



Henkel Polymer Company Limited v Kenya Railways Corporation Limited (Environment & Land Case 329 of 2017) [2022] KEELC 15454 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 329 OF 2017
LL NAIKUNI, J
DECEMBER 9, 2022**

BETWEEN
HENKEL POLYMER COMPANY LIMITED PLAINTIFF
AND
KENYA RAILWAYS CORPORATION LIMITED DEFENDANT

RULING

I. Introduction

1. The Defendant/Applicant herein, the Kenya Railways Corporation Limited, moved this Honorable Court through filing the Notice of Motion application dated July 2, 2021 for its determination. The application was brought under the provisions of Sections 1A, 1B (1), 3A and 63 (e) of the Civil Procedure Act, Order 17 Rule 2(1) & (3), and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Article 159 (2) (b) of the Constitution of Kenya, 2010.

II. The defendant/applicant's case.

2. The Defendant/Applicant herein sought for the following orders: -
 - a. This Honorable Court be pleased to dismiss this suit for want of prosecution.
 - b. Costs be provided for.
3. The application was based on the grounds, testimonial facts and averments made under the nine (9) Paragraphed Supporting Affidavit of Simon Karina, sworn and dated on July 2, 2021. He averred as follows, that: -
 - a. He was the Legal Officer of /Applicant the Defendant/Applicant, duly authorized by the Defendant to swear the Affidavit for and on its behalf.
 - b. He confirmed that from the record that this matter was last in Court on March 6, 2018.



- c. He was aware that the Plaintiff/Respondent had failed to make any application or take any steps to prosecute the suit for 3 years since the said March 6, 2018.
 - d. The Plaintiff never had a bona fide reason for not taking any steps to have had the matter resolved expeditiously.
 - e. The Plaintiff/Respondent's prolonged and unjustified delay in prosecuting the suit for 3 years was inordinate, unreasonable and inexcusable.
 - f. He had been informed by the respective Legal Officers of the Defendant/Applicant that the inordinate delay of 3 years had caused and continued to caused serious prejudice to the Defendant/Applicant because the Defendant could not continue with his business with certainty because of the anticipated and uncertain outcome of the suit.
 - g. This delay defeated the overriding objective of the Court to ensure efficient and timely resolution and disposal of disputes.
 - h. In the circumstances, this suit should be dismissed because the interest of justice called for expeditious determination and resolution of proceedings.
4. He urged the Court to allow the application as prayed with Costs.

III. The replying affidavit by the plaintiff/respondent

5. On October 25, 2021, the Plaintiff/Respondent by way of opposing the application filed an eight (8) Paragraphed Replying Affidavit sworn by Olga Omondi and dated the 21st October, 2021 together with two (2) annexures marked as "OO – 1 and 2" annexed thereto. She stated that she was an Advocate of the High Court of Kenya averred being an Advocate of the High Court of Kenya practicing in the name and style of Olga & Associates which had the conduct of this matter on behalf of the Plaintiff/Respondent herein and therefore was competent and duly authorised to swear the Affidavit. She averred as follows, that:-
- a. She had read and understood the application dated July 2, 2021 by the Defendant/Applicant's Counsel which she opposed and replied as hereunder.
 - b. She was recently instructed by the Plaintiff/Respondent herein to prosecute this matter as shown by her annexure marked as "OO -1" which was a notice of change of Advocates.
 - c. In response to contents of Paragraph 2 of the Defendant/Applicant's Supporting Affidavit, the matter was last in court on August 1, 2019.
 - d. On May 24, 2019, the matter was in court for pre-trial conference and the parties' counsels did confirm that the parties were negotiating the matter out of court and sought more time to settle.
 - e. Further, David Cattermore who had been previously authorized to prosecute the suit on behalf of the Plaintiff/Respondent had since left the employment of the Plaintiff/Respondent. She annexed a copy of the Notice of Change of Authority to plead under seal.
 - f. The delay in prosecuting the suit was attributed to the authorized agent, David Cattermore, acting in bad faith and failing to bring to the attention of the Plaintiff/Respondent the proceedings and the outcome thereof.
6. It urged the Court to dismiss the application with Costs.



IV. Submissions

7. On September 29, 2022 while in the presence of all the parties, Honorable Court directed that the Notice of Motion application dated July 2, 2022 be disposed off by way of written submissions with stringent timelines provided thereof. Pursuant to that, all parties complied according. Subsequently, the Court reserved a date for delivery of the Ruling on notice.

A. The written submissions by the defendant/applicant

8. On February 4, 2022, the Law firm of Messrs. Ndegwa, Katisya and Sitonik Advocates for the Defendant/Applicant herein filed their written submissions dated January 28, 2022. The Learned Counsel submitted that the Notice of Motion application by the Defendant dated July 2, 2021 which sought for the dismissal of the suit for want of prosecution. The Plaintiff/Respondent herein had failed to take steps to prosecute this case for three (3) years since March 6, 2018 without any satisfactory reason. This Honourable Court is therefore urged to dismiss the suit with costs.

9. The Learned Counsel submitted that the Defendant would rely upon the following documents on record:

- a. The said application dated July 2, 2021 and filed on July 13, 2021, together with the Supporting Affidavit thereto.
- b. The Defendant's List and Bundle of Authorities dated January 28, 2022.

10. The operative provision of the relevant law was under Order 17 Rule 2 (1) of the *Civil Procedure Rules, 2010* which states that:

“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.”

11. The Learned Counsel submitted that the application raised the following three (3) issues for this Honorable Court to determine.

12. Firstly, on whether the Plaintiff/Respondent had taken any step(s) to prosecute this suit for 1 year. The Counsel for the Defendant/Applicant submitted that the Plaintiff/Respondent had failed to take any steps to prosecute this suit for more than 1 year because:

- a. The record showed that this matter was last in Court on August 6, 2018, specifically as seen from the contents of Paragraph 2 of the Defendant's Supporting Affidavit. The Plaintiff/Respondent had neither made any Application nor taken any steps to prosecute the suit for three (3) years since the said March 6, 2018.
- b. The Plaintiff/Respondent disputed that the matter was last in court on the said March 6, 2018 and instead contended that it was August 1, 2019, thus: “.....the matter was last in court on August 1, 2019” as seen from the contents of Paragraph No 4 of the Replying Affidavit sworn by Olga Omondi Advocate.
- c. Even if it were taken that this case was last in court on the contended August 1, 2019, it would mean that the Plaintiff/Respondent had failed to take any steps for two (2) years. The period of two (2) years still exceeded the requisite threshold of one (1) year for dismissing a suit under Order 17 Rule 2 (1).



- d. Further, the Plaintiff admitted that there was a “.....delay in prosecuting the suit...” as seen from the contents of Paragraph No 7 of the Replying Affidavit sworn by Olga Omondi Advocate.
13. The Learned Counsel submitted that the only logical conclusion from the foregoing, regardless of whether the last date was taken to be March 6, 2018 or the argument of it being August 1, 2019, was that the Plaintiff/Respondent had failed to take steps in prosecuting this matter for more than 1 year.
14. Secondly, the Counsel submitted on the issue of whether the Plaintiff/Respondent had offered any plausible explanation for failing to take steps in the suit for more than 1 year. The Counsel submitted that the Plaintiff/Respondent had not offered any satisfactory bona fide reason for failing to take steps to have this matter resolved expeditiously. The reasons pleaded by the Plaintiff/Respondent were that:
- a. The Plaintiff blamed its previous agent thus: “.....David Cattermole who had been previously authorized to prosecute the suit on behalf of the Plaintiff has since left the employ of the Plaintiff.” As seen from the contents of Paragraph No 6 of the Replying Affidavit sworn by Olga Omondi Advocate.
- b. The Plaintiff/Respondent continued to explain was that:- “.....the delay in prosecuting the suit is attributed to the authorized agent David Cattermole, acting in bad faith and failing to bring to the attention of the Plaintiff the proceedings and the outcome thereof.” As seen from the contents of Paragraph No 7 of the Replying Affidavit sworn by Olga Omondi Advocate.
15. From all this, the Counsel submitted that it never constituted a plausible explanation to excuse the Plaintiff/Respondent from taking steps to prosecute its case, for the reasons enunciated below. I). the Plaintiffs Replying Affidavit sworn by Olga Omondi Advocate deponed on non- formal and contentious matters, contrary to the established principle of law precluding advocates from swearing affidavits on contentious issues.
- a. To that extent, the Rule of the Advocates (Practice) Rules 1966 provides that:-
- “...this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears. (Emphasis theirs).
- b. In the Affidavit, the Advocate averred that the Plaintiffs previous agent, one David Cattermole, had since left the employment of the Plaintiff and that the said agent acted in bad faith by failing to bring these proceedings to the Plaintiffs attention. The Advocate therefore attributed the delay to the said David Cattermole as seen from the contents of Paragraphs No 6 and 7 of the Replying Affidavit sworn by Olga Omondi Advocate.
- c. These averments constituted contentious issues on which the Advocate could not purport to give evidence on behalf of the Plaintiff client. In the case of “*BAW – Versus - EDW* {2020} eKLR, the High Court struck out an Advocate’s affidavit thus:-
- “It has been held in a long line of authorities that an Advocate should not swear an Affidavit on contentious or unauthenticated matters, in any proceedings in respect of which he has conduct... the Applicant’s advocate is not competent to swear the affidavit in support of the application herein. As such, the affidavit having been sworn by the Applicant’s advocate on contentious matters, is worthless.” (Emphasis theirs).



- d. Accordingly, the averments on contentious issues in the Replying Affidavit sworn by the Plaintiffs Advocates remained worthless and ought to be disregarded, if not struck out.
16. Secondly, the Learned Counsel submitted that the invalidity of the Affidavit notwithstanding, the Plaintiff/Respondent's averments never disclosed any sustainable justification for failing taking steps in this case.

- a. Just like a litigant represented by an Advocate, the Plaintiff/Respondent had a duty to show interest, take steps and follow up on its case, irrespective of whether or not it was represented by an authorized agent. The Court of Appeal in the case of:- "[*Habo Agencies Limited – Versus – Wilfred Odhiambo Musingo*](#) [2015] eKLR held that:-

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.” (Emphasis theirs).

- b. The alleged bad faith of the authorized agent in failing to bring the attention of the proceedings to Plaintiff/Respondent was not excusable since it was accompanied by the Plaintiff/Respondent's corresponding inactivity. The Plaintiff/Respondent demonstrated carelessness by condoning its authorized agent's actions. In the case of:- “Tana and Athi Rivers Development Authority – Versus - Jeremiah Kimigho Mwakio & 3 others [2015] eKLR, the Court of Appeal held that:

“While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude... while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favor of such a party cannot be impugned.”

- c. The Plaintiff litigant itself had not adduced any evidence to explain the steps it has taken in this suit for the past 1 year. It is therefore not enough to blame its previous employee/agent David Cattermole. The Court of Appeal in the case of:- "[*Rajesh Rughani – Versus - Fifty Investments Limited & another*](#) [2016] eKLR pronounced itself thus:-

“It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay. It is our considered view that the judge did not err in finding that the delay was not only inordinate but unexplained.” (Emphasis theirs).

- d. In any event, there is no affidavit from the previous employee who allegedly acted in bad faith or any other employee to explain the circumstances of the matter. The Plaintiff has only filed an Affidavit sworn by its advocate. We rely on "[*Nambayi Multi-Purpose Co. Limited – Versus - Agricultural Finance Corporation*](#) [2013] eKLR, where the High Court held that:-

“No mistake of the Advocate has been established before me. The advocate alleged to have committed the mistake has not sworn an affidavit as indicated in the earlier paragraphs to show that he was committed on the date the matter came up for hearing and subsequently dismissed. Annexing a university program only is not



an explanation of the activities of the advocate on the said date... nothing would have been easier than to have the Advocate who made the alleged mistake swear an affidavit to establish the same.” (Emphasis ours).

- e. Curiously, the Plaintiff/Respondent had also neither pleaded nor proved the date the agent/employee David Cattermole left its employment, when it discovered his alleged acts of bad faith or the steps it took upon such discovery. Perhaps such was the deficiency that arises when an advocate swears a contentious affidavit on behalf of the Client.
17. The Learned Counsel submitted that in the upshot, the Plaintiffs unjustified delay in prosecuting the suit for 3 years remains inexcusable.
18. Thirdly, the Learned Counsel submitted on the issue of whether the Defendant/Objector would suffer prejudice if the suit was not dismissed the Learned Counsel submitted that the pendency of the suit was causing serious prejudice to the Defendant/Applicant’s bank. The Defendant was forced to record and report the suit as a liability in its books of account as it could not continue with its business with certainty because of the anticipated and uncertain outcome of the suit. (See paragraphs 6 (a) and (b) of the Defendant’s Supporting Affidavit.)
19. The delay in hearing and determining the Case also defeated the overriding objective of the Court under the provision of Sections 1, 1A and 3A of the Civil Procedure Act, Cap. 21 to ensure efficient and timely resolution and disposal of disputes. The Plaintiff/Respondent filed this case in the year 2017, about 5 years ago. It would seriously prejudice the Defendant/Applicant should the Court decline to dismiss this stagnant suit. In the case of “Jacob Nyaga – Versus - Njeru Kinanda [2017] eKLR, the Environment & Land Court dismissed a suit, holding that:-
- “The suit herein was filed in 2011 which is about six years ago. The court is not satisfied that a fair trial can be had after such passage of time without occasioning prejudice to the Defendant... the same is hereby dismissed in its entirety with costs to the Defendant.”
20. The Learned Counsel concluded by stating that they had demonstrated that all the ingredients to dismiss this suit existed, which ingredients the High Court in the case of:- ”Canuk Holdings Limited – Versus - Pramod Patel tea Pramod Patel Advocate [2020] eKLR laid down as follows:
- “Notably, a court should only dismiss a matter where all the three (3) ingredients to wit, inordinate and inexcusable delay and prejudice to an opposing party exist. If one (1) ingredient is absent, a court should lean towards saving a suit for determination on merit. In the case herein, all the ingredients were present.”
21. The Counsel held that the Plaintiff/Respondent simply sat pretty, waited for time to pass by and only woke up from its comfort zone when the Defendant/Applicant herein filed the present application to dismiss the suit. They therefore urged the Court to dismiss this suit with costs to the Defendant.

B. The written submissions by the plaintiff/respondent

22. On November 10, 2022, the Law firm of Messrs. Osiemo Wanyonyi & Co. Advocates for the Plaintiff/Respondent herein filed their written submissions dated November 1, 2022. The Counsel submitted that the Defendant’s Notice of Motion Application dated July 2, 2021 sought for the dismissal of the suit before this Honourable Court for want of prosecution. The Application was opposed through the Replying Affidavit of Olga Omondi who was the Agent/advocate herein for the Plaintiff/Respondent sworn on October 21, 2021 contesting the Defendant/Applicant’s application.



23. The Learned Counsel submitted that as a way of background information, the Plaintiff was the registered proprietor of a leasehold from the Defendant/Applicant was for a term of sixty (60) years. It was for all that parcel of land comprised in title number Mombasa/block/XLVIII/107. According to the Counsel, the aforesaid leasehold required the Plaintiff/Respondent to pay an annual rent of Kenya Shillings Forty Three Thousand (Kshs 43,000/=) which the Plaintiff/Respondent had continuously paid until the Defendant/Applicant instructed a firm of auctioneers to proclaim on the Defendant/Applicant's demanding for a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs 2,500,000/ =). In the proclamation notice, it was discovered that the annual rent claimed per annum had been increased from the initial Kenya Shillings Forty Three Thousand (Kshs 43,000/=) to Kenya Shillings Two Million Five Hundred Thousand (Kshs 2,500,000/=) without due notice to the Plaintiff/Respondent.
24. The Counsel argued that this obviously compelled the Plaintiff/Respondent to filing of this case on the 13th September, 2017. Since the filing of the case, the Defendant/Applicant had never filed their responses nor even a statement of defence. Upon filing of the suit, the parties immediately engaged in a negotiation aimed at settling the matter, which had dragged on for a number of years until when the present firm of advocates took over the matter and made progress with the settlement.
25. It was the Learned Counsel's submission that the present application was brought in bad faith and the same had been filed to harass the Plaintiff/Respondent for mistakes occasioned by the Defendant in purporting to instruct auctioneers to proclaim against the Plaintiff/Respondent for sums not owed to them. In their efforts to settle this matter, it was noted that the notice for proclamation served on the Plaintiff/Respondent bore a different name from the Plaintiff/Respondent. This anomaly had since been rectified and soon a settlement would be reached after the accounts had been rectified and the wrongly indicated name expunged. But in regards to the application before Court, the Counsel submitted as follows;
- a. Under the provision of Order 17, Rule 2 of the [Civil Procedure Rules, 2010](#).
 - b. that the exercise of the power to dismiss a suit for want of prosecution under the provision of Order 17 was a matter that was within the discretion of the court. In case of:- "[Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium – Versus - MD Popat and others & another](#) [2016] eKLR, the Court stated as follows:

“11. Nonetheless, Article 159 of the [Constitution](#) and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit n here no action has been taken 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 – Versus - Kyumbu](#) [1984] KLR 441 espoused that.

“The test applied by the courts for 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 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 manner of and in the discretion of the court.”



26. Further, in the case of:- ”[Invesco Assurance Co. Ltd – Versus - Oyange Barrack](#) [2018] eKLR, regarding the exercise of discretion, the court stated:-

“II. 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.”

27. What then was the threshold? In the case of:- ”[Argan Wekesa Oktimn – Verus - Dima College Limited & 2 others](#) [2015] eKLR, the court considered the principles for dismissal of a suit for want of prosecution, where it stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita – Versus - Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

28. The Learned Counsel submitted that in the case of: ”[George Gatere Kibata – Versus - George Kuria Mwaura & another](#) [2017] eKLR, the court stated:

“My understanding of the framework contained in Order 17 Rule 2 is that a court may ‘suo moto’ dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.

9. Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of *Ivita – Versus - Kyumbu* (1984) KLR 441 where it is summarized as follows:

“The test is whether the delay is prolonged and if it is, can justice be done despite such delay”.

29. The court went on to say:

11. I have carefully considered the affidavits in support of and against the Application, the submissions by counsel for the Applicant, the legal framework and the guiding jurisprudential principles on dismissal of suit for want of prosecution.
12. In my view, a defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one-year threshold stipulated in Order 17 Rule 2 of the [Civil Procedure Rules](#). After satisfying the one-year threshold, he must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the



court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved. In *Ivita versus Kyumbu*, the court echoed this view by stating as follows:

“(the Defendant) 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.”

13. In answering the three questions set out in the opening paragraph of this Ruling, the court is to be guided by the legal framework in Order 17 Rule 2 and the guiding jurisprudential principles on dismissal of suit on account of want of prosecution. The court should also carefully and critically examine and evaluate the court record, the explanation tendered by the respondent in response to the application for dismissal, the general prevailing circumstances within the judicial system at the time of the alleged inaction, and the grounds put forth by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to proceed to trial.”
30. The Learned Counsel submitted that:- ”*Mwangi S. Kimenyi – Versus - Attorney General and Another*, (2004) eKLR, the court stated:
 - 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
 - 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”
31. In the case of:- ”*Ecobank Ghana Limited – Versus - Triton Petroleum Co Limited & 5 Others* [2018] eKLR, the court observed:

“...it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.”
32. On whether the delay was inordinate and inexcusable, the court in the case of:- ”*Mwangi S. Kimenyi – Versus - Attorney General & another* (supra) considered what constitutes inordinate delay, and said as follows:

“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..... Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”

33. The courts had previously held that in an application for dismissal, such as the one presently before me, an applicant is expected to demonstrate, in specific terms the prejudice he, she or it stands to suffer. In the case of:- ”Mwangi S. Kimenyi (supra), where it was said:-

“... the Defendant must show he suffered some additional prejudice which is substantial and results to 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant. It must also be shown that the delay has worsened the Defendant’s position in the suit. It will not, therefore, be sufficient to just make a general assertion that you will suffer prejudice without showing the particular prejudice as spelt out herein above.”

34. In the case of:- ”*John Harun Mwau – Versus - Standard Limited & 2 others* [2017] eKLR, it was observed:

“But, the appellant’s complaint was that in arriving at this conclusion, the learned judge failed to consider whether indeed the respondents had suffered prejudice, as no evidence was tendered to support the findings that the respondents’ witnesses had suffered a memory loss or ill health.

The case of “Ngwambu Ivita – Versus - Akton Mutua Kyumbu (supra) makes it clear that:- “The Defendant must however satisfy the court that he 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.”

While it is true that the learned judge appreciated the respondents’ assertion that the nature of the suit required that it be promptly prosecuted when the evidence was fresh and the witnesses were available and able to clearly recollect the facts of the case, this conclusion was reached without the benefit of any evidence in support. Nothing was shown by the respondents to demonstrate what prejudice they suffered due to unavailability of witnesses, or that due to the prolonged delay, a key witness had suffered memory loss or did not have a clear recollection of the events leading to the suit. Without evidence to show that the prolonged delay was prejudicial to the respondents’ case, such that a fair trial was thereby rendered impossible, we are not persuaded that the two requisite tests for dismissal were sufficiently fulfilled. We are also cognizant that justice is better served by having matters determined on their merits, unless delay and inaction has resulted in intolerable prejudice.

In view of the above, we are not satisfied that the Learned Judge took into account all the pertinent matters in dismissing the appellant’s suit for want of prosecution. We therefore allow the appeal.”

35. In the instant suit, it should be noted that there is no statement of defence filed in the matter. The Defendant had also not filed any list of witnesses or witness statements. It is clear, therefore, that the Defendant had failed to prove prejudice on its part. The Plaintiff further relied on the provision of Article 50 (1) of the *Constitution of Kenya 2010* which provided for the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court



or, if appropriate, another independent and impartial tribunal or body. Dismissing the suit for of prosecution impugns on the right of a fair hearing.

36. A court of law should be hesitant and cautious always keeping in mind that the general rule is that suits are for sustaining rather than dismissing as embodied in the constitutional edict of access to justice as enshrined in Article 48 of the [Constitution of Kenya \(2010\)](#).
37. The Learned Counsel concluded that the Plaintiff, based on the submissions submitted, prays that If this court were to dismiss this suit, the Plaintiff will be highly prejudiced as it is trying to settle this matter out of court for the interest of justice.

V. Analysis and determination

38. I have considered all the pleadings in this matter arisen from the bounds of the Notice of Motion application dated July 7, 2021 by Defendant herein wanting to have the suit dated September 12, 2017 by the Plaintiff dismissed for want of prosecution, the grounds adduced the Notice of Motion by the Defendant and the articulate written submissions by the parties herein the cited authorities to boot and the relevant provisions of the law.
39. In order to arrive at an informed, just and fair decision I have framed the following three (3) issues for determination these are:-
 - a. Whether the Notice of Motion application dated July 2, 2021 by the Defendant/Applicant to have the suit instituted by the Plaintiff dismissed for want of prosecution meets the required fundamental standards enshrined under the Provision of Order 17 Rule 2 of the [Civil Procedure Rules 2010](#).
 - b. Whether the parties are entitled to the relief sought.
 - c. Who should meet the costs of the Notice of Motion application dated July 2, 2021.

Issue No (a) Whether the Notice of Motion application dated July 2, 2021 by the Defendant/Applicant to have the suit instituted by the Plaintiff dismissed for want of prosecution meets the required fundamental standards enshrined under the Provision of Order 17 Rule 2 of the [Civil Procedure Rules 2010](#).

Brief Facts

40. Before embarking on the analysis of the framed issues herein, the Honorable Court feels it imperative to first and foremost extrapolate on the brief facts of the case. From the filed pleadings, the Plaintiff is held as the Lessee of all that leasehold property – a parcel of land comprised in title known as Land Reference number Mombasa/block/XLVIII/107. The Lease was from the Defendant/Applicant for a term of sixty (60) years. One of the leasehold obligation was for the Plaintiff to pay an annual rent of Kenya Shillings Forty Three Thousand (Kshs 43,000/=)x. The Plaintiff/Respondent claims to have been continuously making this payment until the Defendant/Applicant instructed a firm of auctioneers to proclaim on the Defendant demanding the sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs 2,500,000/ =). The Court was informed that in the proclamation notice, it was discovered that the annual rent claimed per annum had been increased from the initial Kenya Shillings Forty Three Thousand (Kshs 43,000/=) to Kenya Shillings Two Million Five Hundred Thousand (Kshs 2,500,000/=) without due notice to the Plaintiff/Respondent. This caused the Plaintiff/Respondent to institute this suit on the 13th September, 2017.



41. However, it is alleged that since the filing of the case, the Defendant had never filed their response nor even a statement of defence. Upon filing of the suit, the parties immediately engaged in a negotiation aimed at settling the matter, which had dragged on for a number of years until when the present firm of advocates took over the matter and made progress with the settlement. The Plaintiff/Respondent claimed that in an effort to settle this matter, it was noted that the notice for proclamation served on the Plaintiff/Respondent which bore a different name from the Plaintiff/Respondent had since been rectified and soon a settlement would be reached after the accounts have been rectified and the wrongly indicated name expunged. On the other hand, the Defendant has claims that since the August, 2019, the Plaintiff/Respondent had never taken any steps to fix the matter for hearing and hence the suit had caused substantial loss and damages to it. The Defendant/Applicant held that the delay in prosecuting the case was inexcusable, unreasonable and inordinate thus ought to be dismissed for want of prosecution under the provision of Order 17 Rules 1, 2 and 3 of the [Civil Procedure Rules, 2010](#). According to the Plaintiff/Respondent, who admit there was a delay in prosecuting the suit, hold that the delay was attributed to the authorized agent, David Cattermore, an agent, acting in bad faith and failing to bring to the attention of the Plaintiff/Respondent the proceedings and the outcome thereof. Mr. Cattermore had since left employment. That is adequate on the facts.
42. Now turning to the issue under this sub - heading. The Legal substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. There has been tremendous efforts made to assist in clearing of backlog of cases in court and need to restore the bad public confidence and trust towards the judiciary. This Honorable court takes Judicial Notice to the fact that old and delayed matters are still pending before this court but the issue is now being addressed so mechanically. These cases seem to have stagnated and stalled at the behest of the parties. In the recent past, cognizance will be taken that these categories of cases are having Notices to show cause being issued under Order 17 Rule 2 (1) of the [Civil Procedure Rules](#) as a wakeup call and listed in the daily cause list. Further, there has been the Judges service week activity organized within all stations with the intention to clear the backlog cases from unnecessarily clogging the Judiciary system. The decision is working marvelously and borne positive robust results whatsoever.
43. As a matter of principles, it is expected that upon filing of cases, parties should be keen and interested in their matter. They should efficiently and effectively be seen to fast track the hearing and determination the filed cases. There should be no delay at all in disposing these filed cases based on legal maxim – ‘Justice delayed is justice denied’ which is already enshrined under Article 159 (2) of the [Constitution of Kenya](#). Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should be inordinate. Unreasonable and inexcusable as that would be doing grave injustice to one side or the other or both and in such circumstance, the Honorable may in its discretion dismiss the action straight away.
44. In order to alleviate this mischief, the Legislature saw it desirable to have enacted the provisions of Order 17 Rule 2 of the [Civil Procedure Rules, 2010](#) which provides as follows:-
- “Notice to show cause why suit should not be dismissed, -
- (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.”

45. In order for these legal principles to be applicable the following need to be demonstrated: -

- a. That no application has been made or step taken by either party for one (1) year from the time of filing the suit and
- b. That the Respondents have failed to comply with the directions of the court clearly.

Clearly, the powers granted to court hereby by law are discretionally and have to be exercised judicially, fairly and capriciously.

46. In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words, if the delay is satisfied with the Respondent’s excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.

47. This court on the legal ratio of the provision of Order 17 Rule (2) (3) of the [Civil Procedure Rules, 2010](#) relies on the decision of “*Investment Limited – Versus - G4s Security Services Limited* (2015) eKLR where court held: -

“This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality, should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff. This is the test I shall apply.

48. Having laid down the legal principles on the circumstances informing the dismissal of suits for want of prosecution, the Honorable Court will then proceed to apply the said standards to the instant case herein below.

Issue No B). Whether the parties are entitled to the relief sought.

49. From the facts and the legal principles on Order 17 Rule 2 (3) of the [Civil Procedure Rules 2010](#), is graphically clear and are applicable to the instant case. The Plaintiff filed this case on 13th September, 2017. The Court has taken instructive notice that from the year August, 2019 when the matter was last in Court, the Plaintiff/Respondent went to slumber as they never took any tangible steps towards fixing the case for hearing. Indeed, it was after the Defendant/Applicants filed this application, that the Plaintiff/Respondent all of a sudden got a wake up call.



50. From the contents of the Replying Affidavit filed by the Plaintiff/Respondent in opposition of the application for the dismissal of the suit, the Plaintiff/Respondent admits there has been some delay though according to them refute it was inordinate, unreasonable nor inexcusable. They attribute the delay to several reasons. Firstly, their former employee – one David Cattermore, whom they blame for acting in bad faith never informed them on the exact position of the case; secondly, the fact that the Defendant/Applicant all of a sudden raised the annual rent from a sum of Kenya Shillings Forty Three Thousand (Kshs 43,000/=) which they had been continuously paying until the Defendant instructed a firm of auctioneers to proclaim on the Defendant demanding the sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs 2,500,000 =). And Thirdly, the Plaintiff/Respondent allege that this was a matter they had been making efforts to explore an out of court negotiations and there were hopes of arriving at a settlement until the new advocates came on record and things took a different twist and turn.
51. Despite of the above reasons for the delay in taking any steps, this Honorable Court is not at all convinced they are substantive grounds for the Plaintiff/Respondent to have had such a prolonged duration without having fixed the case for hearing for over one year as envisaged by law. Certainly, there is no doubt and this Court is fully satisfied that the delay is inexcusable, inordinate and unreasonable at the chagrin of the Defendant/Applicant. The Plaintiff/Respondent's action has definitely caused the Defendant agony, anguish and frustrations for no apparent good reasons.
52. For this very reason the application by the Defendant/Applicant herein must succeed while the suit by the Plaintiff should be considered for dismissal for want of prosecution.

Issue No c. Who should meet the costs of the Notice of Motion application dated 19th November, 2021.

53. It is now well established that issues of Costs is a discretionary of the Honorable Court. Costs mean the a party is granted at the conclusion of a legal action or process or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, cap. 21 holds that costs follow the events. By events, it means the result or outcome of the process or proceedings or legal action in a litigation.
54. In this case, as the Honorable Court finds that the Notice of Motion application dated July 2, 2021 by the Defendant/Applicant has succeeded and therefore they are entitled to costs for both the application and the suit accordingly.

IV. Conclusion and Disposal.

55. Conclusively, from the above detailed analysis of facts and law of this application and on preponderance of probability, the Court finds that the Notice of Motion application dated July 2, 2021 by the Defendant has merit. Specifically, the Court proceeds to grant the following orders:
- a. That the Notice of Motion application dated July 2, 2021 by the Defendant/Applicant has merit and hence be and is hereby allowed with costs in its entirety.
 - b. That an order be and is hereby made that the suit instituted by the Plaintiff be and is hereby dismissed for want of prosecution. That now brings the matter to a finality and settled as the Court file will be marked as closed.
 - c. That the costs of this Notice of Motion application and suit to be borne by the Plaintiff/Respondent to the Defendant/Applicant herein.
56. It Is So Ordered Accordingly.



RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF DECEMBER,2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant.
- b. No appearance for the Plaintiff/Respondent despite the notices having been dispatched accordingly.
- c. Mr. Borona Advocate holding brief for Mr. Karina Advocate for the Defendant/Applicant.

