



REPUBLIC OF KENYA



Surya Holdings Limited & 4 others v ICICI Bank Limited & another (Commercial Case 68 of 2015) [2023] KEHC 22173 (KLR) (Commercial and Tax) (15 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22173 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 68 OF 2015
DAS MAJANJA, J
SEPTEMBER 15, 2023**

BETWEEN

**SURYA HOLDINGS LIMITED 1ST PLAINTIFF
RHEA HOLDINGS LIMITED 2ND PLAINTIFF
YESHODA INVESTMENTS LIMITED 3RD PLAINTIFF
KARUTURI LIMITED 4TH PLAINTIFF
KARUTURI OVERSEAS LIMITED 5TH PLAINTIFF**

AND

**ICICI BANK LIMITED 1ST DEFENDANT
KOLLURI VENKATA SUBBARAYA KAMASASTRY 2ND DEFENDANT**

RULING

1. The Defendants, through their Notice of Motion dated May 9, 2023, have moved to dismiss the suit for want of prosecution under, inter alia, Order 17 Rule 2(1), (3) and (5) of the *Civil Procedure Rules*. The application is supported by the affidavit sworn by the 2nd Defendant on May 9, 2023 and opposed by the Plaintiffs through the replying affidavit of their director, Sai Ramakrishna Karuturi, sworn on August 10, 2023.
2. The Defendants contend that this matter was filed over 8 years ago on February 17, 2015 seeking various reliefs as against the Defendants touching on the appointment of the 2nd Defendant as a receiver by the 1st Defendant. That since the filing of the suit, the Plaintiffs have filed numerous unsuccessful interlocutory applications and have never shown any interest in having the main suit heard on merit



and that the last application was that dated October 24, 2017 which was struck out with costs to the Defendants by a ruling delivered by Tuiyott J, on February 15, 2018.

3. That immediately thereafter, the Plaintiffs filed another Notice of Motion dated February 28, 2018 which they have never prosecuted to date. The matter was last in court on June 15, 2018, over five years ago, before Tuiyott J, when it was adjourned generally because the Plaintiffs' counsel advised he did not have instructions in the matter. That the Defendants filed an interlocutory appeal at the Court of Appeal; ICICI Bank and others v Surya Holdings Ltd and Others, NRB Civil Appeal No 284 of 2015 challenging an order by this Court granting various injunctions pending hearing of the main suit. In its judgment of June 30, 2017, the Court of Appeal remarked that the balance of convenience tilted in favour of rejection of injunctive orders and speedy determination of the issues on merit at a full hearing. Despite the observation by the Court of Appeal over five (5) year ago, the Plaintiffs have not taken any steps to pursue a speedy. Further, that the costs awarded by the Court of Appeal to the Defendants in the matter have not been settled.
4. The Defendants also state that the Plaintiffs have not taken any steps to comply with pre-trial procedures or fixed the matter for case management which is demonstrative of the fact that they have lost interest in the suit. That due to the prolonged delay in prosecuting this suit, during the pendency of this suit, the 4th and 5th Plaintiffs have been placed in liquidation by creditors.
5. The Defendants proffer that under the law, a suit stands automatically dismissed after two years where no step has been taken in accordance with the provisions of Order 17 rule 2(5) of the Civil Procedure Rules and that the last step in this matter having been taken at the court appearance on June 15, 2018, the suit in any event stands dismissed by operation of the law as this is over three and half years ago.
6. The Defendants reiterate that it is not in the interest of the Plaintiffs, the bank, creditors or the receiver that there is pending unresolved litigation touching on the lending subject matter of this suit and that in the circumstances, this suit is an abuse of the court process. It is for these reasons and in the interest of justice that the Plaintiffs seek that the suit be dismissed for want of prosecution.
7. The Plaintiffs oppose the application and urge the court to permit them to prosecute the suit. They state that the application has been brought in bad faith as the Defendants seek draconian orders which would terminate the suit without giving them the chance to ventilate it on merit. That it is clear that this suit was filed together with various interlocutory applications by various parties that were heard by this Court and also the Court of Appeal. The Plaintiffs contend that the prosecution of these applications has a direct impact on whether or not the main suit can be set down for hearing and that all along, the Plaintiffs have been very serious and desirous to prosecute their cases to conclusion.
8. The Plaintiffs further state that some of them are involved in related litigation including Surya Holding Ltd & 2 Others v CFC Stanbic Bank Ltd & 4 Others, NRB HCCOM No, 78 of 2015 which is being handled by the current Advocates on record, SOW Advocates LLP and which is active and was scheduled for a mention before the Deputy Registrar on August 21, 2023 for pre-trial directions. There is also Anitha Karuturi & Another v CFC Stanbic Ltd & 6 Others, NRB HCCOM No 251 of 2017 which is at the taxation stage; Taxations and Court of Appeal cases. That these cases, in which files were handed over to the current firm of advocates on time, have been prosecuted and are at various levels before various Courts but that some files are yet to be handed over to the current firm of advocates on record.
9. The Plaintiffs contend that the subject matter of the various suits is extremely substantial, running into millions of United States Dollars and that a dismissal at this stage will occasion the Plaintiffs extreme prejudice. That the Plaintiffs had instructed the firm of Kimani & Michuki Advocates to handover this matter plus all other related matters including HCCOM 78 of 2014 to the current advocates on



record but that this file was only handed over when the current application for dismissal was filed and served. That all along, the Plaintiffs were under the impression that the file had been handed over to the current advocates on record and the same was being prosecuted in accordance with the required rules. However, they state that unfortunately, this has not been the position and that from the foregoing, the delay in prosecuting the matter was not intentional by the Plaintiffs but the same was occasioned by the delayed hand over from the previous Advocates on record.

10. The Plaintiffs state that they are aware that no substantive orders that can prejudice the Defendants have been issued by this Court and in fact that there is no other demonstrable injury that the Defendants stand to suffer if the Plaintiffs are allowed to prosecute their case to conclusion. That the Plaintiffs have a substantive cause of action as outlined in their Plaint and that from the time of filing the suit, the Plaintiffs have always been and are still desirous to prosecute the matter to conclusion and are ready to set the matter down for directions and hearing at the earliest opportunity.

Analysis and Determination

11. The Defendants seek to dismiss the suit for want of prosecution under Order 17 Rule 2(3) of the Civil Procedure Rules as follows:

"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. From the above provision, I agree with the Defendants that the suit stood dismissed when no steps were taken to prosecute for a period of two years when the last step was taken. The last step having been taken in June 15, 2018 hence the suit stood dismissed on or about June 15, 2020. The proper step the Plaintiffs were required to take was to apply for setting aside of the dismissal order and for reinstatement of the suit.

13. On the other hand, a party is entitled to apply for dismissal and the court has discretionary power to grant it. Conversely, the court has discretion to reinstate a suit that has been dismissed for want of prosecution. In either case, the principles and factors guiding the court in the exercise of its discretion are similar. The Court of Appeal in Moses Muriira Maingi & 2 others v Maingi Kamuru and another NYR CA Civil Appeal No 151 of 2010 [2013] eKLR adopted and endorsed the test for dismissing



a matter for want of prosecution as set out by Chesoni J, (as he was then) in *Ivita v Kyumbu* [1984] KLR 441 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 he 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."

14. The Plaintiffs have not denied the Defendants' contention that this matter was last in court on June 15, 2018 and that no steps have since been taken by the Plaintiffs to prosecute the matter. The period between June 15, 2018 to the date of the present application is close to 5 years and this is definitely an inordinate delay. The Plaintiffs excuse this inaction and delay by blaming their previous advocates for not releasing the subject file and handing it over to their current advocates on record to enable them prosecute the suit once they were prompted by the application for dismissal.
15. Apart from bare assertions blaming the previous advocates on record, the Plaintiffs did not tender any proof of their attempts or concerted efforts by them or their advocates; previous advocates and present, calling for the file to enable them prosecute the suit. Such evidence of correspondence showing effort is necessary to lend credence to the Plaintiffs' explanation as to the delay. Bare statements alone cannot suffice as the court is required to exercise its discretion on material provided by the party who seeks favour (see *Richard Velji Shah & 3 others v Viktar Maina Ngunjiri* NRB ELCC Misc No 359 of 2009 [2014] eKLR and *Vision Housing Co-operative Limited v Wairimu Kinyanjui & another* NRB HCCA No 375 of 2013 [2018] eKLR.). Even if the advocates did not make such effort, the duty was on the Plaintiffs as parties to make efforts to see that the suit is prosecuted. It is now established that parties have a duty to prosecute their suit and cannot blame their advocates if they sit back and wait for the advocates to prosecute the suit themselves. I would adopt as my own the following sentiments by Kimaru J,(as he was then) regarding the litigant's duty to prosecute its case in *Savings and Loans Limited v Susan Wanjiru Muritu* NRB ML HCCS No 397 of 2002 (UR):

"Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was



dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant." [emphasis added]

16. As the court observed in *James Mwangi Gatundu v Mastermind Tobacco (K) Ltd* [2018] eKLR, , "It was the Plaintiff who instituted the suit and it was his duty to prosecute it to its logical conclusion". I therefore find and hold that the delay of close to 5 years to prosecute this matter is inordinate and inexcusable as it has not been explained.
17. As to whether the Defendants have satisfied the court that the delay will prejudice them, I answer in the affirmative for a number of reasons. The subject matter in this suit involves facilities advanced by the 1st Defendant to the Plaintiffs and the securities held by the 1st Defendant to secure the facilities. The Plaintiffs have previously admitted that from the partially disbursed amount, only USD 9.84 million remains unpaid. This outstanding sum continues to accrue interest and penalties and the more this matter is not resolved, the higher the chances of the outstanding debt outstripping the value of the securities, to the Defendants' detriment. The Defendants have also demonstrated that the 4th and 5th Defendants have since been placed in liquidation which position is alarming to the Defendants as the said Plaintiffs might not be in a position to settle the outstanding debt if it is ruled that their financial position is unsalvageable. The Court of Appeal in *Icici Bank Limited & another Kamasastry v Surya Holdings Limited & 4 others* [2017] eKLR also expressed that the balance of convenience in this matter tilted in favour of a speedy determination of the issues on merit at a full hearing. Despite the appellate court making its position clear, the Plaintiffs failed to act in accordance with its direction. They therefore do not deserve any discretion in their favour.
18. The Plaintiffs contend that they will suffer prejudice if the suit is dismissed because they have claimed substantial sums from the Defendants which they stand to lose. The fact that the suit involves a substantial sum of money ought to have put the Plaintiffs on notice to take all steps to prosecute the suit with alacrity. In the same vein, a large claim against the Defendants is burdensome and must be prosecuted.
19. Ultimately, the Court of Appeal already made its position on speedy prosecution clear yet the Plaintiffs did not take positive steps for over 5 years to set this matter down for hearing. Further, as a matter of law, the suit stood dismissed two years after the Plaintiffs failed to take any steps.

Disposition

20. Upon consideration of the facts placed before the court, I have come to the conclusion that justice will not be done to the Defendants due to the inordinate, inexcusable and unsatisfactory explanation for the delay caused by the Plaintiffs in prosecuting this suit. The application dated May 9, 2023 is allowed and the suit be and is hereby dismissed for want of prosecution.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Wafula instructed by SOW Advocates LLP for the Plaintiffs

Mr Nyaribi instructed by Muthaura, Mugambi, Ayugi and Njonjo Advocates for the Defendants.

