



**Chouldry t/a Simz Florist v Choudhry t/a Jamillan Khushi Florists (Commercial Case 187 of 2016) [2024] KEHC 8916 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8916 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 187 OF 2016**

**MN MWANGI, J  
JULY 11, 2024**

**BETWEEN**

**AMIR MAHMOOD CHOULDRY T/A SIMZ FLORIST ..... PLAINTIFF**

**AND**

**ASIF MAHMOOD CHOUDHRY T/A JAMILLAN KHUSHI  
FLORISTS ..... DEFENDANT**

**RULING**

1. This ruling is on whether the suit herein should be dismissed for want of prosecution. This matter came up on 8<sup>th</sup> April, 2024 for Notice to Show Cause why the said suit should not be dismissed for want of prosecution. Mr. Attalo, learned Counsel for the plaintiff submitted that the plaintiff is desirous of prosecuting this matter. That in as much as there has been delay in prosecuting this suit, the said delay has not been entirely on the plaintiff's part. Furthermore, on 6<sup>th</sup> February 2020, this matter was stood over generally. Counsel stated that dismissal of this suit will not only result to irreparable harm, but substantial justice will also not be achieved as provided for under Section 3A of the *Civil Procedure Act* and Article 159(2) of the *Constitution* of Kenya, 2010.
2. Ms. Athman, learned Counsel for the defendant submitted that the plaintiff's Counsel has not demonstrated sufficient cause why this suit should not be dismissed for want of prosecution. She indicated that this suit was to proceed on 25<sup>th</sup> February, 2022 but it did not, thus it is not true that it was stood over generally on 6<sup>th</sup> February, 2020 as submitted by the plaintiff's Counsel. It was stated by Ms Athman that on 2<sup>nd</sup> March, 2020, the plaintiff filed a defence to the defendant's counter-claim but since then, no action has been taken to set down this suit for hearing.
3. In a rejoinder, Mr. Attalo submitted that the Court record shows that this suit was stood over generally on 12<sup>th</sup> May, 2020.



4. On perusal of the Court record, it is evident that this matter was scheduled for case management conference on 6<sup>th</sup> February, 2020 before the Deputy Registrar. On that day, the Deputy Registrar granted the plaintiff leave to respond to the defendant's counter-claim, and the defendant was granted corresponding leave to file a response to the plaintiff's defence to the counter-claim. Thereafter, the Deputy Registrar indicated that this matter would proceed for hearing on 25<sup>th</sup> February, 2020 as scheduled. On the said date, the hearing of this matter was rescheduled for hearing on 12<sup>th</sup> May, 2020. As correctly submitted by Counsel for the plaintiff, the hearing scheduled for 12<sup>th</sup> May, 2020 did not proceed since none of the parties attended Court on the said date, hence the Court stood over this matter generally.
5. The Court record is clear that no action was taken in this matter by either the plaintiff or the defendant until 31<sup>st</sup> May, 2023 when the Deputy Registrar directed that Notice to Show Cause issue on why the case should not be dismissed for want of prosecution.
6. Dismissal of suits for want of prosecution is provided for under Order 17 Rule 2 of the [Civil Procedure Rules](#), 2010 which states 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 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. The court may dismiss the suit for non-compliance with any direction given under this Order.
  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”.
7. Pursuant to the provisions of sub-rules 1-4 above, where in a suit no application has been made or step taken by either party for one year, the Court shall issue a notice to show cause to the plaintiff to show cause why the suit should not be dismissed, and/or any party to the suit may apply for the dismissal of the suit. Sub-rule 5 on the other hand provides that a suit stands dismissed by operation of the law where a period of two years or more has elapsed and no step has been undertaken. On perusal of the Case Tracking System, I note that on 11<sup>th</sup> August, 2020, the defendant filed its reply to the plaintiff's defence to the counter-claim, and a supplementary bundle of documents.
8. It is not disputed that this matter was last in Court on 12<sup>th</sup> May, 2020 but none of the parties and/or their Advocates attended Court. From the record, I note that on 23<sup>rd</sup> December, 2020 Hon. S. Githogori Deputy Registrar indicated that upon conducting an audit, she came across this file which had no date, hence she directed that it be mentioned before her on 3<sup>rd</sup> February, 2021 and a Notice of the said date be issued. There is however no evidence on record of whether a notice of the said date was ever served to the parties herein, or their Advocates, and/or whether this matter was ever mentioned on 3<sup>rd</sup> February, 2021 as directed by the Hon. Deputy Registrar.
9. On 5<sup>th</sup> March, 2021 the plaintiff's former Advocates on record filed a Notice of Change of Advocates, and on 23<sup>rd</sup> February, 2024, the plaintiff's current Advocates on record filed another Notice of Change



of Advocates. Other than filing pleadings and Notices of Change of Advocates, there is no evidence of any steps taken towards prosecuting this suit since 12<sup>th</sup> May, 2020. In view of the foregoing, it is my considered view that pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010, this suit stood dismissed as at 12<sup>th</sup> May, 2022 by operation of the law. Even if this Court were to find that filing of a Notice of Change by the plaintiff's former Advocates on record on 5<sup>th</sup> March, 2021 amounts to steps taken by the plaintiff to prosecute this suit, this suit still would still stand as at 5<sup>th</sup> March, 2023, thus the issuance of a Notice to show Cause why this suit should not be dismissed for want of prosecution was not necessary.

10. The above notwithstanding, the plaintiff has not offered any explanation as to why there has been prolonged delay since 12<sup>th</sup> May, 2020 in fixing a hearing date for this matter and/or prosecuting this suit.
11. For the reasons explained hereinabove, this Court finds that the plaintiff's suit stood dismissed as at 12<sup>th</sup> May, 2022 by operation of the law. Consequently, the defendant is at liberty to fix a hearing date for his counter-claim on a date to be given by this Court.
12. Costs of the plaintiff's suit are hereby awarded to the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Attalo h/b for Mr. Obwogi for the plaintiff

Ms Athman h/b for Mr. Khan for the defendant

Ms B. Wokabi – Court Assistant.

