



**Kenya Postel Directories Limited v East African Portland
Cement Company Limited (Commercial Case 421 of 2018)
[2023] KEHC 24603 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24603 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 421 OF 2018
MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

KENYA POSTEL DIRECTORIES LIMITED PLAINTIFF

AND

EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED DEFENDANT

RULING

1. The defendant/applicant filed a Notice of Motion application dated 10th February, 2021 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 17 Rule 2(1), (3) & (4), and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law. The applicant seeks the following orders –
 - i. That this suit be dismissed for want of prosecution; and
 - ii. That the defendant be awarded costs of the suit and the application.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Christine Adhiambo Oraro, learned Counsel for the defendant. In opposition thereto, the plaintiff filed a replying affidavit sworn by Rehema Bahati, the plaintiff's Account Manager on 14th April, 2023.
3. The instant application was canvassed by way of written submissions. The defendant's submissions were filed on 26th May, 2023 by the law firm of Christine Oraro & Company Advocates. The plaintiff's submissions were filed by the law firm of CJ Law & Associates LLP on 26th May, 2023.
4. Ms. Wambugu, learned Counsel for the defendant urged this Court to find that this suit has been dormant for four years since 22nd August, 2019 as no action has been taken by the plaintiff in



- prosecuting its suit. Counsel contended that since the plaintiff has lost interest in prosecuting its own case, continuous pendency of this suit is not only unjustified but also prejudicial to the defendant who should not be held hostage by a suit which the plaintiff is not keen in prosecuting.
5. Counsel referred to the provisions of Order 17 Rule 2(3) of the *Civil Procedure Rules*, 2010 and stated that the delay of four years in prosecuting this suit is extremely prolonged and inexcusable. She stated that since the plaintiff has failed to give a satisfactory explanation for the said delay, the suit herein should be dismissed for want of prosecution. Ms. Wambugu relied on the case of *Agnes Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR and submitted that the defendant will be prejudiced if this suit is not dismissed as it is a Government Corporation that works on a strict budget from the National Treasury.
 6. She stated that every year that this matter stands in Court makes it hard and impossible for the Corporation to get funds to settle the claim and that there is erosion of evidence to defend the suit. Ms. Wambugu stated that there have been drastic changes in management making it more difficult to secure witnesses. She urged this Court to award the defendant costs of Kshs 50,000/= for awakening the plaintiff to prosecute its case in the event the instant application is not allowed.
 7. Mr. Kibet, learned Counsel for the plaintiff submitted that the defendant conceded to owing the plaintiff Kshs 5,692,723.20 in one of the mediation sessions, hence the mediator advised the plaintiff to reach out to the defendant directly for payment of the said money. He stated that the plaintiff through its Advocates on record engaged the defendant directly through correspondence on diverse dates but the defendant has been ignoring the request to make good its admission of Kshs 5,692,723.20.
 8. The plaintiff's Counsel referred this Court to the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR and stated that the plaintiff has provided reasons why it did not take action immediately after mediation collapsed, thus dismissing this suit will interfere with the right to a fair hearing as the plaintiff will forever be barred from being heard. Counsel submitted that the defendant had not demonstrated the prejudice it stands to suffer if the instant application is not allowed, but the plaintiff on the other hand has suffered and continues to suffer prejudice on account of the defendant's refusal to pay for services rendered to it by the plaintiff.
 9. Mr. Kibet maintained that the plaintiff has always been keen on prosecuting this matter to its logical conclusion to recover the sum of Kshs 33,145,515.20 owed to it by the defendant for services rendered. He relied on the case of *Juma Ndegwa Nzowa v Dunhill Consulting Limited* [2022] eKLR and submitted that the defendant has a duty to prove on a balance of probability that the delay in prosecuting the matter will prejudice its case and that a fair trial as envisaged under Article 50 of the *Constitution* of Kenya, 2010 will not be achieved but it has failed to discharge this burden.

Analysis and Determination

10. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether the suit herein should be dismissed for want of prosecution.
11. In the affidavit filed by the defendant it deposed that this suit was instituted by the plaintiff vide a plaint dated 5th December, 2018 and filed on the same day. That in response thereto, on 14th March, 2019 the defendant filed a statement of defence dated 13th March 2019. Thereafter, this suit was referred to mandatory Court Annexed Mediation on 26th June, 2019 and it kicked off as scheduled.



12. The defendant averred that parties did not agree or compromise at the mediation stage and on 22nd August, 2019 mediation collapsed and this suit was referred back to Court. It further averred that this suit has been dormant since then as no action has been taken by the plaintiff in prosecuting it.
13. It was deposed by the defendant that the plaintiff has lost interest in prosecuting its own case hence its continued pendency is unjustified and prejudicial to the defendant. The defendant further stated that it should not be held hostage by a suit which the plaintiff is not keen in prosecuting.
14. The plaintiff in its replying affidavit deposed that the plaintiff's Advocates on record have been keen in prosecuting this matter as they have never failed to appear in Court. It stated that parties attended the mediation sessions as scheduled, but mediation was unsuccessful as the defendant made partial admission of being indebted to the plaintiff in the sum of Kshs 5,692,723.20 and disputed the rest.
15. It was stated by the plaintiff that its Advocates on record have been in constant communication with the defendant requesting it to make good its admission and pay the sum of Kshs 5,692,723.20, but the defendant has refused and/or ignored to reply to the said correspondence. The plaintiff further stated that it is desirous of prosecuting this matter to its logical conclusion and recover the sum of Kshs 33,145,515.20 from the defendant.
16. The plaintiff averred that if the instant application is allowed, it will not only suffer substantial loss but it will also be condemned unheard despite the fact that it has a strong case against the defendant. It deposed that the issue raised in the application herein is within the Court's discretion and the Court has to consider whether justice can be done despite the delay.

Whether the suit herein should be dismissed for want of prosecution.

17. It was submitted by the defendant that this matter has been dormant since 22nd August, 2019 as no action has been taken by the plaintiff in prosecuting its suit hence it is ripe for dismissal. The plaintiff on the other hand contended that the defendant conceded to owing it Kshs 5,692,723.20 in one of the mediation sessions, and its Advocates on record have been engaging the defendant directly, but the defendant has been ignoring the request to make good its admission of Kshs 5,692,723.20. In support of this allegation, the plaintiff produced a letter dated 27th September, 2019, which was received by the plaintiff on 30th September, 2019.
18. This matter was referred to mandatory Court Annexed Mediation but mediation collapsed since the parties could not reach a consensus. On perusal of the Court record it is evident that on 26th August, 2019, this matter was referred back to Court by the mediation Deputy Registrar as the parties did not reach a settlement agreement. It is also evident that this matter was mentioned before the Deputy Registrar on 17th February, 2020 and 9th March, 2020 but there was no appearance by any of the parties herein. It is evident that prior to the filing of the instant application, this matter was last in Court on 9th March, 2020. The mention dates for 17th February 2020 and 9th March, 2020 were fixed by the Deputy Registrar when it became apparent that the parties were taking no steps to fix the case for mention or hearing.
19. Dismissal of suits for want of prosecution is provided for under Order 17 Rule 2 of the [Civil Procedure Rules](#), 2010. The said provisions state thus-
 - “ 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.
5. A suit stands dismissed after two years where no step has been undertaken.
6. A party may apply to court after dismissal of a suit under this Order.”

20. The above provisions address two instances when a suit can be dismissed for want of prosecution. The first instance is as contemplated under Order 17 Rule 2 sub-rules 1-4, where in a suit, no application has been made or step taken by either party for one year, the Court shall issue a notice to show cause to the plaintiff to show cause why the suit should not be dismissed and/or any party to the suit may apply for the dismissal of the suit for want of prosecution. The second instance is the one contemplated under Order 17 Rule 2 sub-rule 5 where a suit stands dismissed by operation of the law in instances where a period of two years or more has lapsed, with no step having been undertaken.

21. As explained hereinabove, prior to the filing of the application herein, this matter was last in Court on 9th March, 2020 for mention before the Deputy Registrar. The said mention date was given at the instance of the said Deputy Registrar. The present application was filed on 12th March, 2021 as can be seen from the receipt issued to the defendant’s Advocates on record. The said receipt is available on the Court Case Tracking System (CTS). This means that as at 9th March, 2021, this suit had been inactive. Dismissal of a suit for want of prosecution is a matter that is within the Court’s discretion. In the case of *Ivita v Kyumbu* [1975] eKLR the Court set down the test of whether a suit should be dismissed for want of prosecution as hereunder –

“So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so, both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.” (emphasis added).

22. The plaintiff stated that the delay in prosecuting this matter was occasioned by the fact that parties were engaging in out of Court negotiations with an aim of settling the dispute between the parties herein. The plaintiff however only produced one letter that was written to the defendant on 27th September, 2019. In the said letter, the plaintiff was demanding from the defendant Kshs 5,692,723.20 out of an amount of Kshs 33,145,515.20 it is allegedly owed by the defendant. It is the plaintiff’s contention that



the defendant frustrated the negotiations by not responding to the said letter dated 27th September, 2019.

23. It is however worth noting that the plaintiff has not in the very least attempted to explain what actions it took after the defendant failed to respond to the said letter. It has not explained why the plaintiff did not attend Court when this matter was listed for mention before the Deputy Registrar on 17th February, 2020 and 9th March, 2020 and it has also not explained why it did not cause this matter to be listed for mention or hearing after mediation collapsed. The plaintiff's explanation that parties were engaged in out of Court negotiations is not satisfactory as the plaintiff has only exhibited one letter which was done almost immediately after mediation collapsed. Based on the foregoing, this Court finds that the plaintiff is not keen in prosecuting this matter, and the delay in prosecuting it is not only prolonged but also inexcusable.
24. The defendant submitted that it will be prejudiced if this suit is not dismissed for it is a Government Corporation that works on a strict budget from the National Treasury. It also stated that for each year this matter remains in Court, it makes it hard and impossible for it to get funds to settle the claim and there is erosion of the evidence in defending the suit. It further stated that there have been drastic changes in management making it even more difficult to secure witnesses.
25. For the reasons given, I am satisfied that the defendant has demonstrated on a balance of probability that the delay in prosecuting this matter has prejudiced its case and in the event the application herein is not allowed, the defendant's right to a fair trial as envisaged under Article 50 of the *Constitution* of Kenya, 2010 will be infringed. It is also noted that this case was filed in the year 2018 and has remained unprosecuted for 1½ years between the time mediation collapsed in the year 2019 and 10th February 2021 when the present application was filed. The provisions of Order 17 Rule 2 sub-rules 1 - 4 of the Civil Procedure Rules, 2010 apply.
26. Given the said circumstances, the application dated 10th February, 2021 is merited and I hereby allow it as prayed. Costs of the suit and the application dated 10th February 2021 are awarded to the defendant.
It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Wambugu for the Defendant/Applicant

Mr. Lumaisi for the Plaintiff/Respondent

Ms B. Wokabi – Court Assistant.

