



**Bomet Teachers Training College Ltd v Bank of Africa (Kenya) Ltd & another  
(Civil Case 2 of 2015) [2022] KEHC 12446 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12446 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL CASE 2 OF 2015  
RL KORIR, J  
JULY 29, 2022**

**BETWEEN**

**BOMET TEACHERS TRAINING COLLEGE LTD ..... PLAINTIFF**

**AND**

**LEGACY AUCTIONEERING SERVICES ..... 1<sup>ST</sup> DEFENDANT**

**BANK OF AFRICA (KENYA) LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The applicants filed a Notice of Motion application dated March 12, 2020 which sought the following orders:
  - I. That this suit herein be dismissed for want of prosecution.
  - II. That the plaintiff be condemned to pay the costs of this application and the suit.
2. The application was brought under order 17 rule 2(1), (2), (3) and (4), order 51 rule 1 of the [Civil Procedure Rules](#).

**The applicants case.**

3. It was the applicants contention that the suit herein was filed in the year 2014 and that the matter was last in court in 2017. It was their further contention that it had been more than twelve months without any positive steps being taken by the plaintiff to finalize the case.
4. The applicants stated that the delay in prosecuting the matter was inordinate and manifestly excessive. That the plaintiff had lost interest in prosecuting the same.
5. There was no response to the application from the plaintiff/respondent. They also did not attend court when the application came up for hearing on July 25, 2022 despite service.



6. The sole issue for determination in this application is whether the plaintiff's suit should be dismissed for want of prosecution.

**Determination.**

7. Order 17 Rule 2 of the Civil Procedure Rules state that:-
  - (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”.
8. I have gone through the court record and I have noted that the applicants filed an affidavit of service dated July 22, 2022 sworn by Beryl Achieng- advocate. She deponed that on June 30, 2022, she served copies of the Notice of Change of Advocates and the present application together with its annexures to the office of M/S Gordon Ogolla, Kipkoech & Co Advocates who were on record for the plaintiff/respondent. I have also noted that the copies returned to this court bear the stamp of the aforementioned law firm indicating that they were received on June 30, 2022. I am therefore convinced that the present application was properly served upon the plaintiff/respondent.
9. This matter was filed under Certificate of Urgency on October 13, 2014. The ruling on the Notice of Motion dated October 13, 2014 was delivered on November 4, 2016. That was the last time this matter was in court. It was however revived by the applicants through the present application which was filed on March 13, 2020.
10. 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.
11. It is clear that the matter was inactive for a period of over 3 years. This delay has not been explained by the plaintiff/respondent. In the case of *Ivita Vs Kyumba* (1984) KLR 441 the court 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.”
12. It is my finding that the delay was inordinate and inexcusable and the pendency of this suit will prejudice the defendants/applicants. I am persuaded by the case of *Nilesh Premchand Mulji Shah &*



*Another t/a Ketan Emporium V M D Popat and Others and Another* (2016) eKLR, where Aburili J stated 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”.

13. The Notice of Motion dated March 12, 2020 succeeds. The suit is dismissed for want of prosecution with costs to the defendant.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JULY, 2022.**

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**R LAGAT-KORIR**

**JUDGE**

