



REPUBLIC OF KENYA



**Kenei v Attorney General & 2 others (Civil Suit 2 of 2017)
[2022] KEHC 13075 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT 2 OF 2017
MM KASANGO, J
SEPTEMBER 22, 2022**

BETWEEN

JOSEPH KIPCHIRCHIR KENEI PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND DEFENDANT

DEVKI STEEL MILL LIMITED 3RD DEFENDANT

RULING

1. The plaintiff filed this case on 16th February, 2017. The matter was fixed for directions on 11th July, 2017. The plaintiff and/or his counsel did not attend court on that day. The judge set the case for receiving plaintiff's notice to show cause why the suit should not be dismissed on 27th September, 2017. Once again, there was no attendance for the plaintiff even though the plaintiff's counsel was served with hearing notice by the court's bailiff. The matter was on 27th September, 2017 adjourned in the absence of all parties to 14th November. On that date, the plaintiff was represented, and the case was adjourned to 30th January, 2018 and again, it was adjourned to 7th March, 2018. The plaintiff was represented by an advocate on those two occasions. On 7th March, the court was informed the plaintiff desired to amend his pleading. The court on that day granted the plaintiff 30 days to file the amended plead. The plaintiff's counsel appeared before court on 18th September, 2018 and request for 14 more days to amend the pleading. The learned Justice C. Meoli in her extemporal Ruling stated as follows:-

“No further extension of time should be allowed to the plaintiff as it is several months since leave was granted. In the interest of justice, the plaintiff granted 7 days within which to file/serve the amended plead in default of which the suit will be struck out for want of prosecution.”



2. The plaintiff did not file and serve his amended plaint as ordered. It follows that this suit presently stands as struck out for want of prosecution.
3. The plaintiff has approached this Court with a Notice of Motion application dated 16th October, 2019. The plaintiff prays by that application for the order of 18th September, 2018 to be reviewed and set aside and that the suit be reinstated.
4. I need to say that what is stated in the grounds in support of the application that is, the plaintiff's supporting affidavit do not match in the information given by the plaintiff why he failed to file an amended plaint as ordered by Justice C. Meoli on 18th September, 2018. In the grounds in support of the application, it is stated that:-

“That applicant’s [plaintiff] suit was dismissed on 24th September, 2018, after our court clerk Mr. Sagini forgot to relay the orders given by the court on 18th September, 2018 to the advocate conducting the matter for further action.”
5. The plaintiff in his affidavit in support of the application deponed:-

“My suit was dismissed on 24th September, 2018, on inquiry of my advocates Mr. Sagini as asked upon (sic) when it was established that he said he forgot to relay the orders given by the court on 18th September, 2018 to the advocate conducting the matter for further action.”
6. The contradictions there are obvious. The ground availed for the orders sought is that court clerk, as stated in the grounds, or the advocate as deponed by the plaintiff in his affidavit failed to update the law firm. That is the sole reason given by the plaintiff as a basis of setting aside court orders and of reinstating this suit.
7. The application is opposed by the defendants. The 3rd defendant relied on the affidavit sworn by its Human Resource Manager. He deponed that although the present application was filed on 16th October, 2019, it was only served on the 3rd defendant in February, 2020; and that the plaintiff failed to take positive steps to prosecute this suit and also had failed to explain why he had been indolent.
8. The 1st and 2nd defendant also opposed the application on the ground that the plaintiff had been indolent in prosecuting this suit.

Discussion and Determination

9. Courts have often expressed themselves that suits should be prosecuted without inordinate delay. In Hanbury and Martin: Modern Equity 4th Ed., the learned author expressed himself at page 30 thus:-

“Equity aids the vigilant and not the indolent. This is the foundation of the doctrine of laches, whereby a party who has slept upon his rights cannot obtain equitable relief.”
10. The Kenya Court of Appeal in the case *Tbika Coffee Mills Limited V. Gakuyu Farmers Co-operative Society & 2 Others* (Civil appeal No. 281 of 2019 (2022) KECA 160 KLR (18th February, 2022) (Judgment) while considering an appeal against dismissal for want of prosecution stated this:-

“The rationale behind Order 17 rule 2 is that suits should be heard and determined expeditiously, for as is often said, justice delayed is justice denied. In Fitzpatrick Vs. Batger & Co. Ltd [1967] 2 All Er657, Salmon L.J. expressed the proposition as follows: It is of the greatest importance in the interests of justice that these actions should be brought to trial



with reasonable expedition. It is not in the interests of defendants that this should be done, but it is perhaps even more in the interests of “plaintiffs themselves.”

In the same judgment, Lord Denning, M. R. added that it was a demand of public policy that the business of courts should be conducted with expedition.”

11. On 18th September, 2018, when the court gave the plaintiff limited time within which to file an amended plaint and ordered in default this would be dismissed, the plaintiff was represented by an advocate by the name of Mr. Nyaraki. The court proceedings do not record an advocate called Mr. Sagini. It is therefore hard to understand why the plaintiff states he was represented by Mr. Sagini and that he failed to inform the advocate who had conduct of this case the outcome of that day.
12. Much more importantly, the plaintiff failed to explain why he filed his application more than a year after the order for dismissal was made. Perhaps it would have assisted the court if explanation was given why in plaintiff’s advocate law firm there was no discovery that no action had been taken on the file within the law firm over one year.
13. The defendants have rightly blamed the indolence of the plaintiff in prosecution as the reason the delay in including this case. The background set out above in this Ruling suffices to show that plaintiff has failed to prosecute this case expeditiously. It is apt to cite the case of South Australia Court, that is, *Beverage Bottlers (sa) Ltd (in Liquidation) & Arvo Vs Abode Enterprises Pty Ltd* (2009) Sasc 272, as follows:-

“There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party’s litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case.”

There comes a time when (the Defendant) is entitled to have some peace of mind and to regard the incident as closed.”

Disposition

14. The application dated 16th October, 2019 is dismissed with costs. The defendants are also awarded costs of the suit.
15. This file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Maurice

For the Plaintiff :- N/A

For 1st and 2nd Defendant : - N/A

For 3rd Defendant : - N/A



RULING delivered virtually.

MARY KASANGO

JUDGE

