



REPUBLIC OF KENYA



**Njuguna & another v Kings Developers Limited & 2 others (Civil Case 1 of 2016)  
[2024] KEHC 3852 (KLR) (Commercial and Tax) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3852 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 1 OF 2016  
MN MWANGI, J  
APRIL 12, 2024**

**BETWEEN**

**NELLIE WANJIKU NJUGUNA ..... 1<sup>ST</sup> PLAINTIFF**

**FRANCIS NJUGUNA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KINGS DEVELOPERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ALISACHER BATANWALLA ..... 2<sup>ND</sup> DEFENDANT**

**ZOHER TANERRALI DAWOODBHAI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The defendants filed a Notice of Motion dated 2<sup>nd</sup> June, 2023 brought under Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 17 Rule 2(1) and (3), Order 51 Rule 1 of the Civil Procedure Rules (Amendment) Rules, 2020 and all enabling provisions of the law and procedure, seeking the following orders-
  - i. That the suit be dismissed for want of prosecution; and
  - ii. That the costs of this application and of the entire suit be borne by the claimant.
2. The application is supported by an affidavit sworn by Ms Mercy Musau Advocate, who has conduct of the suit on behalf of the defendants. She averred that she is conversant with the facts of this suit and therefore competent to swear the affidavit on their behalf.
3. She deposed that the plaintiffs instituted the suit against the defendants vide a plaint dated 21<sup>st</sup> December, 2015 and filed on 6<sup>th</sup> January, 2016, and thereafter the defendants entered appearance and filed their respective defences dated 15<sup>th</sup> February, 2016.



4. Ms Musau further deposed that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs passed away on 6<sup>th</sup> July, 2014 and 1<sup>st</sup> June, 2018, respectively, and that after several adjournments to allow the plaintiffs' personal representatives to seek leave to substitute the plaintiffs, an application dated 27<sup>th</sup> June, 2019 seeking the said orders was allowed.
5. She averred that it has been 7 years since the suit was instituted and close to 2 years since the orders for substitution of the plaintiffs were granted, but there has been no substitution of the plaintiffs with a view of prosecuting the suit.
6. The defendants' Counsel stated that there are no justifiable grounds for such delay and/or neglect and that failure to prosecute the suit has occasioned injustice to the defendants.
7. She opined that the personal representatives of the plaintiffs are not keen on prosecuting the suit and she is apprehensive that the defendants are likely to suffer prejudice in terms of availability of their witnesses.
8. She stated that it is only just and fair for the suit to be dismissed for want of prosecution.
9. The application was opposed through a replying affidavit sworn by Mr. Macharia G. King'ori Advocate, who has conduct of the case on behalf of the plaintiffs. In his affidavit he gave a brief background as to the circumstances surrounding the non-progression of the case. He explained that 1<sup>st</sup> plaintiff died on 6<sup>th</sup> July, 2017 and the 2<sup>nd</sup> plaintiff was appointed as the personal representative of the 1<sup>st</sup> plaintiff but he died on 1<sup>st</sup> June, 2018.
10. Mr. Macharia averred that he did not get news of the 2<sup>nd</sup> plaintiff's demise in good time although he knew that he had been unwell, and that he got to know about his death in December 2018. Mr. Macharia averred that he then embarked on searching for the relatives of the deceased and in June 2019, he met the deceased's family and they led him to one Mr. Nicky Njuguna, the deceased's sibling.
11. He deposed that he updated the said Mr. Nicky Njuguna about the progress of the case and Mr. Njuguna directed him to Ms Christine of Kiarie Kariuki & Gathii Advocates who had been instructed by the family of the deceased to initiate the succession process.
12. That the family of the deceased applied for and were granted leave to substitute the plaintiffs with Mr. Nicky Njuguna. That Mr. Nicky Njuguna who was the proposed personal representative of the plaintiffs however passed on before substitution could be done.
13. Mr. Macharia deposed that he is now in touch with a son of the deceased plaintiffs, who was living in London, and that he was able to come back to the country after the lifting of the Covid-19 Pandemic restrictions, a fact that he came to know about recently. He averred that the inactivity for 2 years is justified.
14. He prayed for time trace the Administrator of the deceased's estate with a view of substituting the plaintiffs with their personal representative.
15. In defendants' written submissions dated 27<sup>th</sup> September, 2023, Ms Musau. learned Counsel for the defendants stated that despite the plaintiff's personal representative having been granted leave to substitute the plaintiffs, nothing had been done 2 years later to comply with the ruling of 21<sup>st</sup> July, 2021.
16. She relied on the provisions of Order 17 Rule 3 of the Civil Procedure Rules, 2010 which provides for dismissal of suits for want of prosecution if one of the parties to the suit moves the Court for such an order. She relied on the case of Thathini Development Company Limited v Mombasa Water & Sewerage Co. Ltd [2022] eKLR, and stated that the test to be applied by the Court in an application



- of this nature is whether the delay has been prolonged and inexcusable, and if it is, if justice can be done despite the delay.
17. The defendants' Counsel also relied on the case of Timothy Limo & 2 others v Joel Kinyanjui Muchiri (suing as the legal representative of the late Jacob Muchiri Kinyanjui [2020] eKLR, where the Court stated that timelines are not technicalities which may be accommodated under Article 159 of *the Constitution* and Sections 3A and 3B of the *Appellate Jurisdiction Act*. She also relied on Misc Civil Application No. 126 of 2014 John Mutai Mwangi v Mwenja Ngure & others.
  18. She submitted that non-prosecution of the case continues to prejudice the defendants as 7 years have passed by since the case was filed. She prayed for dismissal of the suit. She also prayed for costs as per the provisions of Section 27 of the *Civil Procedure Act*.
  19. The plaintiffs' Counsel filed written submissions dated 23<sup>rd</sup> October, 2023 wherein Mr. Macharia King'ori, learned Counsel for the plaintiffs restated the test to be applied in an application seeking dismissal of a suit for want of prosecution. He submitted that even if 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 suit will not be dismissed but the Court will order for the suit to be set down for hearing at the earliest time.
  20. Mr. Macharia relied on the holding of Judge Chesoni (as he then was) in the case of Ivita v Kyumbu [1975] eKLR. He also relied on the case of Triller v Sacher [1993] 1 ALL ER, in which Lord Glidwell quoted the speech by Lord Diplock in Birkett v James [1977] 1 ALL ER, on the test to be applied in applications for dismissal of suits for want of prosecution.
  21. The plaintiffs' Counsel also cited the case of Fran Investments Ltd v G4S Security Services Ltd [2015] eKLR, where Judge Gikonyo noted that Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 is permissive and allows quite significant room for exercise of the Court's discretion to sustain a suit.
  22. He stated that the delay in prosecuting the suit has not been deliberate but has been caused by a series of unfortunate events after 1<sup>st</sup> July, 2021, when Hon. Lady Justice Okwany allowed the application for substitution of the plaintiffs with their personal representative Mr. Nicky Njuguna, who has since passed on.
  23. Mr. Macharia submitted that the plaintiffs' current personal representative is keen on pursuing the case to its logical conclusion, and that the case can proceed to hearing without delay once the plaint has been amended.
  24. He contended that the defendants have not bothered to explain how witnesses who were available to give evidence as at 1<sup>st</sup> July, 2021, are now not available and how the passage of two years has so greatly affected their memories that they are not able to recall the facts relevant to the case.
  25. Mr. Macharia further contended that in the absence of such an explanation, it cannot be said that the defendants will be prejudiced if the suit is allowed to proceed as they are still capable of giving evidence in support of their case but conversely, the estates of the plaintiffs will be irreparably prejudiced if this suit is summarily dismissed as prayed by the defendants.
  26. Counsel concluded his submissions by stating that award of costs is discretionary and ordinarily, they are said to follow the event.

### **Analysis And Determination**

27. I have considered the application filed by the defendants alongside their supporting affidavit. I have also considered the replying affidavit and the submissions filed by the Advocates for the parties. The



sole issue for determination is if the suit between the parties herein should be dismissed for want of prosecution.

28. In an application of this nature in which the defendants have moved the Court for an order of dismissal of the suit for want of prosecution, the applicable provisions are Order 17 Rule 2(3) of the Civil Procedure Rules, 2010. For context, the said provisions must be read together with Order 17 Rule 2 (1) of the Civil Procedure Rules, 2010. Order 17 Rule 2 of the Civil Procedure Rules, 2010, provides as follows-

- “(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. ....”

29. In the case of *Ivita v Kyumbu* (supra), the Court set down the test to be considered in determining if a suit should be dismissed for want of prosecution as hereunder –

“So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so, both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff 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. Thus, even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.” (emphasis added).

30. The defendants have applied to have the suit dismissed for want of prosecution as the deceased plaintiffs’ personal representative was granted leave to substitute the said plaintiffs on 1<sup>st</sup> July, 2021, yet no action has been taken so far to do so.

31. Mr. Macharia Advocate, explained that the personal representative of the deceased plaintiffs by the name of Mr. Nicky Njuguna who was to substitute the said plaintiffs passed on subsequent to the orders for substitution being given, and it took him (Mr. Macharia) time to trace the Administrator of the deceased plaintiffs’ estate. In his affidavit, Mr. Macharia stated that he finally found one of the deceased plaintiffs’ sons who was living in the UK during the Covid-19 Pandemic restrictions, who has since returned to Kenya and is willing to substitute the said plaintiffs in the case.



32. As at the time the instant application was filed on 2<sup>nd</sup> June, 2023, one year and 11 months had passed with no action being taken by the plaintiffs' personal representative to comply with the ruling of 1<sup>st</sup> July, 2021. Mr. Nicky Njuguna who was supposed to substitute the deceased plaintiffs is said to have passed on.
33. My considered view is that when this case remains unprosecuted, it continues to hang like the sword of Damocles on the defendants' heads, as it was filed against them. They are justified in complaining that the case is taking too long to be heard and that the deceased plaintiffs' personal representative is the one dragging his feet.
34. On the other hand, I note that dismissal of suits for want of prosecution is a matter that is within my discretion subject to good reason being given as to why the suit should be sustained. From the facts that are not disputed, the 2<sup>nd</sup> plaintiff followed the 1<sup>st</sup> plaintiff in death, within a short time. It took some time before Mr. Macharia Advocate, who was representing the plaintiffs got wind of the death of the 1<sup>st</sup> plaintiff who was to proceed on with this case after the death of the 2<sup>nd</sup> plaintiff. In another stroke of misfortune, Mr. Nicky Njuguna who was to substitute the plaintiffs in the suit is also said to have died, leading to delay in substituting the plaintiffs.
35. Having considered the depositions in the affidavit filed by the defendants, I do not see any prejudice that will be occasioned to them if the suit is to be heard on merits. In my view, the plaintiffs' estate will suffer prejudice if the suit filed by the deceased plaintiffs is dismissed without being heard on its merits.
36. In order to do substantive justice to the parties herein, I exercise my discretion by giving the plaintiffs' personal representative the last opportunity to substitute the plaintiffs by filing and serving an amended plaint within thirty (30) days from the date of this ruling. If the plaintiffs' personal representative fails to comply with the said order, the suit shall stand automatically dismissed on the 31<sup>st</sup> day from the date of this ruling.
37. Although this ruling has sustained the case, costs of the instant application are hereby awarded to the defendants as delay in prosecuting the case has been occasioned by the plaintiffs' personal representative.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Ms Musau for the defendants/applicants

Mr. Mulima h/b for Mr. Kinuthia for the plaintiffs/respondents

Ms B. Wokabi – Court Assistant.

