



REPUBLIC OF KENYA



Mansion Chemist Limited v East African Portland Cement Company Limited (Civil Case 537 of 2004) [2025] KEHC 746 (KLR) (Commercial and Tax) (3 February 2025) (Ruling)

Neutral citation: [2025] KEHC 746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 537 OF 2004
A MABEYA, J
FEBRUARY 3, 2025**

BETWEEN

MANSION CHEMIST LIMITED PLAINTIFF

AND

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED DEFENDANT

RULING

1. Before Court is the application dated 30/7/2021. It is brought under Article 159(2)(b) and e of the *Constitution* of Kenya 2010, sections 1A, 1B and 3A of the *Civil Procedure Act* 2010 Order 17 rule 2, Order 51 rule 1 of the *Civil Procedure Rules 2010*. The application seeks for the dismissal of the suit for want of prosecution.
2. It is supported by the grounds set out on the face of it and the supporting affidavit of Roseline Ominde sworn on 30/7/2021. It is contended that a period of more than a year has lapsed since the suit was last in Court and the plaintiff had not taken any steps to fix the matter for hearing. That the plaintiff instituted the suit on 5/10/2004 and had been in Court on various occasions.
3. That since 4/10/2018, the plaintiff has not taken any step to have the suit fixed for hearing and it seems to have lost interest in the case. That it has been more than two years since the matter was last in Court and the delay is inordinate and inexcusable. That the plaintiff has demonstrated indolence and it should not prejudice the defendant.
4. The application was opposed by the defendant vide a replying affidavit sworn on 15/2/2023 by Pauline Njoki Vittone. She deposed that the plaintiff had instructed the firm of Ngatia to act for it and the relationship did not go well thus prompting the plaintiff to instruct another law firm. That the notice of change of advocate was filed on 26/7/2019 and they visited the Court registry with a view of knowing the status of the file.



5. That at that time, the file was missing and could not be traced which prompted the plaintiff to write to the registrar on 17/9/2019. That there was no response and there was a follow-up with a letter of 13/1/2020. That the covid pandemic struck the country and the plaintiff was unable to take any action thereafter. Thereafter, the plaintiff's director became unwell and underwent surgery whereby she was bedridden for 6 months. That the matter was slated for directions on 4/10/2021 when neither of the parties attended Court.
6. The application was canvassed by way of written submissions which I have considered. The applicant submitted that since 4/10/2018, the plaintiff had not taken any steps to prosecute the matter and it was clear that the plaintiff has lost interest in the case.
7. That the delay was inordinate and inexcusable and there were no reasons for the plaintiff's failure to list the matter for hearing. It was submitted that the right to fair hearing should not be limited and the delay has been prejudicial to the defendant. That it was a state corporation and the persons lined up as witnesses had retired or left the company. That the suit having been filed in 2004, it was difficult to have the witnesses 17 years later.
8. The respondent submitted that the former advocates had failed to inform the plaintiff on the progress of the file and why the matter was part heard. That the defendant had taken advantage of the corona period and filed the application on 30/7/2021. That the defendant was a body corporate and its other employees could produce the documents as evidence.
9. I have considered the parties' contestations in their respective affidavits as well as submissions on record. The main issue for determination is whether the suit should be dismissed for want of prosecution.
10. Order 17 Rule 2 of the Civil Procedure Rules, provides that: -
 - “ 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 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.”
11. The power to dismiss a suit for want of prosecution is in the discretion of the Court. In Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR, it was held: -

“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 vs Kyumba* [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.”

12. In the present case, the suit was filed on 5/10/2003 and filed an amended plaint on 27/3/2007. The hearing commenced on 17th and 18th March, 2015. On 4/6/2015, the plaintiff sought an adjournment and the same was granted. Parties thereafter settled the issue on the quantum of the defendants cost vis taxing masters ruling dated 17/9/2018. Following the ruling, the taxing master directed that the matter be heard before a judge on 4/10/2018. However, since that time, no step was taken by the plaintiff to have the matter determined.
13. The reasons advanced by the plaintiff was that there was misunderstanding between it and its previous advocates. It led to the change of advocates. When the new advocates came on record, they found the file missing which made them write to the deputy registrar twice. The last of such letter was written on 13/1/2020.
14. That shortly thereafter, mid-March, 2020, the covid pandemic hit the country and which paralyzed court operations. That thereafter, the plaintiff's director fell ill and underwent some procedures which incapacitated her for 6 months. That when the matter was slated for directions on 4/10/2021, neither party appeared in Court.
15. I have considered these averments and I note that whereas the matter was last scheduled for hearing in 4/10/2018, the same did not proceed. I have also noted that the plaintiff's claim for missing file is corroborated by the letters addressed to the deputy registrar on the whereabouts of the file. The Court further notes that the letters were sent in the year 2019 and the beginning of 2020.
16. The court further notes that the right to a fair hearing is enshrined in the *Constitution*, and every litigant is entitled to his/her case heard on merit. While there have been delays, they were caused by factors beyond the control of the plaintiff. These are; the missing Court file, illness and the national disruption caused by the COVID-19 pandemic.
17. In the view of this Court, the plaintiff has demonstrated a genuine effort to pursue its case save for matters beyond its control. Further, this is a part-heard matter. The defendant has not demonstrated that the delay has caused it any greater prejudice that would outweigh the plaintiff's right to a fair hearing. In the absence of such prejudice and considering that the delay was not deliberate or inordinate, this is not a fit suit for dismissal.
18. Accordingly, I find no merit in the application and the same is dismissed. The plaintiff is hereby granted 90 days to have the matter fixed for hearing. The costs shall be in the cause.

It is so ordered.

SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

