to a suit must provide a convincing reason for significant delays waiting for a year or more without action is often insufficient. What are the key principles to guide the court in exercising jurisdiction to dismiss a suit for want of prosecution. The court in the in the case **Agip (Kenya) Limited vs. Highlands Tyres Ltd [2001] KLR page 630** held that a court should be guided by the following principles in considering an application for dismissal of a suit for want of prosecution.
 - a. *the delay is inordinate.*
 - b. *the inordinate delay is inexcusable; or*
 - c. *the defendant is likely to be prejudiced by the delay.*

8. Further in the case of **Wilson Kiarie Njoroge v Family Bank Ltd & Another 2015] eKLR** which has been cited by the petitioners, the court stated as follows;

“...while I note that a plaintiff has a primary duty to take steps to progress its case, the law prohibits impulsive inclination and requires that before making such an order as the one sought herein i.e dismissal of a suit, the court must first satisfy itself that there was inordinate delay in prosecuting the matter, that the said delay was deliberate and inexcusable and is an abuse of the court process, that the said delay shall occasion prejudice to the other party....”

9. In this very same circumstance facing this court in another forum presided over Mativo -J (as he then was) he pronounced himself as follows in **Dock Workers Union of Kenya vs Kenya Ports Authority; Portside Freight Terminals Limited & Another (Interested Parties) (Constitutional Petition E006 of 2020) [2022] KEHC 12951 KLR** that;

“... In light of these principles, it is my view that the rules permit a court to dismiss, in appropriate circumstances, an action for want of prosecution. It will constitute a justifiable limitation of a plaintiff’s constitutional right of access to the courts. An intention not to prosecute a suit may reasonably be inferred particularly where there is an inordinate or unreasonable delay in prosecuting the case or application. In order to have the advantage of the courts exercise of discretion, the plaintiff must show that he was prevented by sufficient cause from prosecuting the case. Sufficient cause means something beyond the control of the party. The words “sufficient cause” should be liberally construed. The applicant must satisfy the court that he was not negligent and inactive. It must be considered that when there is a delay in prosecuting a case or the time filing the application or an appeal lapses a valuable right accrues to the successful litigant....”

10. In the instant case the Plaintiff filed its suit on 6th May 2024 seeking the following prayers;

- a. *A declaration that the proclamations of attachment dated 26th March, 2024 are null and void ab initio;*
 - b. *An permanent injunction restraining the defendants from demanding from the plaintiff in any way as regards to the debt herein;*
 - c. *In the alternative to the above, the 1st defendant be enjoined from proclaiming and attaching any of the plaintiff's property;*
 - d. *Costs and incidental to this suit;*
 - e. *Any other relief that the Honourable Court may deem fit and just to grant.*
11. It is very clear from the record that no prosecution of this claim has ever taken place since 6th May 2024. Save for interlocutory applications and some of them have not been prosecuted to their final conclusion. The law in Kenya is very clear under **Order 17 of the Civil Procedure Rules** which states as follows;
- 1. Hearing from day to day [Order 17, rule 1.]**
- (1) *Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.*
- (2) *When the court grants an adjournment, it shall give a date for further hearing or directions.*
- 2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]**
- (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 stands 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.

12. The test applied by courts in an application for dismissal or a suit for want of prosecution is whether, justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can be still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earlier time. It is a matter in the discretion of the court. See Sir Allan Alfred McAlpine and Sons Ltd **(1968) 1 all ER 543. Inter v Kyumba (1984) KLR 441**

13. In the instant case, there is no evidence that the parties have been engaged in any process of attempting to settle the dispute out of court or have it prosecuted to its logical conclusions. The Court finds as a fact that the delay is prolonged and it is in excusable. It is clear that the Respondent/Defendants have been affected by the action of the Plaintiff and therefore the Plaintiff's suit is dismissed for want of prosecution with costs to the Defendants/Respondents. It is so ordered.

GIVEN UNDER MY HAND AND THE SEAL OF THIS COURT THIS 20TH DAY OF JANUARY, 2026.

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R. NYAKUNDI

JUDGE