



**Tahir Sheikh Said Investments Limited v KCB Bank Kenya Limited & another
(Civil Appeal E013 of 2020) [2023] KEHC 17447 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E013 OF 2020
DKN MAGARE, J
MAY 10, 2023**

BETWEEN

TAHIR SHEIKH SAID INVESTMENTS LIMITED PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

JAMII FLOUR MILERS LIMITED 2ND DEFENDANT

RULING

1. This matter came up in the morning. I allocated time for the hearing. Mr. Gikandi for the plaintiff indicated that he was ready to proceed but in the afternoon. Nevertheless, I gave time allocation for 11:30 am. He attended court together with the defence Counsel. The defendants were ready to proceed but, surprisingly the plaintiff's Advocate sought for an adjournment. This was not in line with the indication I got in the morning.
2. The Application for adjournment was strenuously opposed. Upon hearing this matter, I sought time to reflect and deliver a Ruling. I noted that I had issued directions on 13/3/2023.
3. There had been prior directions that the plaintiff files compliance documents. The last one was on 7/11/2022.
4. I have perused the file and noted that witness statements were not filed as at the time of filing the suit. They were also not filed as at the time of my earlier directions.
5. Simply put, even if the witnesses were present, they will not be in a position, to testify. The reasons of their absence is therefore irrelevant. Luckily the plaintiff's counsel is not at fault. He admitted to be in touch with the client who nevertheless has not turned up. The court is therefore at cross roads, even if the adjournment is denied, there is no witness to testify. The court herein is a court of law.



6. Order 3 rule (2) (b) and (c) requires that the claim shall be accompanied by a list of witness as to be called at the trial and written statements signed by the witnesses examined by expert witness. The directions under order 11 were finalized on 23/3/23. Those directions have not been complied with.
7. I have to balance between the continuing pendency of this matter and the 2nd Defendant who is a second purchaser. He bought the suit and from the purchaser from the auction, by 1st Defendant.
8. The failure to attend court is a matter anathema to administration of justice. The plaintiff referred to article 159 3 (d) of *the Constitution*. The failure to file oddments is not a technicality. It is a substantive issue. Rules are handmaids of justice. They are like palm wine with which justice is eaten, so say the 160 of Nigeria. I find no merit in the Application for adjournment. The same is declined.
9. Given that there are no witness statements, it will serve no useful purpose to ask for the plaintiff to proceed. Given that the defence admits no part of the claim and does not have a counter claim, I hereby dismiss this suit for want of prosecution with costs to the defendants.
10. Ordinarily I indicate cost at the time of dismissal. However, I note huge bundles of Application, and which have been handled. It is not humanly possible to indicate to costs. Consequently, the costs shall be taxed or agreed.
11. The court is informed of the position by the holding by Justices Sir Charles Newbold P., Duffus V-P and Law J.A. in *Mukisa Biscuit Manufacturing Co. Ltd = vs= West End Distributors Ltd* (1969) EA (696), where, Justice Law Jaw, succinctly stated as doth: -

“In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., In Saldanha’s case purported to follow the decision of Windham, C.J., in *Mulji v. Jadavji*, [1963] E.A. 217, but all that case decided was that the court’s inherent jurisdiction could not be invoked where an alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the court’s inherent jurisdiction can be said to be fettered, as no alternative remedy existed.”
12. In the instance case it is clear that none of the specific provisions for dismissing the suits applied to the suit subject of the Appeal, that being so, I do not see how the court’s inherent jurisdiction can be said to be fettered, as no alternative remedy exist. I am of the opinion that provisions of the Civil Procedure Rules for dismissal of the suits for want of prosecution do not purport to be exclusive and do not fetter the court’s inherent jurisdiction to dismiss suit in circumstances not flagging directly within those provisions if it is necessary to do so to prevent injustice of abuse of the court process.
13. In this case there is provision for dismissal for want of prosecution and striking out Order 3 Rule 2 provides, that if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends, and he admits no part of the claim, the suit shall be dismissed, except for good cause to be recorded by the court.
14. The Rule is a normative derivative of article 159 (2) (b) where Justice ought to be administered without undue delay. I have no good cause to record. Without a good cause to be recorded, I am enjoined to dismiss the suit with costs. I proceed to do so.

Determination

15. The plaintiffs suit is dismissed under order 12 rule 3 of the *Civil Procedure Rules* as read with Order 3 Rule 2 thereof.



16. Costs of the suit to the defendant to be agreed or taxed by the Taxing Master of this court.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF MAY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Paul Munyao with Henry Kariuki for 1st Defendant

Mr. Titus Mugambi for the 2nd Defendant.

Mr. Gikandi for the plaintiff.

Court Assistant - Firdaus

