



REPUBLIC OF KENYA



**KENYA LAW**  
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**Charity v Abdullahi (Civil Case 219 of 2015)  
[2022] KEHC 15735 (KLR) (Civ) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15735 (KLR)

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

**CIVIL**

**CIVIL CASE 219 OF 2015**

**JN MULWA, J**

**NOVEMBER 24, 2022**

**BETWEEN**

**QATAR CHARITY ..... PLAINTIFF**

**AND**

**IBRAHIM FARAH ABDULLAHI ..... RESPONDENT**

**RULING**

1. This Ruling is in respect to a notice of motion dated November 12, 2021 brought under article 47 and 50 of the *Constitution* of Kenya, 2010, section 3 of the *Civil Procedure Act*, Order 17 Rule 2 and Order 51 Rule 1 of the *Civil Procedure Rules*. The defendant seeks an order that the suit herein be dismissed for want of prosecution. He also prays that the costs of this Application and the suit herein be awarded to him.
2. The application was supported by the defendant's affidavit.
3. In opposition, the plaintiff filed a replying affidavit sworn on January 12, 2022 by its board member Dahir Sheikh Ahmed Sheikh Abukar and Grounds of Opposition dated June 7, 2022. Its main contention was that the application was filed prematurely.
4. The court has considered the parties' respective affidavits, the plaintiff's Grounds of Opposition as well as the written submissions put in support and in opposition of the application.
5. Dismissal of suits for want of prosecution is provided for under Order 17 Rule 2 of the *Civil Procedure Rules* which states:

“2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]



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.”

6. The exercise of the power to dismiss a suit for want of prosecution under Order 17 is an exercise of 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 thus:

“

- “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.” (Emphasis mine)

7. From the court record, I note that this matter commenced in June 2015. On September 13, 2016, the Hon. Justice Mbogholi referred the dispute between the parties to arbitration by consent of the parties and issued a stay of the proceedings herein pending the filing of the Award. This was a culmination of negotiations between the parties herein evidenced by a series of correspondence annexed to the Plaintiff’s affidavit herein as annexure “DSASA-1” which were exchanged between the parties’ advocates way back in 2016 prior to the making of the order by Mbogholi J. Further, it is evident that no other activity took place in the matter until the court issued the Plaintiff with a Notice to Show Cause why the suit should not be dismissed for want of prosecution pursuant to Order 17 Rule 2(1) of the *Civil Procedure Rules*. The Notice to Show Cause came up for hearing before the late



Thuranira J. on July 22, 2021 whereupon counsel for the plaintiff explained that the parties were still trying to agree on an arbitrator.

8. The plaintiff contends that the fact that the matter was in court for NTSC on July 22, 2021 and the writing of a letter dated August 11, 2021 to the defendant's advocates soon after is proof that there had been some activities in the matter which makes the instant application rush. However, since there is nowhere in the court proceedings where it is indicated that the court accepted the explanation proffered for the delay in the prosecution of the suit, it is my considered view that the Defendant was perfectly within his right to lodge the instant application.
9. The court record bears witness that there has been a prolonged and inordinate delay in the prosecution of the case. After Mbogholi J. referred the dispute to arbitration on September 13, 2016, the plaintiff literally went into a slumber and no party took any step in the matter for about five years. Even the arbitration that they were ordered to pursue was pushed to the back and the plaintiff only remembered this after it had been summoned to court for a Notice to Show Cause five years later. Indeed, the plaintiff cannot purport to state that the defendant had an equal duty of pursuing the arbitration. This is because it was the one who instituted the suit and therefore had the burden of pursuing the expeditious determination of its case. A period of five years of delay and inaction is inexcusable in my view.
10. As regards whether justice can be done to both parties in spite of the delay, the defendant contended that the indefinite abeyance of this suit has caused him untold psychological pressure and financial hardship in pursuing legal representation. This contention was not disputed by the plaintiff. I am therefore persuaded that the defendant will be prejudiced if the plaintiff is allowed to continue pursuing a suit it has clearly lost interest in.
11. For the foregoing, I find and hold that the plaintiff is indolent and undeserving of the discretion of this court. The Notice of Motion dated November 12, 2021 is allowed. The suit herein is dismissed. The defendant shall have the costs of the suit and this application.

**Orders accordingly.**

**Delivered, dated and signed at Nairobi this 24<sup>th</sup> day of November 2022.**

**J.N.MULWA**

**JUDGE.**

