



**Nimji v Nimji & 2 others (Civil Case 238 of 2014)
[2024] KEHC 4747 (KLR) (Commercial and Tax) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 238 OF 2014
AA VISRAM, J
APRIL 15, 2024**

BETWEEN

SADRUDDIN SHAMSUDEEN NIMJI PLAINTIFF

AND

GULSHAN SHAMSUDEEN NIMJI DEFENDANT

AND

LAILA SALEMOHAMED APPLICANT

AND

NAZIR JINNAH DEFENDANT

RULING

1. I have considered the motion dated 8th September, 2022, together with the affidavit in support sworn on even date; the replying affidavit sworn in opposition to the same on 16th January, 2023; the rival submissions of the parties; and the applicable law.
2. The Applicant is seeking an order that the Plaintiff's suit be dismissed for want of prosecution.
3. In support of the application, counsel submitted that no action has been taken in the matter since the year 2020. Leave was granted by Sewe, J. at that time to pursue the matter as a derivative action, however since then, no action has been taken to prosecute the same.
4. Counsel relied on the authority of *Harleys Limited v Metro Pharmaceuticals Ltd* [2015] eKLR, which he referred the court to at paragraph 16 of the decision, and submitted, that the reason for lack of action under Order 17 is not important. Once the timeline has passed, the suit is automatically dismissed.



5. In opposition to the application, counsel for the Respondent submitted that contrary to the Applicant's statement, the matter has not been inactive. The matter has been set down for mention on three occasions since leave was granted to pursue the matter as a derivative suit, on various diverse dates.
6. Counsel contended that interim orders were also in force preventing the parties from disposing of various shares. He submitted that the court retains discretion to dismiss a suit for want of prosecution on a case by case basis.
7. Counsel argued that there are pending applications before this court. He could not however tell this court what the nature of those applications are, or to which parties the said applications belong.
8. Counsel for the Applicant however clarified that those applications pending have since been overtaken by events, in particular, by the ruling allowing leave to continue the suit as a derivative action.
9. Having considered the above, I note that the law on dismissal for want of prosecution is provided for under Order 17, Rule (2) (5) of the Civil Procedure Rules, which is the provision under which the instant application is brought. It provides as follows:-
 - “(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.
10. In interpreting the above section, the High Court stated in Surya Holdings Limited & 4 others v ICICI Bank Limited & another (Commercial Case 68 of 2015) [2023] KEHC 22173 (KLR) (Commercial and Tax):-

“From the above provision, I agree with the Defendants that the suit stood dismissed when no steps were taken to prosecute for a period of two years when the last step was taken. The last step having been taken in June 15, 2018 hence the suit stood dismissed on or about June 15, 2020. The proper step the Plaintiffs were required to take was to apply for setting aside of the dismissal order and for reinstatement of the suit.”
11. The Court also considered the above provision in Lutta & 2 others v Co-operative Bank of Kenya (Civil Suit 23 of 2018) [2023] KEHC 19568 (KLR) and stated as follows:-

“Thus, under sub- rule 1 of rule 2, upon expiring of one year without any steps being taken on the suit, the court can issue notice to the parties; under sub- rule 3 a party may apply for dismissal as provided under sub rule 1, that is at the expiry of one year; and finally under sub-rule 5 the suit automatically stands dismissed if the suit has remained dormant for two years. I therefore agree with the Respondent that dismissal under sub- rule 5 do not require an application as the dismissal is automatic.”
12. Looking at the facts in the present matter, by the Plaintiff's own admission, the last time this matter was set down for mention was on 21st October, 2021. It has been over two years since then. This is a considerable amount of time, and I cannot help but think that in the event the Plaintiff was still interested in prosecuting his case, he would have taken substantive steps beyond setting the matter down for a mention over the last three years.
13. Looking at the cause of action, I also see that some of the events giving rise to the present action concern, inter alia, issuance of an irregular notice of Extraordinary General Meeting, which was held way back in 2014. I cannot help but wonder if the events giving rise to the suit have since been overtaken by time. While this court ought not speculate, the logical inference is that in the event the issues were



live and present, the Plaintiff would have taken steps to prosecute his cause of action once he had been granted leave to continue his suit as a derivative action. This has not been done.

14. I am of the view that it is ordinarily a Plaintiff's responsibility to pursue his or her suit. This includes ensuring that he has filed, served, and uploaded his list and bundle of documents; and ensured that his case has been certified as ready for hearing. I do not think that it is proper for a Plaintiff to simply say that he has applications pending before the court, and therefore, the matter is live. Those applications ought to be prosecuted or defended with vigor, and with a view to concluding the case. Applications parked in the CTS system for over two years, without directions or hearing dates, are to my mind, a reflection of lethargy on the part of the Plaintiff, and are subject to the provisions of Order 17 rule 2 and 5 if not attended to.
15. Based on the reasons as stated above, I am satisfied that the Notice of Motion application dated 8th September, 2022, is with merit. The suit is dismissed for want of prosecution with costs to the Defendants.
16. The file is marked as closed.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2024

ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

.....For the Plaintiff

.....For the 1st Defendant

.....For the 2nd Defendant

.....For the 3rd Defendant/Applicant

