



**Kavere & another v Atho & another (Civil Suit 1 of 2018)
[2023] KEHC 20917 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL SUIT 1 OF 2018
RB NGETICH, J
JULY 27, 2023**

BETWEEN

ELIZABETH KAVERE 1ST PLAINTIFF

TERESA GIMISI 2ND PLAINTIFF

AND

LILIAN AWUOR ATHO 1ST DEFENDANT

REAL TIME COMPANY LIMITED 2ND DEFENDANT

RULING

1. This is a ruling on notice of motion dated May 10, 2022 brought by the 1st defendant, seeking to dismiss this suit for want of prosecution and costs of the suit to be paid to the defendants. Grounds on the face of the application are that the plaintiff instituted this suit against the defendants on April 3, 2018. That they obtained an irregular judgement in default that was successfully set aside and defendants granted leave to defend the suit and defence under protest dated October 5, 2020.
2. In the ruling delivered on the September 29, 2020, the court directed the plaintiff to set this matter down for hearing but it has been more than 12 months since the decision was rendered and the plaintiffs have not taken any steps to prosecute the suit and the suit has therefore abated at the behest of the plaintiff who seems to have lost interest in the matter and the suit should therefore be dismissed with costs to the defendants.
3. The application is supported by affidavit sworn by Neddie Eve Akello on May 4, 2022. The defendant aver that the plaintiff instituted this suit against the 1st defendant on April 23, 2018 and the 1st defendant filed statement of defence on April 27, 2020. By ruling delivered on September 29, 2020 on the 1st defendants application dated March 6, 2020 the court granted unconditional leave to the 1st defendant to file and serve the plaintiffs with the statement of defence within 7 days and the matter be set down for hearing within 20 days.



4. The 1st defendant avers that more than twelve months have lapsed and the plaintiffs have not taken any steps to set this matter down for hearing and urged this court to dismiss this suit with costs to the defendants.
5. In response, the plaintiffs filed a replying affidavit sworn by the 1st plaintiff on the August 4, 2022 with the authority and consent of the 2nd plaintiff/ respondent.
6. The 1st respondent aver that vide the ruling delivered on September 29, 2020, the court directed the 1st defendant to file defence within 7 days which was to be filed on or before October 6, 2020 and in lieu of service and compliance with the court's directions, the respondents advocates tried to take a mention date for directions but were advised to wait for official communications from the court as Honourable Justice Edward Murithii had been transferred from Kabarnet High Court station. Further, on inquiry sometimes in May, 2021 their advocates were advised that Justice Bwonwonga from Kapenguria High Court was also handling Kabarnet High Court matters on rotational basis and that they would be advised as to when civil matters filed in 2018 would be allocated dates.
7. The plaintiffs further aver that the 1st defendant has no locus to file the instant application for reason of non-compliance with court orders and the application should be dismissed for that reason; further that the matter has been given several mention dates with intention of fixing hearing dates but no hearing date has been given because the court had no sitting judge for quite some time.
8. The plaintiff further states that this matter was to be mentioned in court on May 17, 2022 before Honourable Korir for directions but unfortunately there were issues with the internet; that delay in prosecuting this matter is inadvertent and is majorly as a result of the court's lack of a sitting judge, a reason beyond the plaintiffs' control; that the advocates on record have taken all steps to set down the suit for hearing and have not in any way dragged and/or delayed the matter and are desirous of prosecuting this case to its logical conclusion and therefore maintain that in the interest of justice the suit ought not to be dismissed.
9. The plaintiff aver that the application is an abuse of the court process and is designed to obstruct justice and the 1st defendant has not demonstrated to this honourable court how the alleged delay will prejudice her.
10. The plaintiff's further aver that the 1st defendant's application is bad in law as the affidavit in support of the application is sworn by the advocate of the 1st defendant who is neither a party to the suit nor has any interests in the said suit; that the application is therefore a malicious scheme by the applicant to deny the plaintiffs justice and urged this court to dismiss the application with costs to the plaintiffs.
11. The application was canvassed by way of written submissions. The plaintiffs filed submissions dated May 29, 2023 but the defendants failed to file submissions.

Plaintiff's Submissions

12. The plaintiff submitted that this suit was filed in the year 2018 and the defendants have been guilty of laches in defending the suit against them and as the record show the plaintiff requested for judgment in default of defence, the case proceeded for formal proof formal proof and judgment was delivered on October 2, 2018, allowing the liquidated claim of Kshs 25,537, 900/=.
13. The plaintiff submitted that the judgment was set aside following defendant's application as captured in averments above. The plaintiff restated averments in response to application and submitted that the plaintiffs did not occasion delay intentionally as the High Court in Kabarnet failed to proceed with the matter because the court station did not have a sitting judge.



14. The plaintiff referred to the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another* [2014] eKLR where the court held that for an applicant to be successful, he/she must satisfy the one-year threshold. He must also show that there was an inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved.
15. That considering that the defendants have never filed and served any defence despite being given leave by the honourable court, it safe to presume that the defendants have never been interested to defend the matter. That additionally, flowing from the conduct of the applicants, the record would show that from the time the matter was filed, they failed to put in a defence until the court entered judgment and after the judgement was set aside in the interest of justice, the applicant's failed to put in a defence, they are violating court processes.
16. The plaintiff further relied on the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR where the Court of Appeal held that:-

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”.
17. The plaintiffs submits that the defendants will not suffer any harm that cannot be remedied by damages. On the issue of costs, they seek that costs of the application to abide by the outcome of the application.

Analysis and Determination

18. I have carefully considered the pleadings filed and submissions made by the plaintiffs. What I wish to consider is whether delay in prosecuting this case has been sufficiently explained.
19. Order 17 rule 2 of the *Civil Procedure Rules* provides for dismissal of a suit for want of prosecution as follows:

“2.

 - (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.”
20. The decision in the case of *Ivita v Kyumbu* [1984] KLR 441 which has been referred to by the plaintiffs in their submissions set out the test to be applied by the courts in an application for the dismissal of



a suit for want of prosecution being whether the delay is prolonged and inexcusable, and, secondly if the delay is excusable and whether justice can still be done to the parties despite the delay.

21. Record show that before the filing of the 1st defendants' application on May 10, 2022, directions were given on March 15, 2022 when the matter came up for mention before the Deputy Registrar Honourable V. O Amboko in the absence of both parties and the court directed that the matter be mentioned on the May 17, 2022 before the judge with notice to issue to both parties.
22. On the May 17, 2022 when the matter came up virtually for directions before Honourable Justice W. Korir, the proceedings did not take off as the system was down. The matter had not therefore remained pending for one year before the application for dismissal was filed as provided under order 17 rule 2 of the Civil Procedure Rules.
23. I also note from annexures by plaintiffs that there were attempts to set the matter herein for hearing, and that hearing dates were taken. I take judicial notice of the fact that after transfer of Justice Muriithi, there was no sitting judge in Kabarnet High court but the court was served by visiting judge from Kapenguria and later Nakuru. This could have contributed to difficulty in allocation of dates or progress in prosecution of this matter.
24. In view of the above I find that delay in prosecuting this matter has been sufficiently explained and is excusable.
25. Final orders
 1. Notice of motion dated May 10, 2022 is hereby dismissed.
 2. No orders as to costs.
 3. This matter be fixed for hearing on priority basis.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET
THIS 27TH DAY OF JULY 2023.**

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Mr. Tirop holding brief for Hillary Kiplagat for Plaintiff/Respondent.

