



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Kamau & another (Civil Suit 100 of 2020)
[2023] KEHC 27084 (KLR) (Civ) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27084 (KLR)

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

**CIVIL
CIVIL SUIT 100 OF 2020**

**CW MEOLI, J
DECEMBER 20, 2023**

BETWEEN

PETER NJOROGE KAMAU PLAINTIFF

AND

MBURU NJOROGE KAMAU 1ST DEFENDANT

PETER MACHARIA MWANGI 2ND DEFENDANT

RULING

1. Mburu Njoroge Kamau and Peter Macharia Mwangi (hereafter the 1st and 2nd Applicants respectively) being the 1st and 2nd Defendants herein, brought the Notice of Motion (the Motion) dated 10th November 2021 seeking the dismissal of the suit for want of prosecution, and further seeking costs of both the suit and the Motion.
2. The Motion is expressed to be brought under Order 17, Rule 2 (1) & (3), and Order 51 Rule 1 of the *Civil Procedure Rules* (CPR); and Section 3A of the *Civil Procedure Act* (CPA), and is anchored on the grounds thereon and the depositions in the affidavit of advocate Lydia Mwangi, a Legal Officer working for CIC Insurance Group Limited, the insurer of the Applicants.
3. The deponent averred that since the suit was last in court on 29th October 2020 Peter Njoroge Kamau (hereafter the Respondent) has not taken any active steps towards prosecuting it, a clear indication of his disinterest in the matter and a proper ground for dismissal thereof.
4. By way of a replying affidavit sworn on 11th May, 2022 the Respondent deposed that contrary to the averments made in support of the Motion, the matter was scheduled for mention on 18th January, 2022 but that on the said date, the Honourable Judges and Deputy Registrars were away, attending the High Court Leaders Conference. The Respondent further deposed that initially, he had filed the present



suit before the Chief Magistrate’s Court at Milimani Commercial Courts as CMCC No. 6007 of 2017 but later in October 2020 obtained an order for the transfer of the suit to the High Court. Hence, the delay in the matter was largely caused by the difficulties experienced by the Respondent’s advocate in effecting the transfer, and the Respondent is keen on prosecuting the suit to its conclusion.

5. In rejoinder, Lydia Mwangi swore a supplementary affidavit on 30th May, 2022 essentially reiterating the contents of her earlier affidavit and terming the reply an afterthought and a mechanism intended to obstruct the course of justice. The deponent also stated that in any case, the Respondent has not made any efforts at complying with the court order made on 19th June, 2020 granting leave for him to amend his pleadings accordingly and hence the suit was not ready for hearing.
6. The Motion was canvassed by way of written submissions. The Applicants’ advocate anchored his submissions on Order 17, Rule 2(1) and (3) of the [CPR](#) as well as the decisions in [George Gatere Kibata v George Kuria & another](#) [2017] eKLR and [Ivita v Kyumbu](#) (1984) KLR 441 on the guiding principles for consideration in applications seeking the dismissal of suits for want of prosecution. Counsel submitted that the Respondent has not demonstrated any due diligence in prosecuting his suit and that he has further failed to tender any sufficient and/or compelling evidence to explain the prolonged delay in the matter. That in the premises, it would be unfair for the Applicants to continue being hamstrung in a clearly dormant suit. On those grounds, the court was urged to allow the Motion as prayed.
7. Counsel for the Respondent termed the Motion premature and misconceived. He urged the court to consider the test, applied in the above-cited [Ivita v Kyumbu](#) (1984) KLR 441 as well as in [Mwangi S. Kimenyi v Attorney General & another](#) [2014] eKLR and [Moses Otsyula v Children of God Relief Institute](#) [2015] eKLR and upon doing so, to exercise its discretion in favour of the Respondent. Counsel added that in the circumstances herein, the Applicants do not stand to be prejudiced if the Respondent is allowed to proceed with the suit, citing the case of [Naftali Opondo Onyango v National Bank of Kenya Ltd](#) [2005] eKLR. For the foregoing reasons, the Respondent’s counsel pleaded with the court to dismiss the Motion with costs.
8. The court has considered the instant Motion, rival affidavit material and competing submissions plus the authorities cited. The power of the court to dismiss a suit for want of prosecution is donated by Order 17, Rule 2(1) of the [CPR](#) which provides as follows:

“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.”
9. Further, Order 17, Rule 2(3) expresses thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”
10. Whether a court should exercise the said power of dismissal under Order 17 is a matter of discretion and which discretion ought to be exercised judicially. This position was reaffirmed by the court in [Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another](#) [2016] eKLR when it reasoned 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. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that: “The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

11. Regarding the question of delay, the court, having considered the rival assertions of the parties, observed that prior to the directions given on the instant Motion, the record does not give any clear indication as to the last time the matter was in court. Be that as it may, it is apparent from the record that the lower court file in CMCC No. 6007 of 2017 was received by the Civil Division of the High Court on 29th October, 2020 subsequent to transfer. Nonetheless, it is apparent that there was a delay of one (1) year between the time of said transfer and the filing of instant Motion. In the court’s view, such delay was not inordinate.
12. As to whether the delay is excusable, the court considered the explanation given by the Respondent that the delay was mostly occasioned by the time taken in effecting the transfer, whilst also noting the rival averments by the Applicants that the delay has not been sufficiently explained or demonstrated by way of evidence. The court also noted the Applicants’ argument regarding the Respondent’s non-compliance with directions earlier issued on 19th June, 2020 requiring him to amend his pleadings and to comply with pre-trial directions in line with the [CPA](#).
13. Upon its perusal of the record, the court did not come across any credible material to support the averment that the Respondent’s advocates experienced delays/challenges in effecting the transfer of the lower court file to the High Court. Similarly, the court did not come across any support for the averments made by the Applicants regarding issuance of pre-trial directions and non-compliance of the same.
14. In view of all the foregoing, the court is of the view that no reasonable explanation has been given for the delay in the suit since its transfer to the High Court. Nevertheless, the court must address its mind to yet another pertinent principle, namely, whether justice can still be done notwithstanding the delay. The court, while noting that there has been no compliance by the Respondent with Order 11 of the [CPR](#) was not shown how the Applicants stand to be prejudiced if the Respondent is granted an opportunity to prosecute his suit. In that regard, the court is alive to the Respondent’s right to be heard and which right ought not to be impeded as a matter of general principle, unless special circumstances have been shown to warrant an impediment. On those grounds, the court finds that the interest of justice lies in granting the Respondent an opportunity to prosecute his claim.
15. That said, the court is obligated in furthering the overriding objective to make appropriate orders aimed at the expeditious disposal of the suit. The parties and counsel are equally duty bound to cooperate with the court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with section 1A and 1B of the [Civil Procedure Act](#). In *Karuturi Networks Ltd & Anor. v. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09 the Court of Appeal had this to say concerning the application of the overriding objective in Section 1A and 1B of the [Civil Procedure Act](#)

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to



attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court”.

16. In the end therefore, the Notice of Motion dated 10th November 2021 is hereby dismissed. However, an attendant order is hereby made, requiring the Plaintiff/Respondent to prosecute his suit by end of April 2024 failing which his suit shall stand automatically dismissed, for want of prosecution with costs to the Applicants. In the circumstances, the costs of the motion are awarded to the Applicants in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Ms. Kiget h/b for Mr Arusei N/A

For the Respondent: N/A

C/A: Caro

