



**Kaindi v Kenya Breweries Limited & another (Civil Case 1164 of 1996)
[2023] KEHC 21881 (KLR) (Civ) (17 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 1164 OF 1996

AN ONGERI, J

AUGUST 17, 2023

BETWEEN

FRANCIS M KAINDI PLAINTIFF

AND

KENYA BREWERIES LIMITED 1ST DEFENDANT

BARCLAYS BANK OF KENYA LIMITED 2ND DEFENDANT

RULING

1. The application coming for consideration in this ruling is the 1st defendant's notice of motion dated January 31, 2022 brought under order 17 rule 2(5) and (6) of the [Civil Procedure Rules, 2010](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#) cap 21 Laws of Kenya.
2. The 1st defendant/applicant is seeking for dismissal of the plaintiff's suit for want of prosecution with costs to the 1st defendant.
3. The application is based on the grounds on the face of it and supported by the affidavit of Dorcas Kirarei, the legal operations manager of the 1st defendant/applicant in which it is deposed as follows;
That the plaintiff filed the suit *vide* its plaint dated May 14, 1996 which was amended on March 14, 2002. The defendant filed its defense on June 17, 1996 and amended on October 14, 1999 and re-amended on May 28, 2002.

The matter last came up in court on February 27, 2018 when parties were directed to take fresh hearing dates at the registry. Subsequently on February 3, 2020, the parties attended the court registry and fixed the matter by consent for hearing on June 10, 2020, on which day the matter did not proceed due to the Covid pandemic. The plaintiff has not taken any steps to prosecute the matter since a year and a half ago when it was last fixed for hearing. The delay in prosecuting the suit is inordinate and



inexcusable and the continued pendency of the suit has been prejudicial to the first defendant in terms of time and costs.

4. The 2nd defendant stated that they supported the application and they did not wish to file any submissions.
5. The plaintiff filed a replying affidavit to the application dated January 31, 2022 in which they stated as follows;

That the firm on record had been unable to trace the respondent/plaintiff until recently and being an old matter, it is fit that the plaintiff be allowed to ventilate his case.

6. The 1st defendant and plaintiff submitted as follows;

Applicant's submissions

The defendant/applicant submitted that under order 17 rule 2 (3) of the Civil Procedure Rules, allows party to suit to apply for dismissal if no application has been made or step taken by either party for one year. Order 17 rule 2 (5) further provides that the suit stands dismissed by operation of law if two years lapse without any action taken to prosecute the matter yet no steps had been taken by the plaintiff since February 3, 2020. They urged the court to allow the application since the plaintiff has not taken any steps to prosecute the suit in a period exceeding one and a half years.

Respondent's submissions

The respondent submits that the plaintiff is 81 years old, prone to sickness and forgetfulness, who has been unreachable by phone for a while but is not ready to proceed with the suit to its finality. The matter had been partly heard before Justice Waweru, making it an adjourned suit and the proceedings took a very long time to be typed. The delay was also occasioned by the Covid-19 pandemic which slowed down court processes and it was not deliberate on the part of the plaintiff's counsel. The respondents urged the court to dismiss the application so that the plaintiff would have his day in court.

7. The sole issue for determination is whether the plaintiff's suit should be dismissed for want of prosecution.
8. This case was filed in court on May 14, 1996. The plaintiff on March 14, 2002.
9. I find that the plaintiff/respondent in this case is a senior citizen who got caught up with the perennial backlog experienced by the courts.
10. I have perused the file- and I find that the nature of the claim and the fact that case is partly heard entitles the plaintiff to be granted an opportunity to be heard.
11. The defendants had an option of listing the case for hearing but they opted to seek dismissal of the same.
12. The court has a discretion to grant the plaintiff/respondent one opportunity to prosecute his case.



13. In the case of *FM v EKW* (2019) eKLR relied on and cited the case of *Kenya Pipeline Company Limited v Mafuta Products Limited* (2014) eKLR) and that of *Shah v Mbugo* (1967) EA. 166 the court held as follows;

.... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit.”

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
17TH DAY OF AUGUST, 2023.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

