



Kenya Pipeline Company Limited v ALS Limited (Civil Case 116 of 2015) [2022] KEHC 49 (KLR)
(Commercial and Tax) (31 January 2022) (Ruling)

Neutral citation number: [2022] KEHC 49 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Civil Case 116 of 2015

DAS Majanja, J

January 31, 2022

Between

Kenya Pipeline Company Limited

Plaintiff

and

ALS Limited

Defendant

Ruling

1.The Plaintiff has invoked, inter alia, section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1(1) of the [Civil Procedure Rules](#) to seek review of the order dismissing the suit for want of prosecution made by Thande J., on 2nd December 2020 by the Notice of Motion dated 19th February 2021. The application is supported by the affidavit of the Plaintiff's Chief Legal Officer, Stanley Manduku, sworn on 19th February 2021. It is opposed by the Defendant through the Grounds of Opposition dated 29th March 2021.

2.The grounds and reasons for the application are set out on the face of the application and in the supporting deposition and are as follows. The Defendant filed an application dated 4th August 2020 seeking to dismiss the suit for want of prosecution on the ground that the Plaintiff had failed to prosecute the suit for a period of one year. It was heard and allowed by Thande J., on 2nd December 2020. The Plaintiff states that the matter had been before a mediator, Mr Kimani Githongo, on various dates in July 2019 and that the mediator filed the report in court on 31st July 2019 indicating that the parties had failed to reach an agreement or resolve the dispute. In the circumstances, it states that it could only make progress as from 31st July 2019 after filing of the report by the mediator.

3.The Plaintiff argues that an application to dismiss the suit for want of prosecution may only be made if no application and or step is made by either party for a period of one year. That the period between 21st December and 13th January of the next year is exempted from computation of time and in this case the application seeking to dismiss the suit for want of prosecution was filed on the 364th day which is before the lapse of the period of one year. It contends that the application was therefore premature and without merit and ought to have been dismissed. It urges that the issue of computation of time is an error or mistake apparent on the face of the record and that there are sufficient reasons to review the order of Thande J., in the interests of justice.

4.In response to the application, the Defendant submits that there is no mistake or error on the face of the record as the application was filed within time which was between 16th July 2019 when the mediation was concluded and 4th August 2020 when the application was filed. It points out that the mediation was concluded unsuccessfully on 16th July 2019 and the report filed on 31st July 2019 and that the Plaintiff did not take any steps to prosecute the suit for more than one year. In its view, the Plaintiff's case is based on a misapprehension of the law on computation of time. It also adds that the application was not filed expeditiously as 75 days had elapsed since the order for dismissal was made.

5.I have considered the application and response and I take the following view of the matter. When the application for dismissal was argued before the court on 2nd December 2020, the same issue of computation of time was raised by counsel for the Plaintiff. The court took the position that the since the Plaintiff had not filed any response, either by way of a replying affidavit or grounds of opposition, the Defendant was denied an opportunity to respond to the issue and therefore the application was not opposed.

6.In the circumstances, I find this application for review an attempt to re-agitate the issue that the judge expressly considered but declined to determine the issue of computation of time on the ground that it had not been properly raised by the Plaintiff filing an appropriate response. Failure or refusal by the court to determine the issue of time as raised by counsel for the Plaintiff cannot therefore be termed as a mistake or error on the face of the record as the learned judge explained why she did not consider the issue. The matter thus is one for appeal rather than review.

7. For the reasons I have set out, the application dated 19th February 2021 is now dismissed with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.D.S.

MAJANJAJUDGE Court Assistant: Mr M. Onyango Mr Muthee instructed by TripleOKLaw LLP Advocates for the Plaintiff. Ms Makena instructed by Mboya Wangong'u and Waiyaki Advocates for Defendant.



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