



REPUBLIC OF KENYA



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**In re Chebon Chepkonga - Exparte the Debtor (Bankruptcy Cause
E001AA of 2012) [2024] KEHC 12288 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
BANKRUPTCY CAUSE E001AA OF 2012**

E OMINDE, J

OCTOBER 16, 2024

IN THE MATTER OF CHEBON CHEPKONGA – EX PARTE THE DEBTOR

RULING

1. The Applicant approached this court *vide* a Notice of Motion dated 22nd May 2023 seeking the following orders;
 - a. Spent
 - b. That the Honourable court be pleased to set aside the order made on 18th September 2018 which rescinded the order made on 01st February 2012 and discharged the Official Receiver as the Interim Trustee of the debtor.
 - c. That the Honourable court be pleased to issue an order reconstituting the Official Receiver as the Interim Trustee of the debtor.
 - d. That there be a stay of execution on all the suits against the debtor and in particular a stay of execution of the judgment in Nairobi CM Milimani Commercial Court CC No. 1534 of 2005 Jane Musimbi Amiani v Margaret Kombichi, Isaac Kipkemboi Kirwa, George Odhiambo Anyul & Chebon Chepkonga pending the hearing and determination of this application in the first instance and pending the hearing the determination of the petition herein.
 - e. That costs of this Application do abide the outcome of the Petition.
2. The Application is premised on the grounds on the face of it and the contents of the Supporting Affidavit sworn by Chebon Chepkonga.
3. The Applicant deposed that she filed the present petition and simultaneously, she filed an application for a receiving order to issue appointing the Official receiver as the Interim trustee. Further, that on 20th January 2012 the Application was certified urgent and a temporary stay of execution and proceedings in all suits filed against her especially Nairobi CM Milimani Commercial Court CC No. 1534 of 2005 issued and the matter was fixed for hearing on 1st February 2012. Upon hearing of her motion, a



receiving order was issued and the Official Receiver was constituted as her interim trustee. The order of stay was also confirmed for the pendency of the Petition.

4. The deponent stated that vide a letter dated 13th March 2023, she was served with a Hearing Notice in Nairobi CM Milimani Commercial Court CC No. 1534 of 2005 accompanied by a Replying Affidavit and a Notice to Show Cause dated 15th December 2022 coming up on 24th May 2023.
5. That she contacted her advocates over the same and upon perusing the file, they discovered a Notice of Dismissal had been issued and a Notice to Show Cause issued. Additionally, on 18th September 2018, the order constituting the Official Receiver as her interim trustee had been rescinded and the Official Receiver had been discharged. She contended that she was never served with the Notice of Dismissal prior to the rescinding of the order made on 1st February 2012 and thus was condemned unheard.
6. She urged that she was at the risk of being arrested and committed to civil jail or have her possessions attached and sold in execution of the judgment in Nairobi CM Milimani Commercial Court CC No. 1534 of 2005 as a Notice to Show Cause has already been issued. Further, that she is still unable to pay her debts as and when they arise. She urged the court to allow the prayers sought as she is intent on prosecuting the Petition.
7. When the matter came up for directions on 16th July 2024, the court gave directions that the Petitioner file submissions and serve within 14 days. The creditor was then to file submissions within 14 days of service. The parties confirmed that they had filed submissions when the matter was mentioned on 25th September 2024.

Submissions

8. A perusal of the record reveals that the Creditor filed Grounds of Opposition to the Petition dated 08th April 2024 through the firm of Messrs. Nelson Kaburu & Co. The creditor filed submissions in opposition to the Application on dated 17th September 2024 whereas the debtor filed submissions to the Petition dated 17th August/2024. From a reading of the submissions, they do not address the Application but seem to address the Petition as a whole.

Debtor/Applicants' Submissions

9. The Applicant urged that in the year 2002 he was involved in the Public Sector as a matatu owner of the motor vehicle KAP 089F which was insured with Lake Star Insurance Company against third party risks. The said motor vehicle was involved in an accident on 24th July 2002 along the Kapsabet-Chavakali road and several people were injured including the opposing creditor.
10. Proceedings were instituted against the debtor vide Nairobi CM Milimani Commercial Court CC No. 1539 of 2005 and a judgment eventually entered. By dint of the judgment the debtor is a judgment debtor having been ordered to pay Kshs. 1,700,000/-. He had banked on the insurer to pay the judgment sum but the insurer went into liquidation before satisfying the judgment and the debtor has been unable to settle the decretal sum and the interest which was at the sum of Kshs. 3,273,893.35 as at 15th December 2022.
11. Further, that he is indebted to other debtors to wit; Justin Kipkoech Rotich in the sum of Kshs. 970,000, NCBA Bank; Kshs. 1,006,560.53 and Kshs. 156,343.31/- which debts he has been unable to honour. He instituted bankruptcy proceedings in Kisumu Bankruptcy Cause No. 001 of 2012 In Re Chebon Chepkonga which was dismissed for want of prosecution.



12. Counsel submitted that there has been no evidence tendered to controvert the facts and evidence by the debtor. He cited the Court of Appeal in the case of *Daniel Kibet Mutai & 9 others vs Attorney General* (2019) eKLR in support of these submissions. He reiterated that the debtor moved the court in Kisumu vide Kisumu Bankruptcy Cause No. 001 of 2012 *In Re Chebon Chepkonga* which were dismissed for want of prosecution and consequently, the present case is not a duplication of the dismissed proceedings. Further, that the debt situation of the debtor in this case is different from his debt situation in those proceedings. He maintained that here was no decision made on merit and therefore an objection of res judicata cannot be sustained in this petition.
13. The debtor refuted the claims that he was attempting to avoid paying the debt and urged that the essence of insolvency petitions is to protect creditors and ensure optimal payment, where possible, and provide a fresh start to individuals overburdened by debt. Counsel cited the case of *In Re James Maina Kabatha (Debtor/Applicant) NKR* Insolvency Cause No. 4 of 2019 (2020) eKLR.
14. Counsel further submitted that the debtor has made full disclosure of his financial position through his statement of affairs and declared his inability to pay the debts accrued. He stated that there has been no evidence led that the debtor has made full disclosure and that he is unable to settle his debts. He urged the court declare the debtor bankrupt and appoint a bankruptcy trustee to handle his property.

Respondent/Creditor's Submissions

15. Learned counsel for the creditor submitted that Jane Musimbi Ambiani obtained judgment against the Applicant in Nairobi CMCC 1539 of 2005 and commenced execution upon which the applicant/debtor rushed to court in Kisumu Bankruptcy Cause No. 001 of 2012.
16. He obtained stay orders and never complied with the trustee's requests for meetings or disclosure of assets or liabilities. As such, the cause was in limbo until the debtor was called upon to show cause why it should not be dismissed. He did not show cause and the same was rescinded on 18th August 2018 and he took no action for its reinstatement.
17. The creditor commenced execution and the debtor tried setting aside the warrants by producing the order in the Kisumu cause but the same was dismissed as the creditor exhibited the order dismissing or rescinding the bankruptcy order.
18. Counsel urged that the debtor has not shown any efforts he made since he filed his bankruptcy cause or since the order for dismissal was made. He has tailored his application and petition to defeat the creditors' suit for as long as it takes. Further, that when a matter is dismissed for want of prosecution, an applicant must show the court the steps he took over the years towards prosecution of the suit. He cited the case of *Julius Odhiambo Oduor v Chairman, Secretary, Auditor & Organisers of Nyikwa Ramogi Welfare* eKLR and *Latifa M. Ramadhani v Omar M. Ramadhani & Another* (2021) eKLR in support of this submission.
19. Additionally, counsel submitted that long delays must be reasonably and candidly explained so as to enable the court to exercise its discretion. He maintained that the Petitioner is abusing the court process by filing duplicate petitions. Further, that it is not clear whether the official receiver has been served with the motion which is a serious omission as it denies the court his input. He urged the court to dismiss the Application with costs.

Analysis & Determination

20. The following issues emerge for determination;



- i. Whether the court should set aside the order made on 18th September 2018
- ii. Whether the orders for stay of execution of the judgment in Nairobi CM Milimani Commercial Court CC No. 1534 of 2005 – Jane Musimbi Amiani v Margaret Kombichi, Isaac Kipkemboi Kirwa, George Odhiambo Anyul & Chebon Chepkonga should issue

Whether the court should set aside the order made on 18/09/2018

21. The impugned order was an order dismissing the Bankruptcy Petition for want of prosecution issued by the High Court at Kisumu. Dismissal of suits for want of prosecution is governed by Order 17 Rule 2 (3) of the *Civil Procedure Rules* provides, *inter alia*;

- 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)
- 3). any party to the suit may apply for its dismissal as provided in Sub-rule 1”.

22. In *Mwangi S. Kimenyi v Attorney General and Another, Misc. Civil Suit No. 720 of 2009*, the court restated the test for dismissal for want of prosecution as follows:

- “ 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

23. The Legal rationale of Order 17, Rule 2(3) was set out in the decision of *Investment Limited –Versus - G4S Security Services Limited* (2015) eKLR where court held :-

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the *Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express



Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff.

24. When a party wishes to set aside an order of dismissal of suit for want of prosecution are guided by the provisions of Order 12 Rule 7 of the Civil Procedure Rules. It provides that,

“Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”

25. In Thatbini Development Company Limited v Mombasa Water & Sewerage Company & another [2022] eKLR, Justice L.L Naikuni expressed himself on the discretion of a court to set aside an order for dismissal as follows;

The discretion of court to set aside an order for dismissal ought to be exercised judiciously. A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.

26. In the case of Josphat Oginda Sasia – Versus - Wycliffe Wabwile Kiiya [2022] eKLR, the court held

“But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites or even court notice boards.

27. Having considered the application by the debtor and exhaustively addressed my mind to the authorities herein cited, it is my finding that for the Debtor to have obtained a receiving order in the year 2012 and then failing to prosecute the same until the cause was dismissed over ten years later for want of prosecution is delay that is very inordinate and particularly since no reason at all for the failure to prosecute the cause has been advanced as is the case with this motion.

28. In this regard, I have no difficulty at all in finding that the debtor’s application has no merit and I accordingly dismiss the same in its entirety with costs to the creditor.

READ DATED AND SIGNED AT ELDORET ON 16TH OCTOBER 2024

E. OMINDE

JUDGE

