



**Deacons East Africa PLC v Modern Technofitness Gym Limited & another
(Civil Appeal 89 of 2016) [2024] KEHC 17080 (KLR) (16 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 17080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 89 OF 2016
DKN MAGARE, J
APRIL 16, 2024**

BETWEEN

DEACONS EAST AFRICA PLC PLAINTIFF

AND

MODERN TECHNOFITNESS GYM LIMITED 1ST DEFENDANT

K REAL ESTATES LIMITED 2ND DEFENDANT

RULING

1. This matter was file many years ago. The CTS indicates 8 years ago. Parties filed a myriad of Applications the last of which ruling delivered on 21/3/2021. The court had delivered another ruing on 23/6/ 2017.
2. Other than the rulings, nothing transpired in the suit. The court found it fit to issue a notice to show cause why the suit should not be dismissed, the first notice was initiated by the deputy registrar of this court on 6/7/2023. There was no reply. The plaintiff sought time to respond indicating that he had serious reasons for not proceedings. I gave time in order not to shut out a genuine litigant.
3. They wrote a response that they were awaiting a ruling which they recently discovered was read on 21/3/2021. There were no enquiries. They stated that the matter was not listed on the day of delivery. After perusing the court file, I was not convinced that the reason was genuine.
4. No action was taken for almost 4 years. In any case the court has inherent jurisdiction to dismiss a matter that is not prosecuted. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 the court stated as doth: -

“In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in Saldanha’s case purported to follow the decision of Windham m C.J. in Mulji v Jadavji, [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction



could not be invoked where an alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed.”

13. It is clear that the plaintiff has lost interest in the case. It is not fair to have a suit hand like the Domacles’ sword on the necks of defendants. It appears also that the defendants lost interest in the case. I shall therefore dismiss the case with each party bearing its costs.
13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

5. Costs follow the event. The event in this case is the dismissal of the case in absence of any action by the defendants.

Determination

6. In the circumstances I make the following orders: -
 - a. The Suit has not been prosecuted for a long time, therefore it is accordingly dismissed for want of prosecution.
 - b. Each party to bear its costs.
 - c. The file is closed.

**DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 16TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Ms Mbaka for the Plaintiff

N/a for the 1st Defendant



Ms Aluviza for the 2nd Defendant

