



**Bomet Teachers Training College v Bank of Africa Limited & another  
(Civil Case 1 of 2020) [2023] KEHC 17971 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17971 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL CASE 1 OF 2020  
RL KORIR, J  
MAY 25, 2023**

**BETWEEN**

**BOMET TEACHERS TRAINING COLLEGE ..... PLAINTIFF**

**AND**

**BANK OF AFRICA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MARY RITA WANJIKU T/A MISTAN AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Applicants filed a Notice of Motion dated July 29, 2022 where they sought the following Orders: -
  - I. That the Plaintiff's suit herein be dismissed for want of prosecution.
  - II. That the Plaintiff be condemned to pay the costs of this Application and the suit.
2. The Application was based on Order 17 Rules 2 (1) and (3) and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. It was supported by the grounds on the face of the Application and further by the Supporting Affidavit sworn by Paul Ouru Advocate on July 29, 2022.

**The Applicants' case.**

3. The Applicants stated that the matter was last in court on July 21, 2021 when this court issued a Ruling in respect to the Respondent's Notice of Motion Application dated December 7, 2020. In the Ruling, the court restrained the Defendant from selling or otherwise disposing of the suit property and also compelled the Defendant to supply the plaintiff a current statement of Account as a current evaluation of Bomet Township/114. That ever since the Respondent got the orders, it has not taken any steps to fix the case for hearing.
4. It was the Applicants' case that they have been greatly prejudiced by the delay occasioned by the Respondent. That the delay was inordinate, inexcusable and manifestly excessive in the circumstances.



5. The Applicants opined that litigation had to come to an end and it would be in the best interests of justice that the suit be dismissed for want of prosecution as it was apparent that the Respondent was not interested in prosecuting the same.

### **The Response.**

6. The Plaintiff filed a Replying Affidavit dated November 14, 2022 sworn by Frankline Rono. The Plaintiff stated that it was willing to settle the balance of Kshs 8,801,999.97/= in satisfaction of its contractual obligations to the 1<sup>st</sup> Applicant. That dismissing the suit would be a grave injustice to it since it had paid a total of Kshs 36,652,894.20/= and was left with a balance of Kshs 8,801,999.97/=.
7. It was the Respondent's case that the delay was occasioned by the fact that it was pursuing an out of court settlement with the Applicant through their branch manager in Kericho. That they had visited the said branch severally over the past year with the intention of settling only to be informed that the Applicants and lodged an application for the dismissal of the suit.
8. The Respondent prayed that this court allows them to prosecute the matter so that it is not driven away from the seat of justice. The Respondent also undertook to ensure compliance of any conditions/orders issued.
9. On November 15, 2022, I directed that the present Application be canvassed by way of written submissions.

### **The Applicants' Written Submissions.**

10. The Applicants submitted that the guiding criteria to be applied in considering whether or not a suit should be dismissed was articulated in the cases of *Ivita vs Kyumbu (1984) KLR 441* and *Nzoia Sugar Company Limited vs West Kenya Sugar Limited (2020) eKLR*.
11. It was the Applicants' submission that the matter was last in court on July 21, 2021 when the Respondent got a temporary injunction preventing the sale of Bomet Township/114. That since then, the Respondent had not made any attempts to prosecute the case. It was the Applicants further submission that what amounted to an inordinate delay could not be measured with exactness and that for the purpose of this application, inordinate delay was delay which was beyond the acceptable limits in the prosecution of cases. They relied on *Mwangi S Kaimenyi vs Attorney General & another (2004) eKLR*.
12. The Applicants submitted that the delay of one year was manifestly inordinate. They relied on [\*Francis Waitbaka Ngariuko vs Margaret Nyawira Kariuki \(2021\) eKLR\*](#).
13. The Applicants submitted that the Respondent was misleading the court when it stated that it was pursuing an out of court settlement. That the Respondent did not attach any annexures to demonstrate that there was communication between them as alleged and they relied on [\*Mukavi Ways Co Limited vs Family Bank Limited \(2020\) eKLR\*](#). The Applicants further submitted that it was unprofessional for the Respondent to by-pass the advocates on record if at all it engaged with the 1<sup>st</sup> Applicant's branch manager.
14. It was the Applicants' submission that once the Respondent got the temporary injunction, it went to slumber and it had been enjoying the orders to their detriment. That the 1st Applicant continues to be prejudiced by the Respondent's delay in prosecuting the suit. They relied on [\*Peter Kipkurui Chemoiwo vs Richard Chepsergon \(2021\) eKLR\*](#).



15. The Applicants submitted that when the temporary injunction was issued, it was forced to halt its efforts in recovering the outstanding Kshs 8,801,999.97/=. That this amount continued to accrue interest at contractual terms. The Applicants further submitted that they had incurred huge costs in defending a suit that the Respondent was unwilling to prosecute.
16. Despite this court's directions and time extension granted to the Respondent to file their written submissions, it has failed to do so.
17. I have gone through and considered the Notice of Motion Application dated July 29, 2022, the Replying Affidavit dated November 14, 2022 and the Applicants Written Submissions dated February 6, 2023 and the only issue for determination is if the Applicants have made out a case for the suit to be dismissed for want of prosecution.
18. The law on dismissal of suits for want or prosecution is anchored in Order 17 Rule 2 of the Civil Procedure Rules which provides that: -
  - (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.
19. In *Argan Wekesa Okumu vs Dima College Limited & 2 others (2015) eKLR*, the court considered the principles for dismissal of a suit for want of prosecution and 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 –vs-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.'
20. Similarly in *Vintage Investments Limited vs Amcon Builders Limited & another (Civil Appeal 45 of 2019) [2021] KECA 259 (KLR) (3 December 2021) (Judgment)*, the Court of Appeal held that:-

' In considering an application for dismissal of a suit for want of prosecution, a defendant (like the appellant herein) must show:

  - (i) That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case



to case but should not be too difficult to recognise inordinate delay when it occurs.

- ii. That this delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.
- iii. That the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff or between each of other or between themselves and third parties. In addition to any interference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.' See *Allan vs Sir Alfred Mc Alphine and Sons Ltd* [1968] 1 ALL ER 543.'

21. The power of a court in dismissal of a suit for want of prosecution under Order 17 of the Civil Procedure Rules is discretionary. I associate myself with the sentiments of Aburili J in [\*Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs MD Popat and others & another \(2016\) eKLR\*](#), where she stated 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.'

22. The Applicants therefore have the burden of proving that there was inordinate delay by the Respondent in prosecuting the suit, whether the delay was excusable and the prejudice they will suffer because of the delay.

23. The Applicants have stated that the matter was last in court on July 21, 2021 when this court granted the Respondent a temporary injunction. That ever since it got the injunction, the Respondent has gone to slumber. In the said Ruling, I granted prayers 3 and 4 of the Notice of Application dated December 12, 2020 which restrained the Applicants or their agents from selling or transferring Bomet Township/114 pending the hearing and determination of the suit. I also ordered the 1<sup>st</sup> Applicant to supply the Respondent herein a current Statement of Account and a current Valuation Report for Bomet Township/114.

24. The present Application was filed on August 1, 2022. By my count, between the last activity in the file which is July 21, 2021 and the date for the current Application was filed is slightly more than one year which falls within the ambit of Order 17 Rule 2 of the Civil Procedure Rules. The question then becomes whether the one year was enough to be considered an inordinate delay. As was stated in the *Vintage Investments Limited (supra)* case, what is inordinate delay or not must depend on the facts of each particular case. I am guided by the Court of Appeal in [\*Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another \(2014\), eKLR\*](#) where it stated that 'There is no set rule as to what constitutes inordinate delay.



25. Similarly, I associate myself with the sentiments of Gikonyo J in *Mwangi S Kimenyi vs Attorney General & another (2014) eKLR*, where he held:-

' 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. Caution is, however, advised for courts not to take the word 'inordinate' in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. See the case of *Allen v Alfred Mcalphine & Sons* [1968] 1 All ER 543: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of *Agip (kenya) Limited V Highlands Tyres Limited* [2001] KLR 630 and *Sagoo v Bhari* [1990] KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also *NBI Hc Elc Case No 2058 Of 2007* where delay of about 1 ½ years was considered not to be inordinate. At this point, I think I should examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable?'

26. In the present case, the Respondent got a temporary injunction that restrained the Applicants from interfering or selling the Respondent's charged land number Bomet Township/114. The Applicants wanted to sell the land to recover Kshs 8,801,999.97/=, an amount that the Respondent owed in arrears to a loan facility he was loaned by the 1<sup>st</sup> Applicant. The temporary injunction was to be in force until the main suit was heard and determined but the Respondent went into slumber deliberately enjoying the temporary orders to the Applicant's detriment and against the spirit with which the temporary orders were issued. The arrears in question are of a significant nature and the delay of one year in this case, was therefore inordinate.
27. The Respondent stated that the reason for the one-year delay was that it was engaging with the 1<sup>st</sup> Applicant's branch manager in Kericho with a view of having an out of court settlement. I have gone through the Respondent's Replying Affidavit and there is no evidence attached to back up its claim. It is trite law that he who claims must prove it. This court has no way of ascertaining the Respondent's claims. It is clear that the Respondent had failed to take steps towards having the suit set down for hearing. I agree with the Applicants' submission that the Respondent was trying to mislead this court. It is my finding therefore that the reason given for the delay was not convincing at all. It was not excusable.
28. The courts have previously held that in an Application for dismissal, such as the present one, an Applicant is expected to demonstrate, in specific terms the prejudice he or she or it stands to suffer. In *Mwangi S Kimenyi (supra)*, it was held that:-

' The Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant's position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above.'



29. In *John Harun Mwau vs Standard Limited & 2 others (2017) eKLR*, the Court of Appeal observed that:-

' The case of *Ngwambu Ivita vs Akton Mutua Kyumbu (supra)* makes it clear that:

'The Defendant must however satisfy the court that he 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.'

30. In this case the Applicants have stated that they would be highly prejudiced by the delay in prosecuting the suit. This bearing in mind the outstanding loan owed by the Plaintiff. I have perused the court record and I observe that both parties were not keen in the expeditious disposal of this suit. Though the Plaintiff was filed on December 7, 2020, to date there is no statement of defence filed. There has been no effort to set down the matter for Directions on hearing. There's also no evidence of compliance by either party of this court's order for the Defendants to serve the Plaintiff its current statement of Account. The prejudice to be suffered by the Defendant is therefore not demonstrated.

31. I must however point out that the plaintiff must demonstrate seriousness in his suit. The plaintiff must show that they did not file the suit only for purposes of obtaining an injunction. I associate myself with the Sentiments of *Musyoka J In Nzoia Sugar Company Limited vs West Kenya Sugar Limited (2020) eKLR* where he stated that: -

' The mere fact that the defendant has not demonstrated prejudice is not sufficient to sustain a suit that the plaintiff has shown no interest in prosecuting for the two years before the application for dismissal was made. It would appear that the suit was filed for the sole purpose of obtaining injunctive orders, and once the same were denied the plaintiff lost interest in the matter.'

32. In the end, having weighed the respective interests of the parties, I am persuaded not to dismiss the suit for want of prosecution. I exercise discretion to allow the parties ventilate their case on merits. Consequently, I direct that the suit be set down for Directions within 14 days of today.

33. The Application is thus dismissed. Costs shall be in the suit.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 25TH DAY OF MAY, 2023**

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**R. LAGAT-KORIR**

**JUDGE**

**Ruling delivered in the presence of Mr. Koech Caleb for Plaintiff, Mr. Ouro for the Defendant and Siele(Court Assistant).**

