Alpine Coolers Limited v East African Portland Cement Company Limited (Civil Appeal E437 of 2023) [2025] KEHC 2251 (KLR) (Civ) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2251 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E437 OF 2023

TW OUYA, J

FEBRUARY 27, 2025

BETWEEN

ALPINE COOLERS LIMITED ..... APPELLANT

AND

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED . RESPONDENT

(Being an appeal against the ruling and order of Honourable J.P.A Aduke, SPM delivered on 16.05.2023 in Milimani CMCC No. 2148 of 2019)

RULING

1. This appeal is in respect of the ruling delivered on 16.05.2023 in Milimani CMCC No. 2148 of 2019 (the suit). The background facts leading up to the said ruling are that Alpine Coolers Limited (hereafter the Appellant) filed the suit in the lower court against East African Portland Cement Company Limited (hereafter the Respondent) by way of the plaint dated 28.03.2019 seeking the sum of Kshs. 5,146,570/- plus costs of the suit and interest thereon, being monies allegedly owed to the Appellant for the supply of water to the Respondent, at all material times.

2. Upon service of summons, the Respondent entered appearance and filed a statement of defence on 29.05.2019 denying the key averments in the amended plaint and liability.

3. Subsequently, the Respondent proceeded to file the Notice of Motion dated 27.06.2022 (the application) seeking an order striking out the Appellant's suit for want of prosecution. The application was opposed by the Appellant.

4. Upon hearing thereof, the trial court allowed the application, thus dismissing the suit for want of prosecution, vide the ruling delivered on 16.05.2023.

5. The aforementioned ruling triggered the instant appeal which was brought through the memorandum of appeal dated 29.05.2023 and founded on the grounds hereunder:

   I. The learned Magistrate failed to consider and take into account the extensive material placed before her touching on pertinent and substantial points of fact and law, so as to arrive at a just and fair decision.

   II. The learned Magistrate erred in law and in fact in failing to consider the written submissions of the Appellant in arriving at her ruling.

   III. The learned Magistrate erred in law and in fact by dismissing the suit while there were justifiable reasons for the delay presented by the Appellant.

   IV. The learned Magistrate erred in law and in fact by failing to evaluate correctly the evidence adduced by the Appellant and consequently arriving at a conclusion that has no legal or factual basis.

   V. The learned Magistrate erred in law and in fact in arriving at a decision that the Appellant is not desirous of prosecuting the suit to conclusion. (sic)

6. The Appellant consequently seeks the sole order that the appeal be allowed with costs and that the trial court's ruling be set aside and the suit be reinstated.

Written Submissions

7. Pursuant to the directions given by the court, the parties filed and exchanged written submissions in the appeal.

8. The Appellant's counsel anchored his submissions on the decision in Njai Stephen v Christine Khatiala Andika [2019] KEHC 11046 (KLR) on a party's constitutional right to a fair hearing, as envisaged under Article 50 of *the Constitution* of Kenya, 2010. He argued that by prematurely dismissing the Appellant's suit, the trial court essentially denied the said Appellant an opportunity to be heard and to prosecute its case.

9. Counsel further cited the decision in Mwangi S. Kimenyi v Attorney General & another [2014] KEHC 4220 (KLR) where the High Court set out the germane principles governing the dismissal of claims for want of prosecution. Counsel submitted that the delay in prosecuting the suit was both reasonable and excusable, and that the trial court ought to have favourably considered the explanation brought forward by the Appellant to explain such delay. Counsel submitted that the Appellant had at all material times taken active steps at prosecuting the suit and that the primary delay was occasioned by the effects of the Covid-19 pandemic on court operations, relying on the case of Whispering Palms Estate Limited & 3 others v Radio Africa Group Limited & 3 others [2021] KEHC 13416 (KLR) in which the court appreciated the following:

> "I have considered the anxiety faced by the defendant/applicants as a result of the delay in the prosecution of this matter. It has also not escaped the mind of this court that processes in the courts of this country since March 2020 have not been the same. Several cases which were even ready for hearing are yet to be heard. This is all because of the covid-19 menace.
>
> It is therefore clear that the plaintiff/respondents are not wholly to blame for the delay. They have expressed a serious interest in proceeding with the case. I therefore find it fair in the interest of justice to give them an opportunity to proceed with the matter..."

10. It is counsel's contention that in any event, the Respondent herein does not stand to be prejudiced if the suit is reinstated, and that any inconvenience caused can be adequately compensated by an award of costs, with reliance being placed inter alia, on the decision in John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] KEHC 6789 (KLR) where the question of prejudice to be suffered by a defendant was considered. On those grounds, the court was urged to allow the appeal accordingly.

11. In urging the court to dismiss the appeal with costs, counsel for the Respondent submitted that the trial court acted correctly by dismissing the Appellant's suit, the same having not been active before the lower court for a period of over two (2) years preceding filing of the application seeking its dismissal. Whilst citing the decisions in Harleys Limited v Metro Pharmaceuticals Limited [2024] KEHC 802 (KLR) and Alshabai Hassan t/a Setlack Two Thousand v Jaswinder Bhabra [2018] KEELC 1778 (KLR) in which the respective courts addressed their minds on the question of delay, counsel argued that the delay in the present instance was not only inordinate but was equally inexcusable. Counsel challenged the veracity of the explanation that the delay in question was largely the result of the Covid-19 pandemic; adding that no sufficient reasons for the delay were presented before the trial court for consideration. In closing, counsel further argued that to reinstate the suit would be prejudicial to the Respondent given the likelihood that the period that has since passed may impede a fair trial.

Analysis

12. The court has considered original record, the record of appeal and the rival submissions plus the authorities cited in support thereof. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Peters v Sunday Post Limited [1958] EA 424; Selle and Another v Associated Motor Boat Co. Limited and Others [1968] EA 123 and Williams Diamonds Limited v Brown [1970] EA 1. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278 stated that:

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

13. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is the court's view the appeal turns on the central issue whether the learned trial magistrate acted correctly in allowing the application and in consequently dismissing the Appellant's suit for want of prosecution.

14. As earlier set out, the Respondent moved the trial court by way of the application, seeking the dismissal of the suit for want of prosecution. The application was supported by the grounds present on its face and the facts stated in the affidavit of the Respondent's Legal Officer, Simon Peter, who stated that at the time of filing the aforesaid application, the suit was last in court on 31.10.2019 and that since then, the Appellant had taken no active steps at prosecuting the matter. The deponent further stated that the prolonged delay of close to two (2) and a half years would likely hinder a fair trial and hence it would be in the interest of justice for the dismissal order sought to be granted.

15. As was to be expected, the Appellant opposed the application by way of a replying affidavit sworn by its Business Development Manager, Hansraj Shah, on 1.09.2022. Therein, the deponent averred that the application is prejudicial to the Appellant given the nature of the claim and the sum being sought in the plaint. The deponent further averred that the Appellant previously encountered difficulties in tracing

the court file and that at one point, the Respondent paid a sum of Kshs. 200,000/- to the Appellant as a show of good faith in an attempt at settling the dispute. That in the circumstances, the application has not been made in good faith. The deponent added that the Appellant remains keen on prosecuting the suit and therefore urged the court to dismiss the application.

16. Upon considering the application alongside the reply in opposition thereto, the learned trial magistrate reasoned that the suit had been inactive for a period exceeding two (2) years, which delay the magistrate termed as prolonged. The said magistrate further reasoned that the explanation given for the delay is insufficient and that going by the record, the Appellant did not appear keen on prosecuting the suit to its conclusion. On those grounds, the learned trial magistrate allowed the application as prayed, with costs.

17. From a perusal of the record, it is apparent that the learned trial magistrate drew reference from Order 17, Rule 2(1) of the CPR which donates powers to a court to dismiss a suit for want of prosecution in the following manner:

> " 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."

18. Further, Order 17, Rule 2(3) also cited by the learned trial magistrate, expresses thus:

> " Any party to the suit may apply for its dismissal as provided in sub-rule 1"

19. It is a standing legal principle that whether to exercise the power of dismissal for want of prosecution under Order 17, Rule 2 (supra) is a matter that lies purely with the discretion of the court and which discretion ought to be exercised judiciously. This position was reaffirmed by the court in Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR when it reasoned as follows:

> " Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs Kyumba [1984] KLR 441 espoused that: "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it 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 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 earliest time. It is a matter of and in the discretion of the court."

20. Now applying the principles enunciated in the above-cited authorities to the present circumstances, the court; in addressing the principle on inordinate/prolonged delay; reconsidered the rival arguments as to the last time the matter was before the lower court. From a re-examination of the record and more particularly the lower court proceedings, it is apparent that prior to the filing of the application, the matter was last in court on 31.10.2019 on which date the lower court delivered a ruling dismissing the Appellant's application dated 18.06.2019 which application sought to have the Respondent's statement of defence struck out and for entry of judgment as prayed in the plaint. The lower court

record shows that previously, the parties' respective counsels had attended court on 25.09.2019 for purposes of confirming filing of submissions on the abovementioned application. Upon confirmation thereof, the lower court slated the said application for hearing on 31.10.2019 but instead delivered the above ruling on the said date.

21. Suffice it to say that, it is not in doubt that there was a delay of over two (2) years between the last court attendance and the filing of the application. The question remains: does this constitute inordinate delay? The case of Mwangi S. Kimenyi v Attorney General & another [2014] eKLR cited in the Appellant's submissions on appeal, brings perspective into what may be considered to be inordinate delay in the following manner:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."

22. From the court's reading and understanding of the above analysis and upon applying the aforementioned principles, the court concurs with the view taken by the learned trial magistrate, that the delay of close to two (2) and a half years is inordinate in the circumstances.

23. As to whether the said delay is excusable, the court considered the varying positions taken before the lower court and already set out. Upon its re-examination of the record, the court did not come across any credible material to support the averment by the Appellant that the court file could not be traced from the registry. The court is equally unconvinced that the averment regarding the impact of the Covid-19 pandemic entirely justifies the inactivity in the suit, especially considering the fact that the courts have been undertaking virtual sessions since the pandemic era and hence the Appellant would have had every reasonable opportunity to prosecute the suit. It cannot therefore be heard to cushion itself solely on that argument.

24. In view of all the foregoing circumstances, the court supports the learned trial magistrate's view that no reasonable explanation was given for the delay in the suit since its last court session.

25. Nevertheless, the court must reconsider a separate pertinent principle, being whether justice can still be done notwithstanding the delay. Upon weighing the rival positions taken on this issue which touches on prejudice, the court observed that the Respondent on its part did not tender any credible evidence or material before the lower court, to demonstrate the manner in which it would stand to be prejudiced if the suit subsisted. In contrast, the court is alive to the Appellant's right to be heard and which right ought not to be impeded as a matter of general principle, unless special circumstances have been shown to warrant an impediment.

26. Upon re-examination of the record, it is clear that the suit was filed in the year 2019. It is also apparent that the hearing had not taken place in the suit, as at the time of its dismissal. It is equally apparent from the record that during the course of the proceedings, the Respondent issued a cheque dated 15.07.2019 to the Appellant, for the sum of Kshs. 200,000/- which sum allegedly constitutes part payment of the claimed sum. The foregoing circumstances would have collectively favoured a continuation of the suit as opposed to a dismissal order at that juncture, save with strict timelines being set for its prosecution.

27. Separately and on the issue whether the learned trial magistrate overlooked the Appellant's submissions placed before her, the court did not come across anything to indicate so. From a study of the impugned ruling, it is apparent that the said magistrate reasonably considered the totality of the relevant material and submissions on record.

28. In view of all the foregoing circumstances, while there is nothing on the record to indicate that the learned trial magistrate necessarily overlooked or did not properly consider the material tendered before her, upon considering the age of the suit and the nature of the claim, the court finds that the substantive interest of justice lies in disturbing the impugned ruling

29. The upshot therefore is that the appeal succeeds on merit and it is hereby allowed. Resultantly, the ruling delivered by the trial court on 16.05.2023 in Milimani CMCC No. 2148 of 2019 is hereby set aside and is substituted with an order reinstating the suit on the condition that the Plaintiff/Appellant prosecutes the same within 60 days from this day, failing which the suit shall stand dismissed, with costs. In the circumstances, parties shall each bear their own costs of the appeal.

Determination

i. This appeal is allowed.

ii. Ruling delivered by the trial court on 16.05.2023 in Milimani CMCC No. 2148 of 2019 is hereby set aside and is substituted with an order reinstating the suit

iii. Condition to ii above, that the Plaintiff/Appellant prosecutes the same within 60 days from this day, failing which the suit shall stand dismissed, with costs

iv. Parties to bear their own costs

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF FEBRUARY, 2025

HON. T. W. OUYA

JUDGE

For Appellant... No Apperance

For Respondent... Rasoa HB for Juma

Court Assistant: Martin