



**Royal Housing Co-operative v National Co-operative Housing Union & another  
(Civil Suit 15 of 2018) [2023] KEHC 3535 (KLR) (Civ) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3535 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 15 OF 2018**

**DO CHEPKWONY, J**

**APRIL 19, 2023**

**BETWEEN**

**ROYAL HOUSING CO-OPERATIVE ..... PLAINTIFF**

**AND**

**NATIONAL CO-OPERATIVE HOUSING UNION ..... 1<sup>ST</sup> DEFENDANT**

**ELIZABETH MUNGALA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. For determination before this court is a Notice to Show Cause why the suit should not be dismissed for want of prosecution under order 17 rule 2 of the Civil Procedure Rules. The said notice was issued by the Deputy Registrar of this court on 13<sup>th</sup> January, 2022 and served upon the parties for hearing 14<sup>th</sup> October, 2022.
2. On 14<sup>th</sup> October, 2022, when this matter came up for mention for parties to Show Cause why the suit should not be dismissed for want of prosecution. Counsel for the Plaintiff was in attendance and she indicated that they filed a Replying Affidavit in response to the said notice. Directions then issued that both parties file their respective affidavits in response.
3. Through its advocate on record, the Plaintiff filed a Replying Affidavit dated 12<sup>th</sup> October, 2022 in response, in which counsel deposes that they filed a plaint on behalf of the Plaintiff seeking general damages and exemplary damages plus costs and interests resulting from defamatory actions of the 2<sup>nd</sup> Defendant.
4. Counsel states that the pleadings were served upon the Defendants who entered appearance and filed their responses. The matter was certified ready for hearing on 16<sup>th</sup> September, 2019 and parties were asked to fix a hearing date at the registry.



5. Counsel has deposed that they followed up with the registry to be furnished with a hearing date but the same was in vain. That on 22<sup>nd</sup> January, 2021, counsel wrote a letter to the Deputy Registrar of the High Court requesting to be furnished with a hearing date. That the said letter was never acted upon which made them write another letter on 28<sup>th</sup> January, 2021.
6. Counsel avers that ever since the matter was certified ready for hearing they have been requesting for a hearing date of the main suit in vain. And on 7<sup>th</sup> October, 2022, they received a message from the judiciary informing them that the matter has been fixed for notice to show cause on 14<sup>th</sup> October, 2022.
7. He urges this court to take cognizance of the challenges that they have faced in trying to get dates at the registry and set down the matter for hearing and that it is in the interest of justice that the Plaintiff is heard so that substantive justice can be done in the matter. He has urged that the Notice to Show Cause be set aside and they be given a hearing date.

### **Analysis and Determination**

8. I have considered the Plaintiff's response to the Notice to Show Cause and the oral submissions by counsel. I find that the sole issue for determination is whether or not the suit should be dismissed for want of prosecution.
9. Notice to Show Cause issue pursuant to order 17 rule 2 of the *Civil Procedure Rules*, 2010 which is the provision on dismissal of suits for want of prosecution. It provides 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.”
10. Thus, in line with the above provision, the Deputy Registrar of this Court caused this matter to be listed for dismissal for want of prosecution having taken more than one year without any activity therein. It is noted that the last time the matter was in court was on 16<sup>th</sup> September, 2019.
11. Through its counsel on record, the Plaintiff filed a Replying Affidavit dated 12<sup>th</sup> October, 2022 in which it has explained the reasons for failing to list this matter for hearing. The Plaintiff has attached an email dated 22<sup>nd</sup> January, 2021 containing a letter to the Deputy Registrar requesting for a hearing date. There is also another letter dated 28<sup>th</sup> January, 2021 addressing the same issue.
12. I have perused the pleadings and note that this matter was filed way back on 18<sup>th</sup> January, 2018 vide a Plaint of even date. It has therefore been pending in our system for more than 5 years without setting off. I find the explanation that had been advanced by the Plaintiff for failing to have this matter scheduled for hearing is not so convincing as efforts were only made to have it listed for hearing in January, 2021 from the last time the matter was in court on 16<sup>th</sup> September, 2019.
13. However, it has been held severally that dismissal of suits is a draconian mechanism which should be exercised sparingly and judiciously depending on the evidence placed before Court otherwise it can be



a weapon for causing injustice to the affected party. In the case of *John Nabashon Mwangi –vs- Kenya Finance Bank Limited (in Liquidation)* [2015]eKLR, the Court held that:-

“Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ‘Sword of the Damocles’ which should only draw blood where it is absolutely necessary.”

14. Further, under Article 50(1) of *the Constitution*, provides for the right of a fair hearing and states that:-

“Every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

15. My understating of the aforementioned provision is that dismissing a suit without having it heard on its merits is like curtailing a party’s right to a fair hearing as envisioned in our Constitution. This Court being the custodian of justice is entitled to make sure that parties are given ample opportunity to ventilate their issues before it, which in my considered view, can only be achieved in a full trial.

16. The Court of Appeal in the case of *Richard Ncharpi Leiyagu –vs- Independent Electoral Boundaries Commission & 2 Others* [2013]eKLR held as follows:-

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

17. Based on the aforementioned reasons, and noting that the Defendant has never attended court or filed a response to rebut the Plaintiff’s explanation, I do agree with the Plaintiff averments as explained in their affidavit regarding the delay in having this matter heard and determined, even though not very convincing.

18. In the interest of justice, I proceed to find in favour of the Plaintiff and grant it the opportunity to prosecute its claim on merit and to finality.

19. Accordingly, I decline to dismiss the Plaintiff’s suit and set aside the Notice to Show Cause issued on 13<sup>th</sup> January, 2022 with directions that:-

- a. Mention on 22<sup>nd</sup> May, 2023 before the Deputy Registrar for Pre-trial directions as per Order 11 of the Civil Procedure Rules.
- b. Failure to comply with the above directions, the suit shall stand dismissed.
- c. Each party to bear their own costs.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19<sup>TH</sup> DAY OF APRIL 2023.**

**D.O CHEPKWONY**

**JUDGE**

