



REPUBLIC OF KENYA



**Wambugu & another v Housing Finance Limited (Civil Suit 168 of 2003)
[2022] KEHC 105 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 105 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 168 OF 2003
A MABEYA, J
FEBRUARY 18, 2022**

BETWEEN

JOHN WACIRA WAMBUGU 1ST PLAINTIFF

TROJAN SECRETARIES LIMITED 2ND PLAINTIFF

AND

HOUSING FINANCE LIMITED DEFENDANT

RULING

1. On 9/11/2020, the Court issued a Notice to Show Cause why this suit should not be dismissed for want of prosecution.
2. In response, the Plaintiffs filed a Replying Affidavit sworn on 23/09/2021 by the 1st Plaintiff. He explained that the court file had been misplaced in the court's registry and effort to locate it proved futile to an extent that the Deputy Registrar, on two occasions, wrote to them advising that they make an application for reconstruction of the file. However, before the reconstruction they managed to locate it and filed an application dated 24/6/2020.
3. He averred that the said application was first fixed for hearing on 17/9/2020 but the same has never proceeded to date due to no fault on their part. He put blame on among other things; the failure by the court registry to list the application for hearing on 17/9/2020, technological challenges on the part of their advocates on 9/11/2020 when the matter came up for mention for directions and covid-19 challenges which affected the operations in the court registry. Lastly, he stated that the Plaintiffs are still desirous of prosecuting this suit and urged the court not to dismiss the suit but to allow it to proceed to its logical conclusion in the interest of justice.



4. Dismissal of suits for want of prosecution is governed by Order 17 Rule 2(1) of the Civil Procedure Rules 2010 which provides that: -

“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.”
5. Determining whether or not to dismiss a suit which has been inactive for a period exceeding one year is however a matter of court’s discretion which must be exercised judiciously. In Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR, the court observed that: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita -vs- Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”
6. In *Ivita v Kyumbu* [1984] KLR 441, Chesoni J held: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay ... 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.”
7. In Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR, it was held that: -

“However, in deciding whether or not to dismiss a suit under rule 6, it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”
8. From the foregoing, it is clear that the court must consider the reasons advanced for the delay or failure to prosecute the suit and whether the same are excusable and/or reasonable. It is also clear that the court should not be quick to dismiss a suit for want of prosecution where the suit can proceed without further delay and if the Defendant will not suffer hardship as a result thereof.
9. In the present case, the record reveals that there were negotiations between the parties and the matter was stood over generally sometime in 2011 to give parties time to finalize the same. The Plaintiffs have annexed a letter dated 8/5/2013 from the Deputy Registrar informing their advocates to apply for reconstruction of the file as it could not be traced.
10. There is also on record a letter dated 9/1/2020 from the Plaintiffs’ advocates to the Deputy Registrar requesting yet again for assistance in tracing the court file. The Deputy Registrar responded to the same vide a letter dated 14/2/2020 advising that an application for reconstruction of the court file be made. It appears that the court file resurfaced soon after as the Plaintiffs filed the application dated 24/6/2020.



11. From the foregoing, it is clear that the constant disappearance of the court file has greatly contributed to the delay in prosecuting the present suit. The Plaintiffs have annexed proof and even the court record reveals that they made effort to trace the file in order to prosecute the matter.
12. Accordingly, I am satisfied that the Plaintiffs have shown cause that this suit should not be dismissed for want of prosecution. This being an old matter, the Plaintiffs are hereby directed to take the necessary steps to expedite the hearing of the matter.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

A. MABEYA, FCIArb

JUDGE

