



REPUBLIC OF KENYA



KENYA LAW
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**Ngobi v Kenya Ports Authority & another (Civil Suit
87 of 2013) [2022] KEHC 17042 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 17042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 87 OF 2013
MN MWANGI, J
JUNE 30, 2022**

BETWEEN

BOB THOMPSON DICKENS NGOBI PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

MAERSK LINE KENYA LIMITED 2ND DEFENDANT

RULING

1. The application before me is a notice of motion dated March 11, 2021 brought under order 17 rule 2(3), order 51 rule 1 of the *Civil Procedure Rules, 2010* and section 3A of the *Civil Procedure Act*. The 3rd defendant/applicant seeks the following orders-
 - i. That the plaintiff's suit herein be dismissed for want of prosecution; and
 - ii. That this honourable court be pleased to grant the 3rd defendant the costs of the suit this application (sic).
2. The application is premised on the grounds on the face of it and the affidavit sworn on March 11, 2021 by Andambi Chabala Victor, learned counsel for the 3rd defendant. He averred that the plaintiff moved this court through an amended plaint and application dated March 3, 2014. That the 3rd defendant replied to the said amended plaint by way of a statement of defence dated March 23, 2014 and subsequently, the 1st and 3rd defendants filed preliminary objections dated April 25, 2014 and August 4, 2014, respectively.
3. He deposed that thereafter, the 2nd defendant filed a chamber summons application dated April 22, 2014 seeking to have the instant suit dismissed for failure to establish a cause of action against it, and that the plaintiff through his duly authorized advocates challenged the same through a replying affidavit dated December 18, 2015.



3. The deponent averred that the last step/action in this instant suit was the delivery of judgment by Justice P.J Otieno on December 22, 2017, wherein, the 3rd defendant's preliminary objection was dismissed with the court giving further orders that the main suit be fixed for a pre-trial conference on February 28, 2017. He further averred that from that date, there has been no effort by the plaintiff and/or his duly appointed advocate on record, aimed towards progressing the instant suit and/or having it slated for mention or hearing so that they can be accorded sufficient latitude to prosecute their case against the defendants.
4. The 3rd defendant's case is that the article 159(2)(b) enjoins this court to dispense with matters in a timely manner but the plaintiff has lost interest in the present suit since he has failed to prosecute the same or set it down for hearing for a period of almost four (4) years since its last engagement in court. It was stated that the said delay is inordinate, unreasonable, inexcusable and highly prejudicial to the republic because the 3rd defendant collects revenue on its behalf and it is in the interest of justice to dismiss the instant case with costs to the 3rd defendant.
5. The application herein was opposed through a replying affidavit sworn on November 8, 2021 by the plaintiff. He averred that he is a foreigner working for the United Nations and that from time to time, he is posted to work in different places all over the world, and the during the course of the proceedings herein, he has worked in Somalia for three years, in Sudan (Darfur) for three and a half years and in Afghanistan for three years. He stated that his current posting is in Eritrea where he has been for the last one year and that he has never lost interest in pursuing this suit.
6. The plaintiff averred that sometime in October, 2018 he was informed by his advocate that there was a ruling on a preliminary objection that was pending at the time, and that he was surprised by the inordinate delay in the delivery of the ruling as submissions on the ruling had been filed way back in 2015. He deposed that through an acquaintance, he learnt that the ruling in the suit had been delivered in February, 2018 but his advocate on record was not aware of the same.
7. The plaintiff averred that he agreed with his advocate that the suit herein would be set down for hearing as directed by the court. He further averred that sometime in the year 2019, he called his former advocate through a whatsapp call and he was informed that there were no dates available for hearing, and that dates would be fixed upon receiving notification from the court when the diary for the year 2020 would be opened. He stated that in August 2020, nothing much happened, since the corona virus pandemic had led to lockdowns, and as such, no much activity was going on in the courts he stated that because of travel restrictions, it was not possible to attend court in Kenya.
8. The plaintiff deposed that on October 7, 2021, he received a letter from his former advocate accompanied with a hearing notice informing him that the instant application was coming up for hearing. That his former advocate also threatened to cease acting if instructions were not given to him. The plaintiff further deposed that he did not understand the instructions his former advocate wanted but he replied that he would come (to Kenya) on October 27, 2021.
9. The plaintiff averred that on October 28, 2021, he terminated the services of his former advocate after he visited his advocate's chambers on October 27, 2021 and established that they did not have a copy of the application dated March 3, 2021 and a copy of the letter sent to him via email in June 2021.
10. In concluding, the plaintiff averred that he relied on the advice and directions of his former advocates on record, and it is unfortunate that there were serious lapses on the part of the advocate in handling of the matter. The plaintiff expressed interest to progress the case herein since the container that transported his goods was lost and his vehicle was still being detained by the 3rd defendant on account of claims by the 2nd defendant.



Analysis And Determination

11. The application was canvassed by way of written submissions. The 3rd defendant's submissions were filed on January 24, 2022, by the law firm of Andambi Chabala & Company Advocates, while the plaintiff's submissions were filed on January 20, 2022 by the law firm of Macharia Burugu & Co Advocates.
12. Mr Chabala, learned counsel for the 3rd defendant submitted that a four-year delay was inordinate and inexcusable under the circumstances, since the plaintiff had never bothered to set down the suit for hearing and he never appeared to the pre-trial conference on February 28, 2021.
13. He also averred that there was no explanation given for the inaction and there was no evidence that the plaintiff took action as the owner of the suit and changed his advocate. Mr Chabala stated that it is noteworthy that this court had been notified of the change of advocate through a replying affidavit contrary to order 9 rule 9 of the [Civil Procedure Rules](#)
14. He submitted that while acknowledging that mistakes of counsel should not be visited their clients, parties have a responsibility to show interest in and follow up on their cases even when they are represented by counsel. To buttress his submission, he cited the Court of Appeal decision in [Habo Agencies Limited v Wilfred Odhiambo Musingo](#) [2015] eKLR, where the court held that parties have the responsibility to show interest in and follow up on their cases even when they are represented by counsel.
15. Mr Macharia, learned counsel for the plaintiff cited the case of [Ivita v Kymbu](#) [1984] KLR 441, where the court held that even if delay is prolonged but 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.
16. He further submitted that justice could still be done without prejudice against the defendants, delay notwithstanding. Further, that the 3rd defendant had not demonstrated that it would suffer prejudice if the application was not granted and if the suit was steered on a course for expeditious disposal under strict directions of the court.
17. The application herein is premised on order 17 rule 2(3) of the [Civil Procedure Rules](#). Order 17 rule 2 of the said rules provides as follows-
 - “2. In any suit in which no application has been made or step taken by either
 - (1) 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.”
18. It is evident that the statutory threshold set out under order 17 rule 2 of the [Civil Procedure Rules](#) is that a suit qualifies to be dismissed for want of prosecution; if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.



19. It is settled by courts that the power to dismiss a suit for want of prosecution lies at the discretion of the court. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat and others & another* [2016] eKLR, the court stated as follows:

“11. 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 Kyumbu* [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.”

20. In *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, it was noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows-

“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.”

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.” (emphasis added).

21. A perusal of the proceedings and file herein discloses the history of this matter as follows: The court delivered a ruling on two preliminary objections by the 1st and 3rd defendants on December 22, 2017 and directed the matter to be mentioned on February 28, 2018 for case conference. All parties were granted leave to file any document or witness statements within 30 days. Since December 22, 2017, there has never been any step made in the file until the filing of the instant application by the 3rd defendant on May 28, 2021. Order 17 rule 2 of the *Civil Procedure Rules* provides that a matter should have been pending for twelve months, with no action or step having been made before the court, either on its own motion or on the application by a party, makes an order for its dismissal for want of prosecution.
22. The plaintiff in his defence blames the covid -19 pandemic and mistakes of his former advocate for the failure to set down the instant suit for hearing. It is noteworthy that the one year from the last action/step on the court file lapsed on December 21, 2018, even before the covid -19 pandemic affected court operations and before travel restrictions were put in place. The court is therefore not persuaded that the covid -19 pandemic impeded on the ability of the plaintiff to take any action/step towards fixing the instant suit for hearing.



23. On the issue of mistakes of the plaintiff's former counsel on record, the plaintiff only annexed one email he wrote to his former advocate on October 17, 2018, which was even before elapse of the statutory 12 months from the last action/step taken in the instant suit. It is my finding that the plaintiff's allegations on mistakes on the part of his former advocate on record are not plausible as the same have not been backed by any evidence.

24. The Court of Appeal in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR considered the duty that advocates owe to the court and stated thus:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (See. *Halsbury's Laws of England*, 4th Edn, Vol 44 at p 100-101) and also *Re Jones* [1870], 6 Ch App 497 in which Lord Hatherley communicated the court's expectations this way:

“... I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...”

25. On whether any prejudice would be occasioned to the 3rd defendant, the said defendant never made any submissions on the same. The plaintiff on the other hand stated that delay notwithstanding, the suit ought not to be dismissed since the 3rd defendant had not demonstrated what prejudice it would suffer was to be steered on a course for expeditious disposal under strict directions of the court.

26. Courts have held that in an application for dismissal, such as the one before this court, an applicant is expected to demonstrate, in specific terms the prejudice he, she or it stands to suffer. In *John Harun Mwau v Standard Limited & 2 others* [2017] eKLR, it was observed as follows-

“But, the appellant's complaint was that in arriving at this conclusion, the learned judge failed to consider whether indeed the respondents had suffered prejudice, as no evidence was tendered to support the findings that the respondents' witnesses had suffered a memory loss or ill health.

The case of *Ngwambu Ivita v Akton Mutua Kyumbu* (supra) makes it clear that:

“The defendant must however satisfy the court that he 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.”

While it is true that the learned judge appreciated the respondents' assertion that the nature of the suit required that it be promptly prosecuted when the evidence was fresh and the witnesses were available and able to clearly recollect the facts of the case, this conclusion was reached without the benefit of any evidence in support. Nothing was shown by the respondents to demonstrate what prejudice they suffered due to unavailability of witnesses, or that due to the prolonged delay, a key witness had suffered memory loss or did not have a clear recollection of the events leading to the suit. Without evidence to show that the prolonged delay was prejudicial to the respondents' case, such that a fair trial was thereby



rendered impossible, we are not persuaded that the two requisite tests for dismissal were sufficiently fulfilled. We are also cognizant that justice is better served by having matters determined on their merits, unless delay and inaction has resulted in intolerable prejudice.

In view of the above, we are not satisfied that the learned judge took into account all the pertinent matters in dismissing the appellant's suit for want of prosecution. We therefore allow the appeal."

27. It is my view that the delay of two years in prosecuting this matter was inordinate and unreasonable. The 3rd defendant has however not demonstrated the prejudice it will suffer if the plaintiff is allowed to prosecute his case. I am satisfied that if the hearing of the suit herein can proceed without further delay, the 3rd defendant will suffer no hardship since none has been demonstrated apart from the allegation that it is collecting taxes on behalf of the Republic.
28. In the interest of justice, and having the responsibility to ensure that litigants are given ample opportunity to be heard, it is my finding that in the circumstances hereof, no prejudice will befall the 3rd defendant which cannot be remedied by an award of costs. To the contrary, it is the plaintiff who would be greatly prejudiced by being driven from the seat of justice without a hearing, if the suit is to be dismissed.
29. The application dated March 11, 2021 is dismissed. Due to the delay on the part of the plaintiff in taking action to prosecute his case, I hereby order him to pay the costs of this application in the sum of Kshs 20,000/= to the 3rd defendant within 30 days.
30. I hereby direct that this case be fixed for hearing or be settled within 30 days from today, failing which, the orders herein will be automatically vacated.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 30TH DAY OF JUNE, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Mutune h/b for Mr. Khagram for the 2nd defendant

Mr. Macharia for the plaintiff

No appearance for the 3rd defendant.

