



REPUBLIC OF KENYA



KENYA LAW
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**Nakitare v Airtel Kenya Limited (Civil Suit E245 of 2019)
[2023] KEHC 2132 (KLR) (Commercial and Tax) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E245 OF 2019
A MABEYA, J
MARCH 22, 2023**

BETWEEN

HUBERT MBUKU NAKITARE PLAINTIFF

AND

AIRTEL KENYA LIMITED DEFENDANT

RULING

1. Before court is the defendant's notice of motion dated 5/5/2022 brought *inter-alia* under order 17 rule 2(1) and (3) of the [Civil Procedure Rules 2010](#). The defendant sought the dismissal of the suit for want of prosecution.
2. The grounds for the application were that this suit was filed on 13/8/2019. The defence was filed on 13/9/2019 and the reply to defence on 4/10/2019. That since 30/3/2020 when this matter was before court for a mention, the plaintiff has taken no measures to prepare this suit for hearing nor taken any steps to prosecute the same. That the delay in prosecuting this matter has been prejudicial to the defendant in terms of accruing legal costs and time in maintaining this suit.
3. In opposition, the plaintiff filed a replying affidavit sworn on 12/5/2022 by N Katee David, the plaintiff's counsel on record. He averred that shortly after 20/3/2020 when the matter was in court for a pre-trial conference, a pandemic struck and this matter was never heard and determined. That he contracted the virus at some point and was indisposed. That the plaintiff was thereafter relocated to the United States of America and while there he also contracted Covid 19 three times and his counsel could only wait for him to recover.
4. That the defendant being a company enjoys perpetual succession hence is not affected by matters that affect natural persons. Finally, that the plaintiff was desirous to see this matter litigated to the end and the case ought to be heard on merit.



5. The defendant responded to the plaintiff's replying affidavit through a further affidavit sworn on 23/5/2022 by David Wayumba, its advocate on record. He averred that no evidence had been tendered to support the allegations made by the plaintiff in the replying affidavit and that the plaintiff being in a foreign jurisdiction does not bar him from participating in the suit online.
6. The plaintiff filed a supplementary affidavit sworn on 16/9/2022 by his advocate in answer to the defendant's further affidavit. He contended that the matter was scheduled for pretrial in March 2020 but the same never took place as that was the inception of the pandemic and the lockdown was declared thereafter hence the court did not sit. That the plaintiff is ready to testify from the United States of America virtually. That the plaintiff had not been sitting on his rights as on the 17/8/2021, he instructed his advocates to fix a date for hearing in this matter and his advocates wrote to the registry requiring them to avail the file for that purpose.
7. The court has considered the parties contestations. The issue is whether the plaintiff's suit should be dismissed for want of prosecution.
8. Order 17, rule 2(1) of the Civil Procedure Rules states: -

“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.”
9. In Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR, the court held: -

“The principles governing applications for dismissal 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. ... 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.”
10. In Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR, it was held that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated: -

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.”
11. It is clear that the power to dismiss a suit for want of prosecution is discretionary. It should be robustly exercised where it is shown that there has been no reason for failure to prosecute the suit, there has been inexcusable delay and where such delay has caused prejudice to the defendant like inability to locate witnesses.
12. However, the court has to consider that a party should not be preemptorily barred from the seat of justice without good cause, that disputes are to be determined on merit and that each case has to be determined on its own peculiar circumstances.



13. In the present case, the last time there was activity in this matter was on 20/3/2020, which is two years and two months before the present application was lodged. The delay was clearly inordinate and requires an explanation.
14. The reason advanced was that shortly after that date, a pandemic broke out, the plaintiff's advocate contracted the disease same as the plaintiff who had travelled to the USA.
15. The court takes judicial notice that the Covid19 was a world-wide pandemic. That on 15/3/2020, a lockdown was declared in this country which went on for months. Court and other businesses were disrupted and that normalcy returned over a year later. That virtual court business took a rapid uptake thereafter but it a while before normalcy ensued.
16. Further, it was contended that both the plaintiff and its advocate contracted the virus and were down for some time.
17. In my view, although that may have taken about a year, there was no good explanation by the plaintiff as to what may have happened between sometimes after May, 2021, when normalcy returned and May, 2022. That was nearly a year lost.
18. The plaintiff cannot be said to be innocent of indolence. But the court also takes note that a defendant can also take steps to list a suit for trial. The defendant here also never took any such step, although this was not its case.
19. In the circumstances of this case, I find that no prejudice was shown to have been suffered by the defendant. The plaintiff's advocate asserted that the plaintiff was willing to testify virtually although he is living abroad. This indicates that the hearing of this matter may proceed without further delay.
20. In this regard, despite the inordinate delay, I find that it would be draconian to dismiss the suit now as there is a likelihood that this suit may be prosecuted without delay. The plaintiff shall take steps to ensure that the suit is prosecuted within 90 days of the date hereof.
21. Accordingly, I find the application to be without merit and dismiss the same. However, the costs shall abide the outcome of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

