



**Mutambi & another v Kihonge & 2 others (Commercial Case 1608 of 2001)
[2023] KEHC 17360 (KLR) (Commercial and Tax) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 1608 OF 2001
DO CHEPKWONY, J
APRIL 25, 2023**

BETWEEN

RUTH MUTAMBI 1ST PLAINTIFF

AGNES EUNICE OLEMBO 2ND PLAINTIFF

AND

FRANCIS NGANGA KIHONGE 1ST DEFENDANT

SAFARI 'M' PARK MOTORS LIMITED 2ND DEFENDANT

BARCLAYS BANK OF KENYA LIMITED 3RD DEFENDANT

RULING

1. On October 6, 2022, this suit came up for mention for parties to show cause why the same should not be dismissed for want of prosecution, the notice having been issued by the court on July 25, 2022 after the file was found in the registry and found that it had been inactive since September 7, 2016, when it came up for ruling on the plaintiffs application dated March 2, 2016. On this day, only counsel for the 3rd defendant, Mr Kimani was in attendance and he indicted to court that the suit which was last before court in 2016, already stands dismissed pursuant to order 17 rule (5) of the Civil Procedure Rules, which was amended to the effect that where no steps have been taken to set down a suit for hearing, the same stands automatically dismissed. He referred the court to an affidavit sworn by Stephen Owino on August 30, 2022 in respect of the same.
2. In considering whether or not to dismiss the suit herein for want of prosecution, I have gone through the oral submissions by the counsel for the 3rd defendant and the replying affidavit dated August 30, 2022 that was filed by the plaintiffs' counsel in response to the notice to show cause issued herein.



3. The notice to show cause why the suit should not be dismissed for want of prosecution in this case was issued by the court, which is provided for under order 17 rule 2 of the [Civil Procedure Rules](#), that states:-

“Notice to show cause why suit should not be dismissed;-

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.
4. From the said provision, it is clear that the exercise of the power to dismiss a suit for want of prosecution is a matter that is within the discretion of a court, as was observed by the court in the case of [George Gatere Kibata v George Mwaura & another](#) [2017]eKLR, where it was stated:-

“My understanding of the framework contained in order 17 rule 2 is that a court may *suo moto* dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit”.

5. Further, in the case of [Nilesh Premchand Mulji Shah & another T/A Ketan Emporium v MD Papat & others](#) [2016]eKLR, the court stated that:-

“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, inexcusable, and is likely to cause serious prejudice to the Defendant on account of that delay. This is what the case *Ivita v Kyumbu* [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”.

6. For a suit to be dismissed for want of prosecution, besides the legal framework set out in order 17 rule 2, the guiding principle to be applied in considering whether or not to dismiss suit for want of



prosecution have been articulated and settled in a number of cases including the case of Argan Wekesa Okumu v Dima College Limited & 2 others [2015]eKLR, where it was stated as follows:-

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff’s case for want of prosecution see the case of *Ivita v Kyumbu* [1984] KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

7. In the instant case, it was instituted *vide* plaint on October 18, 2001. Clearly, a number of processes were conducted in the matter until September 7, 2016 when a ruling was delivered on an application dated March 2, 2016, so that by the July 25, 2022, a period of six (6) years had lapsed, and the court was therefore in order when it moved *suo moto* to have a notice issued upon the parties to show cause why the suit should not be dismissed for want of prosecution as provided under order 17 rule 2 of the Civil Procedure Rules that provides that a matter should have been pending before court for twelve (12) month without any action or activity, for the court either on its own motion or on the application by a party, to order for its dismissal for want of prosecution.
8. The plaintiffs, through their counsel, Mr Owino in the replying affidavit dated August 30, 2022 explained and attached correspondences between counsel and the Deputy Registrar their effort to obtain typed copies of proceedings and ruling in this suit for the sake of preparing a record of appeal.
9. I have perused the court record and established that there is a certificate of delay by the Deputy Registrar dated August 3, 2022 explaining that it had taken the court 2131 days, that it is from September 23, 2016 to July 25, 2022 to prepare and supply copies of proceedings to the plaintiff herein. Furthermore, while counsel for 3rd defendant supported the dismissal of the suit on the ground that the same was automatically dismissed by virtue of order 17 rule 5 of the Civil Procedure Rules, on the ground that the same had not been prosecuted for over 2 years, this court notes that these amendments are of 2020 while the matter is a 2016 matter.
10. This court has balanced the positions advanced by each party in this matter and find that the delay in having the suit set down for hearing, as inordinate as it is, cannot be blamed on the plaintiffs’ preparation and supply of typed copies of court proceedings is not within their purview to avoid. They cannot even be said to have been indolent.
11. The court is therefore satisfied with the explanation that has been advanced by the plaintiffs on why the suit should not be dismissed for want of prosecution as the inordinate delay in having the suit set down for hearing having been caused by the court cannot be visited on them.
12. Having filed a response and offered an explanation for the inordinate delay in having the suit set down for hearing, this court is persuaded and finds the plaintiffs have demonstrated they still have an interest in the prosecution of their case before this court. The court proceeds to set aside the notice to show cause issued on July 25, 2022 with directions that:-
 - a. Mention on May 9, 2023 before the Deputy Registrar for directions on case management.
 - b. Notice to issue upon the parties.



It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25TH DAY OF APRIL, 2023.

D.O CHEPKWONY

JUDGE

No appearance for and by the Plaintiffs

Mr. Kimani counsel for 3rd Defendant

Court Assistant – Mwenda/Sakina

