



**Swaleh, Mwangi & Co Advocates v Maina & 2 others (Miscellaneous Civil Suit 61 of 2017) [2023] KEHC 18199 (KLR) (Family) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18199 (KLR)

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

**MISCELLANEOUS CIVIL SUIT 61 OF 2017**

**EKO OGOLA, J**

**MAY 2, 2023**

**BETWEEN**

**SWALEH, MWANGI & CO ADVOCATES ..... APPLICANT**

**AND**

**JOHN KAGUMA MAINA ..... 1<sup>ST</sup> RESPONDENT**

**STANLEY KARIUKI MAINA ..... 2<sup>ND</sup> RESPONDENT**

**CHARLES KANYUGA MAINA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Application before this court is dated April 5, 2022. The Applicant prays for the following:-
  - a. That the Application dated March 11, 2020 filed in court by the respondents on the same date be dismissed for want of prosecution.
  - b. That the judgment for the sum of Kshs 23,010,220.52 plus the accrued interest thereon at 14% per annum from December 19, 2019 until payment in full be entered in favour of the Applicant as against the 1<sup>st</sup> and 3<sup>rd</sup> respondent jointly and severally.
  - c. That the cost of this application be provided for.
2. The application is based on the grounds therein and the Supporting Affidavit sworn by Mwangi Gathuri, the Managing Partner of the Applicant. Mr Gathuri deposed that following a disagreement with the respondents on professional fees payable for services rendered in High Court Succession Cause No 361 of 2001, In the matter of the Estate of Samuel Maina Gatonga (Deceased), the Applicant filed a Bill of Costs dated April 24, 2017. The Bill of Costs was consequently taxed, and a ruling was delivered by the taxing master on October 31, 2017. Being dissatisfied with the decision of the taxing



master, the Applicant filed a reference dated January 15, 2018 challenging the said decision. The court allowed the reference and ordered for fresh taxing of the Bill of Costs before a different taxing master. The Bill of Costs was heard afresh, and the ruling was delivered on December 19, 2019 for a sum of Kshs 23,010,220.52. The said ruling was forwarded to the respondent's advocate on March 3, 2020. The respondents then filed an application dated March 11, 2020 praying for leave to file a reference against the decision of the taxing master dated December 19, 2019 and orders for an extension of time within which to file the intended reference. However, it has been over two years since the respondents prosecuted their application, an action that Mr Gathuri claims was to delay the recovery of duly earned fees. He further deposed that the delay in prosecuting the said application is inordinate, unreasonable, inexcusable, and highly prejudicial to the applicant.

3. In response, the respondents filed a joint Replying Affidavit sworn by the 1st respondent on May 11, 2022. He deposed that before this court dismisses the respondents' application for want of prosecution, the court should determine whether the delay in prosecution was intentional and contumelious; whether the delay or the conduct of the plaintiff amounts to an abuse of the court process; whether the delay is inordinate and inexcusable; whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and whether the respondent will suffer prejudice if the Application is dismissed. Relying on the *Ivita vs Kyumbu* (1984) KLR 441 case, it was averred that the court should not assist the indolent, but rather serve the interest of justice.
4. The respondents deposed that the delay in prosecuting the application was neither intentional nor contumelious as the respondents have been in constant communication with the Applicant through their advocates and the respondents have settled a substantive amount of money duly owed to the Applicant. Therefore, the respondents did not prosecute the application as it would demonstrate bad faith. Mr Kaguma, the 1st respondent deposed that the respondents have been remitting to the Applicants monthly payments of Kshs 1,000,000/= and they have since settled over Kshs 20,000,000/=.
5. He further deposed that the reference they were seeking leave to file was for a sum of Kshs 15,000,000/= as instruction fees. Therefore, the respondent's advocate has been in constant communication with the Applicant to agree on the disputed amount. He deposed that the respondents are still willing to prosecute their application and the court is bound by the rules of natural justice not to drive away a litigant from the seat of justice without hearing, however weak his case may be.

### **Determination**

6. I have considered the application, the affidavits filed and the entire record. The first issue for determination is whether the respondents' application dated 11th March 2020 should be dismissed for want of prosecution.
7. Order 17 Rule 2(1), which governs the dismissal of suits for want of prosecution, provides as follows:

“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.”
8. Further Order 17 Rule 2(3) states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”



9. There is no dispute, I believe, with respect to the law on the dismissal of suits for want of prosecution. Whether to exercise the power of dismissal for want of prosecution under Order 17 is, however, a matter that is within the discretion of the court. In its decision in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M D Popat and others & another* [2016] eKLR, the court 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 vs 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.”

10. In this case, it has been three years since the respondents filed their application. In my view, this is an inordinate delay. The respondents argued that the delay was not intentional as they were attempting to settle the matter out of court. Their desire and the reason they wanted to file a reference to the taxed Bill of Costs was to have the instruction fees further taxed to Kshs 15,000,000/=. The respondents have further averred that they have been paying the applicant monthly instalments of Kshs 1,000,000 and as it stands, they have already remitted around Kshs 20,000,000/=. Clearly, the parties have not come to an agreement in their out of court discussions. The respondents have not taken any steps since March 11, 2020. They did not even file a letter informing the court of the out-of-court discussions. The respondents abandoned the matter until the applicant filed this instant application demanding their money.

11. In the interest of justice, the Applicant enjoys the fruit of the judgment. Any further delay in this matter will cause the Applicant prejudice.

12. I am satisfied that the Application dated April 5, 2022 is merited and I allow it as follows:

- a. The Application dated March 11, 2020 is hereby dismissed for want of prosecution.
- b. The 1<sup>st</sup> and 3<sup>rd</sup> respondents to comply with the Ruling of this court dated December 19, 2019.
- c. Cost of this application be borne by the respondents.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2023**

**E K OGOLA**



**JUDGE**

**In the presence of:**

**Ms Nyamongo for the Applicant**

**Mr Mbakeya for the Respondents**

**Gisiele Muthoni Court Assistant.**

