



**Pinnacle Group Kenya Limited & another v Geodis South Africa (PTY) Ltd (Civil Case E797 of 2021) [2022] KEHC 13965 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13965 (KLR)

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

**CIVIL  
CIVIL CASE E797 OF 2021**

**DO CHEPKWONY, J**

**SEPTEMBER 23, 2022**

**BETWEEN**

**PINNACLE GROUP KENYA LIMITED ..... 1<sup>ST</sup> APPLICANT**

**SUSAN WANJIRU LEE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GEODIS SOUTH AFRICA (PTY) LTD ..... RESPONDENT**

**RULING**

1. This matter was listed before this court for dismissal for want of prosecution. On July 25, 2022, learned counsel Mr Stanley and M/S Chemutai appeared on behalf of the appellants and respondent respectively and orally canvassed the Notice to Show to Cause why the suit should not be dismissed for want of prosecution.
2. M/S Chemutai, counsel for the respondent submitted that the suit was instituted vide an application dated October 25, 2021 under certificate of urgency wherein the applicant was seeking leave to appeal out of time. But since the filing of the application, the applicants have never taken active steps to prosecute the same, a clear indication that they have lost interest in having it prosecuted. As such, she termed the delay as inexcusable and urged the court to dismiss the suit for want of prosecution and allow respondent to proceed with execution since they already extracted the decree in November, 2021.
3. On the other hand, Mr Stanley, counsel for the applicants that the application was indeed filed under certificate of urgency and attributed the delay to challenges experienced with the e-filing portal. He submitted that the matter was to be heard by Hon Justice Okwany under certificate of urgency at the earliest time possible but this did not happen. He states that he followed up on the matter with the registry but was informed that the matter was before the Hon Judge and they did not have the file since certificates under urgency are sent to an assigned judge electronically. He goes on to submit that



the orders from the court reflect that the matter only went to the Judge once and there was no way the appellants would have known that the application was taken in court two weeks after. He further submitted that there is a draft Memorandum of Appeal attached to the application, an indication that the applicants are interested in prosecuting the appeal. He has urged the court to grant the appellant a chance to prosecute the appeal.

### Determination

4. Having listened to the oral submissions by counsel for the parties, I wish to state that the legal framework on dismissal of suit for want of prosecution is found in order 17 rule 2 of the Civil Procedure Rules which 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.
6. In the case of Ivita vs Kyumbu [1984]KLR 441 the criteria to be applied in dismissal of suits for want of prosecution was laid down as follows:-

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay”
7. In regard to the above principle, order 17 rule 2(1) prescribes that for dismissal of a suit for want of prosecution, the legal threshold and requirement of one year must be satisfied. It is after satisfying the one year threshold, that the court should consider whether the delay was inordinate and inexcusable in the circumstances of the case. Lastly, the court is also expected to consider what prejudice the delay would cause if the suit were to be allowed to proceed for trial.
8. With regard to the first ground of satisfying the one year threshold, I do note that the suit was lastly in court on October 15, 2021 when directions were issued for the same to proceed on November 17, 2021. There is no record of what transpired on November 17, 2021 and this court infers a reluctant presumption that the parties never attended to court until July 25, 2022 when this court was moved for dismissal of the suit.
9. I find that the period between October 15, 2021 and July, 25, 2022 is less than one year. The legal ramification of 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.
10. As shown in the chronology of events in the preceding paragraphs that the mandatory one year requirement has not been met, it would be moot exercise to deal with the other two issues stated to be considered in an invite to dismiss suit for want of prosecution, which would then require this court delve into the arguments raised in the submissions by the parties.
11. I also note that there are no adverse orders for stay against the respondents and I see no prejudice to be incurred on them.



12. In the upshot, I find the Notice to Show Cause premature and decline to dismiss the suit for want of prosecution. I proceed to direct that the applicant herein serves the application dated October 25, 2020 for interparties hearing within the next fourteen (14) days from the date hereof. There shall be no orders as to costs.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23<sup>rd</sup> DAY OF SEPTEMBER, 2022.**

**D O CHEPKWONY**

**JUDGE**

**In the presence of:**

**No appearance for and by applicant**

**M/S Akal counsel holding brief for Mr Ndungu counsel for the respondent**

**Court assistant - Sakina**

