



**Ikinya v Khushi Motors Limited (Civil Case 93 of 2017)
[2023] KEHC 19762 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 93 OF 2017
DKN MAGARE, J
JULY 3, 2023**

BETWEEN

HUDSON NGAIRE IKINYA PLAINTIFF

AND

KHUSHI MOTORS LIMITED DEFENDANT

RULING

1. The applicant made an application dated March 10, 2023 seeking the following orders: -
 - (a) That pending the hearing and determination of this Application the Honourable Court directs and issue an Order that the Plaintiff/ Respondent continue today and/or settle the outstanding amount of Kshs 1,280,000/= owed to the defendant/Applicant herein.
 - (b) That the injunctive Orders granted by his Hononorable Court on February 7, 2018 be discharged, lifted, vacated and /or set aside forthwith.
 - (c) The cost of this Application be provided for.
2. The ground were that the Plaintiff failed to prosecute the suit since October 11, 2017 when orders were given. They pray that the orders given February 7, 2018 be discharged.
3. The Plaintiff obtained orders and went to sleep. They injunctive orders were not and cannot be a bar from fulfilling contractual obligation. In the meantime, the law also changed. Under Order 17 Rule 2 (5) of the *Civil Procedure Rules*, a suit that remains unprosecuted for 2 years stands dismissed. I have perused the file and note that the suit remains unprosecuted since February 7, 2018.



4. In *Thatbini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, Hon Justice L L Naikuni (Judge), stated as doth; -

“This court on the legal ration of Order 17 (2) (3) of the Civil Procedure Rules, 2010 relies on the decision of “*Investment Limited v G4s Security Services Limited* [2015] eKLR where court held: - “This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff. “

5. In the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 at page 699, Charles Newbold P, Duffus VP, held as follows:

“In cases falling outside the specific provisions quoted above. Farrell J adopted this view. Dalton J in Saldanha’s case purported to follow the decision of Windham C J in *Mulji v Jadavji* [1963] EA 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 the court’s inherent jurisdiction can be said to be fettered, as no alternative remedy existed.”

6. It is over 5 years since this suit as at in court. The suit therefore stands dismissed. Consequently, I allow prayer 2 of the application dated March 10, 2023 with costs.

Determination

- (a) The upshot of the foregoing the plaintiff suit stands dismissed for want of prosecution with costs of 90,000/= to the Defendant.
- (b) Costs of Kshs 15,000/= for the current application.
- (c) The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3RD DAY OF JULY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistant - Brian

