



**The UAP Insurance Company Limited v Paul Bwalwane Sajjabi t/a Musubo Agencies
(Civil Suit E025 of 2021) [2024] KEHC 10208 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 10208 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT E025 OF 2021
DO CHEPKWONY, J
JUNE 7, 2024**

BETWEEN

THE UAP INSURANCE COMPANY LIMITED PLAINTIFF

AND

PAUL BWALWANE SAJJABI T/A MUSUBO AGENCIES DEFENDANT

RULING

1. The court issued a Notice to Show Cause why the suit should not be dismissed for want of prosecution dated 25th October, 2023 to the Plaintiff's Counsel herein and the same was served via email on 2nd November, 2023.
2. When the matter was placed before the court on 14th May, 2024, the Plaintiff's Counsel informed the court that the suit is undefended since he has experienced challenges in trying to trace the Defendant and it was not until recently that he managed to and now requests that he be allowed to prosecute the matter.
3. According to the Applicant, Summons have already expired hence the filing of an Ex parte Chamber Summons application dated 3rd May, 2024 seeking extension of the Summons and he has now urged the court to allow the same so that he can serve with the Defendant.
4. Having perused the record herein, the court notes that the suit was filed on 11th November, 2021 by way of Plaint dated 24th September, 2021. Summons to Enter Appearance dated 12th November, 2021 was duly issued and thereafter step was taken in the matter until October, 2023 when the court issued the said Notice to Show Cause.
5. It is obvious that the Plaintiff is not interested in prosecuting the matter as he was only awoken from slumber by the Notice to Show Cause. The court further notes that the said Notice to Show Cause was served on 2nd November, 2023 and the Plaintiff still remained silent until 7th May, 2024 when the



Plaintiff filed the application for extension of summons in readiness to respond to the Notice to show Cause which was coming up for mention on 14th May 2024.

6. The court has gone through the application, and more particularly the Supporting Affidavit which was sworn by Winnie Kemunto Ombwori, an Advocate of the High Court practising in the firm of Mose and Mose Advocates on 3rd May, 2024. The Counsel attributes the delay in having the matter prosecuted in the law firm whereby she submits that the office file was erroneously placed among closed files by the office clerk and the same went unnoticed since the Advocate who was previously handling the matter left the firm. She stated that her client, the Plaintiff has been desirous of having the matter prosecuted and has made several calls in following up on the same which prompted her to take all the necessary steps to have the file traced.
7. Counsel for the Plaintiff has submitted that the said Advocate had instructed a process server, one Paul Biage Motanya who made efforts to locate the Defendant but this was futile. As a result, the summons expired and counsel requests that the court do re-issue fresh summons to counsel then serve the Defendant. She states that no prejudice will be occasioned to the Defendant.

Determination

8. In this particular case, the Notice to show cause dated 25th October, 2023 was issued pursuant to the provision of Order 17 Rule 2 (1) of the [Civil Procedure Rules](#) which provides 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”.

Further, Order 17 Rule 2(3) provides that:

“Any party to the suit may apply for its dismissal as provided in Sub-rule (1)”.
9. A reading of these provisions shows the threshold for dismissal of a suit for want of prosecution. In this case, the issuance of the Notice to show Cause was done after the court noted that the matter had been inactive since neither party had taken any steps to have the same prosecuted for more than a year. This then prompted the Appellant’s counsel to attend court and explain the reason why there had been inactivity on the matter since 12th November, 2021. Therefore, under Order 17 Rule 2 of the [Civil Procedure Rule](#), this suit qualifies to be dismissed for want of prosecution.
10. However, in the case of [Argan Wekesa Okunu Vs. Dima College Limited and 2 Others](#), (2015) eKLR, the court had this to state on the principles to be considered for dismissal of a suit for want of prosecution:

“The Principles governing applications 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 –vs-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”.



11. On exercise of discretion by a court, the court in the case of *Nilesh Premchand Mulji Shah & Another T/A Ketan Emporium Vs. M.D. Popat and others & another* [2016] eKLR 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 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 V 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 consideration of the fact of this case, the court finds that indeed there has been no steps taken to have the suit prosecuted for almost two years and its inordinate delay has been blamed on the misplacement of the case file and counsel who was handling the matter in the firm having left. A perusal of the court record clearly shows that the Plaintiff’s counsel was awakened from slumber by the Notice to Show Cause. However, it is counsel’s submissions that the Plaintiff is desirous of having the matter prosecuted and has attached an affidavit sworn by the court process server, Paul Biage Motanya dated 3rd May, 2024 explaining the efforts that have been made in trying to trace the Defendant for service of pleadings filed by the Plaintiff on several occasions.
13. In view of this explanation by counsel for Defendant and process server’s affidavit, this court finds that the delay in having the matter prosecuted has been confirmed not to be on the part of the Plaintiff, hence it should not be punished for mistakes of counsel. It is also clear that the Defendant in the case is yet to be served with the pleadings so that it cannot be seen that he has or is likely to suffer prejudice if he had entered appearance and filed his pleadings.
14. Guided by the test restated in the case of *Mwangi S. Kimenyi Vs. Attorney General and Another*, Miscellaneous Civil Suit No. 720 of 2009, this court finds that even though the delay has been long, the Plaintiff should not be locked out from having its case prosecuted in the interest of serving substantive justice and according to fair trial.
15. In conclusion, the Notice to Show Cause is hereby set aside with orders that:
- a. The Plaintiff ensures the suit is set out for hearing on priority basis.
 - b. Mention on July 21, 2024 for compliance to be confirmed.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 7TH DAY OF JUNE., 2024.

D.O CHEPKWONY

JUDGE



In the presence of:-

M/S Ombwori counsel for the Plaintiff

Court Assistant - Martin

