



REPUBLIC OF KENYA



**KENYA LAW**  
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**Molyn Credit Limited v Mutua (Commercial Appeal E041 of 2023)  
[2023] KEHC 21848 (KLR) (Commercial and Tax) (31 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21848 (KLR)

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

**COMMERCIAL APPEAL E041 OF 2023**

**DAS MAJANJA, J**

**AUGUST 31, 2023**

**BETWEEN**

**MOLYN CREDIT LIMITED ..... APPELLANT**

**AND**

**JOYCE MBEKE MUTUA ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. S.N. Muchungi, SRM dated 17th February 2023 at the Magistrates Court at Nairobi in Civil Case No. 2504 of 2017)*

**JUDGMENT**

**Introduction and Background**

1. On 17.02.2023, the subordinate court dismissed the Appellant's suit against the Respondent for want of prosecution ("the Ruling"). The Appellant is aggrieved with the Ruling and has appealed to the court through its Memorandum of Appeal dated 02.03.2023 where it seeks to set aside the Ruling.
2. From the record, the Appellant filed suit on 10.04.2017 claiming that the Respondent among others had guaranteed a loan facility of Kshs. 225,000.00 taken up by the 1<sup>st</sup> defendant in the suit from the Appellant. The Appellant claimed that the 1<sup>st</sup> defendant had since defaulted in repaying the loan leading to an accumulated debt of Kshs.2,520,139.00 which it now sought from the Respondent and the other defendants.
3. When the suit was filed, the record indicates that the Respondent entered appearance and filed a statement of defence on 11.05.2017. By an application dated 26.08.2022, the Respondent sought to dismiss the suit against her for want of prosecution based on the ground that the matter was last in court in September 2020 and that the Appellant had never taken any action for over a year. In its response, the Appellant admitted that indeed the matter was last in court on 29.09.2020 for a pre-trial mention



but that the Respondent's advocates were absent and the subordinate court directed the Appellant to fix another mention date and serve the defendants. That the Appellant was also directed to follow up on the request for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants and ensure that the interlocutory judgment was entered. The Appellant deponed that in as much as it believed that one of its officers had taken action as directed, the said officer left employment in May 2022 and that this matter was amongst the files he handed over with an incomplete task and that the matter did not come to the Appellant's attention until when served with the Respondent's application.

4. The Appellant stated that it had a good case against the Respondent and the other defendants and that it was desirous of prosecuting the matter. It stated that it would suffer irreparable harm and expose it to huge financial losses if the suit was dismissed and that from the nature of the reliefs sought in its plaint, the Respondent and the defendants therein did not stand to suffer any prejudice or loss which cannot be compensated by a reasonable award of costs. The Appellant urged that the error on the part of its officer should not be visited upon it.
5. In the Ruling, the Subordinate Court noted that when the parties first appeared in court for pretrial conference on 22.05.2018, the Appellant sought 30 days to request for judgment against the 1<sup>st</sup> and 2<sup>nd</sup> defendants but never did. It made the same request on 09.04.2019 and 29.09.2020 and the court granted it indulgence. The Subordinate Court noted that the Appellant never took further action until the Respondent filed her application. It further noted that the suit has been in court for a period of over 5 years which in the subordinate court's view was inordinate in the circumstances. It noted that a litigant is obligated follow up its case and know its progress which had not been the case with the Appellant who seemed to have lost interest in prosecuting the matter. That the delay occasioned is prejudicial to the Respondent and thus, the Subordinate Court allowed the application and dismissed the suit against the Respondent.
6. The Appellant now appeals against the Ruling. This appeal has been canvassed by way of written submissions which I have considered in the analysis and determination below.

### **Analysis and Determination**

7. This is an appeal against the discretion exercised by the Subordinate Court dismissing the suit for want of prosecution. In an appeal against the exercise of discretion, this court will not intervene merely because it would come to a different conclusion to that of the lower court. Madan JA., expressed this position in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA 898:

The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.

8. Even though the Appellant raises 7 grounds of appeal in its Memorandum of Appeal, it has condensed the same into three issues which I shall deal with accordingly; whether the Appellant's reasons of failure/delay in prosecuting the case were sufficient, whether the Appellant's right to a fair trial has been extinguished and whether the failure/delay in prosecuting the case prejudiced the Respondent. In the end, the court is being called to determine whether the subordinate court erred in dismissing the Appellant's suit against the Respondent for want of prosecution.



9. An application seeking dismissal of a suit for want of prosecution is grounded under order 17 rule 2(3) of the Civil Procedure Rules as follows:

2. Notice to show cause why suit should not be dismissed [order 17, rule 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.
- (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.

10. From the above provision, it can be deduced that a court has discretion to dismiss a suit for want of prosecution. The Court of Appeal in Moses Muriira Maingi & 2 others v Maingi Kamuru & another NYR CA Civil Appeal No. 151 of 2010 [2013] eKLR adopted and endorsed the test for dismissing a matter for want of prosecution as set out by Chesoni J.,(as he was then) in Ivita v Kyumbu [1984] KLR 441 as follows:

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 the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. [Emphasis mine]

11. It is common ground that for almost two years, that is between September 2020 and August 2022, the Appellant did not take any steps to prosecute the suit. It is also not disputed that on various occasions, the Appellant failed to comply with the directions given by the trial court despite being granted indulgence. The Appellant's excuse was that it was one of its officers who failed to complete the tasks assigned to him that occasioned the delay and that this error should not be visited upon it.
12. Applying the principles outlined above to this matter, I fail to find any misapprehension or misapplication of discretion by the trial court in dismissing the suit against the Respondent for want of prosecution. The Appellant's excuse for the delay demonstrates laxity and lack of seriousness in



prosecuting its case particularly where it contends that it would suffer significant loss if the suit is not reinstated. It is expected that the Appellant would put in place mechanisms to ensure that its employees follow on its cases and ensure continuity of its affairs even when employees exit employment. Even assuming that the employee left the Appellant's employment without completing his assigned tasks, no reason is given as to why the said employee never took any steps within the two years to follow up the case while still employed to the Appellant and in the face of court orders directing it to take certain action.

13. I agree that based on the nature of the case facing the Respondent, a delay in prosecuting the case is prejudicial to her as the amount claimed by the Appellant continues to accumulate monthly interest and penalties to the Respondent's detriment. No justice will be served if the trial court is to find the Respondent liable for interest and penalties accrued as a result of the Appellant's inordinate delay and inaction in prosecuting the suit.

### **Disposition**

14. Ultimately I find that the Subordinate Court took into account all the relevant facts in coming to the decision to dismiss the suit for want of prosecution. This appeal is accordingly dismissed. The appellant shall pay the respondent's costs assessed at Kshs. 30,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF AUGUST 2023.**

**D. S. MAJANJA**

### **JUDGE**

Court Assistant: Mr M. Onyango.

Mr Githinji instructed by Mugo Githinji and Company Advocates for the Appellant

Mr Okello instructed by Ulando Udoto and Okello Advocates for the Respondent.

Mr Okello instructed by Ulando Udoto and Okello Advocates for the Respondent.

