



**Ochieng t/a Mecko Enterprises v PS Ministry of Education &
2 others (Commercial Miscellaneous Application 29 of 2020)
[2023] KEHC 24537 (KLR) (Commercial and Tax) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION 29 OF 2020**

MN MWANGI, J

JULY 28, 2023

BETWEEN

MESHACK OCHIENG T/A MECKO ENTERPRISES APPLICANT

AND

THE PS MINISTRY OF EDUCATION 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

CS NATIONAL TREASURY 3RD RESPONDENT

RULING

1. This ruling is on the issue of whether the suit herein should be dismissed for want of prosecution. This matter came up for Notice to Show Cause why it should not be dismissed for want of prosecution on 3rd May, 2023. On the said date, Mr. Ochieng, the applicant herein submitted that this matter was concluded on 27th January, 2023 and that the 2nd respondent’s application dated 5th April, 2018 was also concluded. He urged the Court to peruse the Court orders issued in the instant suit.
2. On the other hand, Mr. Kiarie learned Counsel for the respondents submitted that the applicant filed this suit in the year 2020 and failed to prosecute it hence it should be dismissed for want of prosecution.
3. On perusal of the record, it is evident that the Court issued a Notice to Show Cause why the suit herein should not be dismissed for want of prosecution on 24th May, 2022. On 12th July, 2022, Hon. Lady Justice W. Okwany after listening to all the parties reserved this matter for ruling on 1st December, 2022 on the Notice to Show Cause. There is no copy of the said ruling in the Court file and none of the parties has alluded to the fact that a ruling on the Notice to Show Cause dated 24th May, 2022 was ever delivered.



4. It might be argued that by virtue of this Court entertaining the applicant's application dated 11th October, 2022 and subsequently delivering a ruling on the same on 27th January, 2023, the Notice to Show Cause dated 24th May, 2022 is spent. That is however not the case since on 4th January, 2023, Hon. Justice Mabeya made an order that all matters to await the ruling of 20th January, 2023. Therefore, in view of the fact that the ruling of 20th January, 2023 was delivered on 27th January, 2023, this Court will consider whether the suit herein should be dismissed for want of prosecution since the Notice to Show Cause dated 24th May, 2022 predates all the pending applications filed in this suit.
5. Dismissal of suits for want of prosecution is provided for under order 17 rule 2 of the *Civil Procedure Rules*, 2010 which states 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.
6. Under the provisions of sub-rules 1-4 above, where in a suit no application has been made or step taken by either party for one (1) year, the Court shall issue a Notice to Show Cause to the plaintiff, to show cause why the suit should not be dismissed and/or any party to the suit may apply for the dismissal of the suit. Pursuant to sub-rule 5, a suit stands automatically dismissed by operation of the law in instances where a period of two years or more have elapsed and no step has been undertaken either by the filing of any application or by having the case listed for hearing.
7. The suit herein was filed on 8th October, 2020 and there is no evidence of any action and/or activity in the file since the time it was filed until 24th May, 2022 when the Notice to Show Cause was issued. Based on the foregoing, the provisions of order 17 rule 2 sub-rules 1 to 4 of the *Civil Procedure Rules*, 2010 apply.
8. Dismissal of a suit for want of prosecution is a matter that is within the Court's discretion. In the case of *Ivita v Kyumbu* [1975] eKLR, the Court set down instances wherein suits may be dismissed for want of prosecution as hereunder–

“So, 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 and that justice can still be done to the parties notwithstanding 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. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed."

9. In this case the respondents did not file an application seeking for the suit herein be dismissed for want of prosecution, instead, the applicant was issued with a Notice to Show Cause why the suit herein should not be dismissed for want of prosecution suo moto by the Court. Since the Court issued the said notice suo moto, it had already found that there had been a delay of two (2) years with no action being taken to prosecute the case.
10. In the submissions made by the parties herein before Hon. Lady Justice W. Okwany on 12th July, 2022 in respect to the Notice to Show Cause, the applicant submitted that this matter was before Mativo J., (as he then was) on 8th October, 2020 and the learned Judge directed that this matter be transferred together with HCCOMM Misc No. 445 of 2013. That since then, he has been pursuing HCCOMM Misc No. 445 of 2013, which is the lead file and raises many issues under the presumption that this matter is before the Court.
11. The respondents on the other hand submitted that this matter has been dormant for over 2 years. Further, that the ruling by Mativo J., (as he then was) is in respect to HCJR MiscNo. E048 of 2020 and it does not even mention this matter. I have perused the said ruling dated 8th October, 2020 and I agree with Counsel for the respondents that in the said ruling, the learned Judge transferred HCJR Misc No. E048 of 2020 to the High Court Commercial Division. The said ruling did not address and/or refer to the suit herein.
12. Based on the foregoing, I am not satisfied by the applicant's explanation of why the suit herein has never been prosecuted since 8th October, 2020 when it was filed. Additionally, from the applicant's submissions made before me on 3rd May, 2023, he stated that this matter was concluded on 27th January, 2023 thus leading to the inescapable conclusion that he has no interest in prosecuting this matter.
13. Accordingly, for the reasons explained here before, the suit herein is dismissed for want of prosecution. Costs are awarded to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mechack Ochieng - applicant appearing in person

No appearance for the respondents

Ms B. Wokabi – Court Assistant.

