



Wafaa Industries Limited v NIC Bank Limited & another (Environment & Land Case 109 of 2019) [2024] KEELC 6277 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 109 OF 2019
A NYUKURI, J
SEPTEMBER 25, 2024**

BETWEEN

WAFAA INDUSTRIES LIMITED PLAINTIFF

AND

NIC BANK LIMITED 1ST DEFENDANT

APEX STEEL LIMITED 2ND DEFENDANT

RULING

Introduction

1. Before court is a Notice of motion dated 13th July 2023 filed by the plaintiff seeking the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to set aside the order for dismissal of 30th May 2023 dismissing the instant suit for want of prosecution.
 - c. That this Honourable Court be pleased to reinstate the suit and fix it for hearing in the earliest available time to be heard on merit; and
 - d. That costs of the application be provided for.
2. The application is premised on the affidavit of Michelle Ouma advocate for the plaintiff. The applicant's case is that when the suit came up for hearing on 30th May 2023, Ms Ouma had instructed another counsel to hold her brief as she could not proceed because her prime witnesses was unreachable and unavailable for hearing. She maintained that that was the only time the plaintiff sought for adjournment as it was the defendants who sought for adjournments on 17th November 2022 and that on 9th March 2023, counsel for the 1st defendant was unwell. She stated that the reason for



the application for adjournment on 30th May 2023 was that the plaintiff's prime witness is based in Turkey and due to unfortunate earthquake occurrence that happened in 2022, the said witness was affected and has been unable to travel back to Kenya leading to breakdown of communication with the advocate. She attached letters from the plaintiff's advocate dated 19th July 2022; letter by counsel for 1st defendant dated 16th November 2022 and the notice of the court dated 14th November 2022.

3. The application is opposed. Stephen Atenya, a Senior Legal Counsel for the 1st defendant swore a replying affidavit dated 1st December 2023 opposing the application. It was his averment that the court properly exercised its discretion in dismissing the suit for want of prosecution for the failure of the plaintiff to avail its witness on the hearing date. Further that litigation ought to be conducted expeditiously without unreasonable delay.
4. The application was disposed by way of written submissions filed by the plaintiff on 22nd November 2023 and submissions filed by the 1st defendant on 2nd February 2024.

Plaintiff's submissions

5. Counsel for the plaintiff submitted that Article 159 (d) of *the Constitution* of Kenya provides that justice should be administered without undue regard to procedural technicalities. Reliance was placed on Order 12 Rule 7 of the Civil Procedure Rules and counsel urged the court to exercise its discretion so that the plaintiff is not exposed to loss of its land.
6. The court was referred to the case of Josephat Oginda Sasia v. Wycliffe Wabwile Kiiya [2022] eKLR for the proposition that in an application for setting aside an order of dismissal of suit for want of prosecution, the court ought to interrogate facts of each case and the circumstances of the dismissal as well as reasons for failure to prosecute the case and for delay in filing the application to set aside the order.
7. It was submitted for the plaintiff that the delay in pursuing the case was unintentional. Counsel argued that the court should not position justice beyond the plaintiff. Reliance was placed on the case of Ivita v. Kyumbu [1984] KLR 441 for the proposition that even where the delay is prolonged, but the court is satisfied with the plaintiff's excuse for the delay, the suit should not be dismissed but ought to be set down for hearing at the earliest.
8. Counsel also contended that the defendants will not suffer serious prejudice if the claim is reinstated. Reliance was placed on the case of Jim Rodgers Gitonga Njeru v. Al-Husnain Motors Limited & 2 Others [2018] eKLR.

1st defendant's submissions

9. Counsel for the 1st defendant submitted that Article 159 (b) of *the Constitution* of Kenya requires that justice shall not be delayed. It was submitted for the 1st defendant that equity favours the vigilant and not the indolent and that the applicant was guilty of laches.
10. Counsel cited the provisions of Order 12 Rule 7 of the Civil Procedure Rules and the case of *Eric Oluoch Olele v. Kenneth O. Obae HCC No. 322 of 2009* and Fran Investment Limited v. G4S Security Services Ltd [2015] eKLR and argued that the Constitutional requirement for courts to strive to serve substantive justice should be balanced with another Constitutional requirement that justice should not be delayed.



Analysis and determination

11. The court has carefully considered the application, the reply thereto and parties rival submissions. The only issue that arise for determination is whether the plaintiff has provided a valid reason for failure to attend court on 30th May 2023.
12. Order 12 Rule 7 of the Civil Procedure Rules grants the court power to set aside orders for dismissal of suit for want of prosecution, in the following terms;

Where under this order judgment has been entered or suit has been dismissed, the court on application may set aside or vary the judgment or order upon such terms as may be just.
13. Therefore the power to set aside an order dismissing a suit for want of prosecution is discretionary, and the court ought to exercise its discretion judiciously and not whimsically or capriciously.
14. In the case of *Thathini Development Company Limited v. Mombasa Water & Sewerage Company & Another* [2022] eKLR, the court stated as follows;

The test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay.
15. The tenets of justice are embodied in Article 159 of *the Constitution* which provides that courts shall endeavour to administer substantive rather than technical justice and that justice shall not be delayed. In an application for setting aside orders dismissing a suit for want of prosecution, the court ought to interrogate the excuse for the delay and the circumstances that led to the dismissal of the suit for want of prosecution.
16. In this case, the plaintiff a limited liability company, filed this suit on 3rd October 2019. The record shows that the plaintiff's only witness is the only surviving director of the plaintiff one Nureein Sheikh as his father, the only other director of the plaintiff was deceased before the suit was filed. This suit had come up for hearing on 20th July 2022 and 9th March 2023 and that the same was on both dates adjourned for reasons that the plaintiff's counsel was bereaved, and indisposed. On 9th March 2023, the other reason for adjournment was that the 1st defendant's counsel was indisposed. Therefore the matter was fixed for a virtual hearing on 30th May 2023.
17. On 30th May 2023, there was no virtual or physical attendance by the plaintiff when the matter was called out in the morning and the court directed that the matter will proceed. Later, in the afterthought, counsel holding brief for the plaintiff's counsel attended court and sought for adjournment on the basis that their only witness was unreachable and could not be traced. Upon hearing both the plaintiff and the 1st defendant's counsel, the court declined to grant an adjournment and dismissed the suit for want of prosecution.
18. It is on 17th July 2023 that the plaintiff's counsel filed the instant application seeking orders to set aside the orders dismissing the suit for want of prosecution. She swore the supporting affidavit stating that the plaintiff's witness who is based in Turkey had been affected by an earthquake that allegedly occurred in Turkey in 2022 and that he had been affected and was unable to travel back to Kenya for the hearing of this case. Further that there was breakdown of communication between her and the witness.
19. Having considered the reasons for non-attendance of the plaintiff's witness which were given on 30th May 2023 that the witness was unreachable and could not be traced, counsel for the plaintiff who filed the application and swore the supporting affidavit has not stated whether the witness has been traced and or has been reached. That witness who is stated to be the sole director of the plaintiff, did not swear any affidavit to clarify and explain the circumstances around him being unreachable and not being



traced and therefore until now, it is not clear to the court if the plaintiff's sole director has allegedly been traced and if indeed he could not be traced in May 2023. Therefore even if the plaintiff is given a chance to prosecute its case, his sole director has not sworn an affidavit to confirm to this court that he will be available at the hearing.

20. Considering the reasons given by the plaintiff's counsel and the circumstances that led to the dismissal of this suit, this court finds that the reasons and circumstances for non-attendance of court on 30th May 2024 are inexcusable as the court has no assurance that if this matter is fixed for hearing at the earliest available time, the plaintiff's director would be traced to attend court.
21. In the premises, I find no merit in the plaintiff's application dated 13th July 2023 and the same is hereby dismissed with costs to the 1st defendant.
22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Mwaniki for plaintiff/applicant

Ms. Mburu for 1st defendant

No appearance for 2nd defendant

Court assistant – Abdisalam

