



REPUBLIC OF KENYA



**Ali & 2 others v Diamond Trust Bank Kenya Ltd & another (Commercial Case 175 of 2018)
[2024] KEHC 12424 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 175 OF 2018**

H NAMISI, J

OCTOBER 17, 2024

BETWEEN

**SAHRA HERSI ALI 1ST PLAINTIFF
YURUB INVESTMENTS LTD 2ND PLAINTIFF
NEW NYANZA SUPERMARKETS LTD 3RD PLAINTIFF**

AND

**DIAMOND TRUST BANK KENYA LTD 1ST DEFENDANT
DALALI TRADERS AUCTIONEERS 2ND DEFENDANT**

RULING

1. Before the Court is a Notice of Motion dated 24 July 2023, filed by the 1st Defendant. The same is filed under Order 17 rule 2, Order 51 rule 1 of the [Civil Procedure Rules](#) as well as Article 159 of the [Constitution](#) and seeks dismissal of the suit for want of prosecution. The Application is supported by the Affidavit of Faith Ndonga, Manager Legal Department, and premised on the grounds on the face of it. The gist of the grounds is that since 5th July 2021, the Plaintiffs have failed to take any tangible steps towards fixing this matter for hearing.
2. In response thereto, the Plaintiffs filed Grounds of Opposition dated 24 June 2024 as follows:
 - i. That the Application as drawn and filed is fatally defective, incompetent and does not lie in law;
 - ii. That the grounds disclosed and the laws invoked in the application are absolutely misconceived and cannot justify this Court to grant the orders sought;
 - iii. That the application is bad in law, sensational, frivolous, vexatious, speculative, made in bad faith and a proper candidate for dismissal with costs;



- iv. That the application is intended to waste precious judicial time;
 - v. That the grounds set out in the application are otherwise an abuse of process;
 - vi. That the provisions under which the application has been brought cannot be the basis for this Court to grant the orders sought.
3. Parties filed their respective written submissions.
 4. In their submissions dated 3 October 2024, the 1st Defendant/Applicant submitted that it is an undisputed fact that the Plaintiffs have failed to prosecute the suit for a period of more than 2 years from the date of filing of the suit, and that they have taken exactly 11 months to file their Grounds of Opposition in response to the Application. The 1st Defendant contended that the Plaintiffs have failed to offer any reason as why the suit has never been prosecuted. They relied on the case of *Mwangi S. Kimenyi vs. Attorney General and Another*, [2014] eKLR.
 5. In their written submissions dated 7 October 2024, the Plaintiffs argued that the 1st Defendant ought to satisfy the Court as to how exactly they will suffer grave injustice and prejudice or some other form of harm. They relied on several cases including *Ivita – vs - Kyumbu* [1984] KLR 441, *Josphat Oginda Sasia – Versus - Wycliffe Wabwire Kiiya* [2022] eKLR and *Joshua Chelelgo Kulei vs. Republic & 9 others* [2014] eKLR.
 6. Order 17, rule 2 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) 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. Examining the record herein, the suit was instituted by Plaintiff dated 8 May 2018, which was filed alongside a Notice of Motion of even date. The Application was heard and dismissed on 15 August 2018. The Supporting Affidavit at paragraph 5 indicates that the Plaintiffs, being aggrieved by the Ruling, lodged an appeal. The appeal was subsequently dismissed on 21st May 2021. This was then followed by an Application by the 1st Defendant dated 6 June 2020, which was dismissed on 5th July 2021. Since then, the Plaintiffs have not taken any steps to move this matter forward.
 8. Both parties relied on the case of *Mwangi S. Kimenyi -vs- Attorney General and Another*, Civil Suit Misc. No. 720 of 2009, where the court stated thus:

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.”



9. In the case of *Et Monks & Company Ltd vs. Evans* [1985] KLR 584 Kneller, J (as he then was) stated as follows:

“The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances...If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself...The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and award the defendants the costs of the suit and of the application...It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy...If the court is satisfied that there will be prejudice to the defendant as a result of a delay of ten years if the case proceeds and it would be impossible to have a fair trial the suit dismissed for want of prosecution since the principle witness for the defence was dead and 3 others had left Kenya and their whereabouts were unknown”

10. It is trite that the power to dismiss a suit is a discretionary and the said discretion must be exercised judiciously. Nevertheless, the Plaintiffs have offered no explanation or reason for their inactivity since July 2021. In the end, I find the application by the 1st Defendant seeking to dismiss the Plaintiffs' suit for want of prosecution merited and accordingly allow it, dismissing the Plaintiffs' suit against the Defendants for want of prosecution. I award costs of this application and the suit to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 17 DAY OF OCTOBER 2024

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Amutavi h/b Okatch.....for the Plaintiffs/Respondents

Mr. Kisinga.....for the 1st Defendant/Applicant

