



**Sheikh & 10 others v Shah & another (Commercial Case 39 of 2014)  
[2022] KEHC 12566 (KLR) (Commercial and Tax) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12566 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 39 OF 2014  
DO CHEPKWONY, J  
JULY 26, 2022**

**BETWEEN**

**AZHAR MOHAMMED SHEIKH & 10 OTHERS ..... PLAINTIFF**

**AND**

**VELJI NARSHI SHAH ..... 1<sup>ST</sup> DEFENDANT**

**RAJIN VELVI SHAH ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This matter is coming up for Ruling of the Defendants/Applicants' Notice of Motion application dated 21<sup>st</sup> September 2021 expressed in terms of Sections 1A, 1B and 3A all of the *Civil Procedure Act*, Order 17 Rules 2(1) & (3), Order 40 Rule 7 and Order 51 Rules 1, 3 and 4 all of the *Civil Procedure Rules* 2010, seeking for the following Orders that;
  - a. This suit be dismissed for want of prosecution.
  - b. In the alternative but without prejudice to prayer No. 1 above, this Honourable Court be pleased to set aside, vary and/or otherwise discharge the Orders issued by Hon. Lady Justice L. Gicheru on 20<sup>th</sup> August, 2013.
  - c. That the costs of Notice of Motion application, together with the costs of this suit be borne by the Plaintiffs.
2. The application is premised on the grounds on the face of the application and supported by the annexed Affidavit of Ronald Wakhisi Makokha. I will set out the grounded reasons for the orders to dismiss for want of prosecution as couched in the following manner;



- a. The Plaintiffs have not taken any steps to prosecute this suit herein since 15<sup>th</sup> January, 2020 when the Plaintiffs disclosed to the Court that they intend to file an application for leave to amend their documents before the next case management conference which was scheduled for 11<sup>th</sup> March, 2020.
  - b. It has now been more than eighteen (18) months since the matter was last in Court and the Plaintiffs have neglected and/or refused to take any steps to prosecute their case.
  - c. There has been inordinate, inexcusable and unjustifiable delay by the Plaintiffs in the prosecution of this suit.
  - d. The continued suit in this court without prosecution is highly prejudicial to the Defendants, thus the suit is ripe for dismissal.
  - e. The Plaintiffs have been enjoying the injunctive orders made in their favour by Hon. Lady Justice L. Gicheru on 20<sup>th</sup> August, 2013 without taking any further steps in advancing the prosecution of this suit, to the Defendants' prejudice.
  - f. The inordinate delay by the Plaintiffs is inexcusable. It is evident the Plaintiffs are no longer interested in prosecuting their case and have abandoned their suit.
  - g. It is in the interest of just and fairness that this Notice of Motion be granted as prayed.
3. The application is opposed by the Plaintiffs/Respondents *vide* a Replying Affidavit sworn by Azhar Mohamed Sheikh dated 2<sup>nd</sup> March 2022. The Plaintiff/Respondent deposed that;
- a. That the deponent of to the Affidavit in support of the application being an advocate is precluded by the *Advocates Practice Rules* from becoming a witness and swearing Affidavits on behalf of a client hence the Supporting Affidavit is incompetent and should be struck out.
  - b. That there is no justification for the Applicant as to why the 2 Defendants could not swear the Affidavit in support of the Application.
  - c. That there is no indication by the Deponent that he has be authorized to swear the Affidavit and the said authority cannot be assumed.
  - d. That it is true that the Defendant had previously filed an application but what the deponent failed to indicate was that the primary prayer was that the suit be deemed as having abated for failure to serve Summons to enter appearance.
  - e. That the Deponent also failed to disclose to the court that after the Application to dismiss the suit was dismissed, this matter was referred to Mediation but for a considerable period of time, the same could not take off as the Defendants were said to be out of the county due to specialized treatment.
  - f. That the parties appeared for the Mediation but however, they were unable to agree and the Mediator issued a report on 22<sup>nd</sup> July, 2019 confirming that the parties had been unable to agree.
  - g. That thereafter, the matter was fixed for 15<sup>th</sup> January, 2020 when after consultations with or advocates, we saw the need to amend the Plaint.
  - h. That before we could arrange for a physical meeting with our advocates, there was an onset of the Covid pandemic from March 2020 and lots of restrictive measures were taken which



inhibited a number of activities a number of them which had a negative effect on the progression of this matter.

- i. That I confirm that all the Plaintiffs numbering 12 are relatively advanced in age with the oldest being the 9<sup>th</sup> Defendant and 2<sup>nd</sup> Defendant respectively at 80 and 78 years of age and the youngest being me at 52 years.
- j. That arising out of old age, most of them are frail and sickly and due to the Covid requirements ranking them in the category of vulnerable individuals, it was quite difficult during the period to schedule a physical meeting and make resolutions on the substance of the amendments that were crucial.
- k. That it would be a travesty of justice for the suit involving such a number of people and touching on the nerve of their residence to be dismissed without a full trial.
- l. That I am advised by my advocates which I verify believe to be true that the prevailing Public Policy in the administration of Justice as anchored in the Constitution of Kenya and in the proclamations by the various courts is that courts should strive to determine issues on merits.
- m. That it is not correct that the matter was last in court on 11<sup>th</sup> March, 2020 as it was subsequently mentioned as the court record will show.
- n. That prior to fixing this matter for trial, it was imperative that the status of the company known as Pride Power Properties Ltd which is the registered owner of the grounds where the apartments the subject of this dispute are built to be regularized in the meantime prior to progression of this suit.
- o. That there is also necessity to replace or substitute Praful Jayantibai Patel the 5<sup>th</sup> Defendant who has since passed away.
- p. That one of the amendments proposed by the Advocate was the inclusion of the said company in the suit which proposal became thorny amongst the Plaintiffs necessitating consensus building amongst the Plaintiffs.
- q. That there is no prejudice that the Defendants will suffer if the matter herein is heard on merits in due course and if any prejudice on the delay has occurred, the same can be remedied by a modest amount of costs.
- r. That indeed, the Defendants on their part have made no effort to progress the matter including complying with Case Management requirements.
- s. That I am informed by my Advocates which I verify believe to be true that this Court under the provisions of Sections 1A & 1B of the Civil Procedure Act has the power to ensure that the overriding objective of the Act is achieved and this would best be achieved by hearing the matter on merits.
- t. That with the remission of the Covid situation and the easing of restrictions, I can confirm that the Plaintiffs are now ready to progress the matter and in this regard, have agreed to lodge the application for amendment of the Plaint once the present application is dispensed with.
- u. That I am also interested in having the matter herein expedited so that the parties who are all neighbors can move on and know their rights on the property.
- v. That I pray that the Defendant's application be dismissed with costs and the court can even give timelines within which the matter is to progress failure to which the suit can then be dismissed.



4. From the Respondents Replying Affidavit dated 2<sup>nd</sup> March, 2022 sworn by Azhar Mohamed Sheikh in objection to the application and the subsequent orders sought by the Defendants/Applicants, the Respondents deposed that they were not able to fix the matter for hearing due to Covid-19 restrictions and more importantly, most of the Respondents are of old age from 78 years and 80 years and the youngest is 52 years.
5. The Notice of Motion was disposed off by way of written submissions and both counsel for the Plaintiff/Respondents and the Defendants/ Applicants filed their respective submissions.
6. The Applicant's submissions are dated 10<sup>th</sup> February, 2022 while the Respondent's submissions are dated 2<sup>nd</sup> March, 2022.

### **Analysis and determination**

7. I have considered the Notice of Motion application dated 21<sup>st</sup> September, 2021, the response thereto and the submissions in support and in opposition to the application. I find that the issue arising for determination before this court is whether or not this matter is liable for dismissal for want of prosecution.
8. Order 17 Rule 2 of the *Civil Procedure Rules*, 2010 is the guiding provision on dismissal of suits for want of prosecution. It provides as follows: -
  - “(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.”
9. The provisions of Order 17 rule 2 of the *Civil Procedure Rules*, were echoed by the Court where it laid down the criteria to be followed in considering the issue of dismissing a suit for want of prosecution in the case of *Ivita v Kyumbu* (1984) KLR 441;

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant, so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and, or witnesses may be wanting and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however, satisfy the court that he will be prejudiced by the delay or even that the Plaintiff 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. Thus, even if the 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”.



10. My understanding of the aforementioned authority is that a Court may dismiss a suit for want of prosecution if there is prolonged delay which cannot be explained by the Respondent.
11. The answer to the question of what amounts to inordinate delay was highlighted in the case of *Mwangi S. Kimenyi –vs- Attorney General & Another* (2014) eKLR

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable....”

12. In the instant case before Court the Plaintiffs/Respondents have explained the delay in setting down this suit for hearing and in fact filed a replying affidavit explaining the reason for the delay in prosecuting this matter.
13. The Plaintiffs/Respondents have alleged in their affidavit that the delay was occasioned by the Covid-19 pandemic and thus were not able to meet their advocate to discuss the issue of amending their documents. They further stated that most of the Plaintiffs/Respondents are of old age ranging from 78 years to 80 years and the only youngest is 52 years old.
14. The Plaintiff has alleged that the delay was among other reasons stated above the Covid-19 and the shifting from physical filing to online filing caused delay in having this matter fixed for hearing.
15. Upon perusal of the court record, I note that the last time this matter was in court before the filing of the current application before court was on 11<sup>th</sup> March, 2020. Immediately thereafter there was Covid-19 and later the Court scaled down its operations.
16. Further perusal of the Replying Affidavit by the Plaintiffs/ Respondents clearly outlines the reasons for delay in listing this matter for hearing.
17. A reading of the *Constitution* of Kenya under Article 50(1) provides for the right of a fair hearing and it states that;

“Every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

What I gather from the said provision is that dismissing a suit without having it heard on merits is curtailing the right to a fair hearing envisioned in our Constitution. Fair trial under the current Constitutional dispensation is governed by rules which ensure that each party to a case is given an opportunity to present or defend their case in a fairly manner. This Court must make sure that the parties are given ample opportunity to ventilate the issues arising from their case. This according to me can only be achieved in a full trial of this matter.

18. The same position was held by the Court of Appeal in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* [2013] eKLR as follows:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court



process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

19. It should be noted that dismissal of suits is a draconian mechanism which should be exercised sparingly and judiciously depending on the evidence placed before Court otherwise it can be a weapon for causing injustice to the affected party. This is the position taken by the court in the case of [\*John Nabashon Mwangi v Kenya Finance Bank Limited \(in Liquidation\)\*](#) [2015] eKLR, where the court held that;

“Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the Plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ‘Sword of the Damocles’ which should only draw blood where it is absolutely necessary.”

20. The Honourable Chief Justice issued Practice Directions on standardization of Practice & Procedures in the High Court, 2021 which came into force on 11<sup>th</sup> January 2022. The Practice Directions provides a guidance on issuance of dates among other procedures in the High states that;

“24-Issuance of dates

- a. All filed matters must have dates.
- b. Priority hearing dates shall be given to cases according to age, urgency and nature as may be practicably possible.
- c. Deputy Registrars may on the direction of the Judge issue hearing dates on applications which are not under certificate of urgency.
- d. Hearing Dates for the main suit shall be given by the Judge.
- e. Matters without hearing dates shall be listed for mention before a judge to give a hearing date.
- f. Mentions before a Judge shall only be for the following purposes-
  - i. For compliance with the courts directions
  - ii. For fixing of hearing dates
  - iii. For directions
  - iv. To take a ruling/judgment dates upon filing submissions by parties
  - v. All other mentions shall at first instance be before the Deputy Registrar.”

21. It is my humble view therefore that the Defendants/Applicants ought to have been guided by the above Practice directions before seeking to dismiss this suit for want of prosecution.

22. Based on the aforementioned reasons, I do agree with the Plaintiffs’/ Respondents’ averments as explained in their affidavit regarding the delay in having this matter heard and determined which in my view is excusable.



23. It is in the interest of justice that the Plaintiffs/Respondents are given the opportunity to prosecute their claim to finality.
24. Accordingly, I decline to allow the application for dismissal of the Plaintiffs/Respondents' suit and dismiss the Defendants/Applicants' application dated 21<sup>st</sup> September, 2021 with directions that:-
  - a. The Plaintiffs do fix the matter for pre-trial directions within 30 days from the date hereof.
  - b. Failure to comply with the above directions, the suit shall stand dismissed.
  - c. Each party to bear their own costs.
  - d. Mention on 29<sup>th</sup> August, 2022 for case management and further directions.

It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Waklisi for Defendant/Applicant

Court Assistant - Kevin

