



**Achendid v National Bank of Kenya Limited (Commercial Case 382 of 2017)
[2023] KEHC 24741 (KLR) (Commercial and Tax) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 382 OF 2017
MN MWANGI, J
OCTOBER 13, 2023**

BETWEEN

MINA ACHENDID PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. The defendant/applicant filed a Notice of Motion application dated 7th July, 2022, under the provisions of Section 3A of the *Civil Procedure Act*, Order 17 Rule 2(1) & (4), and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law. The defendant seeks the following orders –
 - i. That the plaintiff's suit filed herein be dismissed for want of prosecution; and
 - ii. That costs of this application and of the entire suit be awarded to the defendant.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn by Jillian Ndirangu, learned Counsel for the defendant on 7th July, 2022. In opposition thereto, Mina Achendid the plaintiff herein filed a replying affidavit.
3. The application was canvassed by way of written submissions which were highlighted on 5th July, 2023. The defendant's submissions were filed on 9th June, 2023, by the law firm of Igeria & Ngugi Advocates, whereas the plaintiff's submissions were filed by the law firm of Rachier & Amollo LLP on 3rd July, 2023.
4. Ms Ndirangu, learned Counsel for the defendant cited the provisions of Order 17 Rule 2(1) & (3) of the *Civil Procedure Rules, 2010* and submitted that the suit herein should be dismissed for want of prosecution since the last time it was in Court for purposes of taking a hearing date was on 8th June,



- 2021, but the Court file was missing. Counsel stated that since then, the plaintiff has never taken any steps to prosecute this matter. She referred to the case of *Rose Makokha Mteka v Oserian Development Company Limited [2022]* eKLR and submitted that the statutory threshold has been met in this case. She indicated that this suit had been previously dismissed on 4th March, 2019, for want of prosecution and when it was reinstated on 5th May, 2020, the plaintiff was required to set it down for hearing within 90 days, failure to which the suit would stand dismissed.
5. Counsel relied on the Court of Appeal case of *Vintage Investments Limited v Amcon Builders Limited & another (Civil Appeal 45 of 2019) [2021] KECA 259 (KLR)* and stated that inordinate delay has been demonstrated by the fact that the plaintiff has not taken any steps in over one year to trace the Court file in this case and/or set this matter down for hearing in order to prosecute the suit. She added that the said delay is inexcusable as the plaintiff has not provided any credible excuse for failure to set down this matter for hearing. Ms Ndirangu contended that the plaintiff has annexed letters that appear to have barely legible Court stamps thus the dates on the said stamps cannot be established.
 6. She indicated that Courts no longer receive hard copies of documents due to the Covid-19 Pandemic and hard copies are only received when the Court gives directions that they be availed. She pointed out that the said letters are not uploaded onto the online platform and the plaintiff has not in the very least made any attempt to send them to the Court's known email address. Counsel asserted that the defendants are seriously prejudiced by the delay in prosecuting this suit since an injunction was granted on 24th November, 2017 against the defendant pending the hearing and determination of this suit, which injunction still remains in force.
 7. Ms Ndirangu stated that in dealing with the application herein, the Court should balance the right of a party to a hearing and the constitutional demand that cases should be disposed of expeditiously and without delay. In submitting that it is in the interest of justice to dismiss this suit for want of prosecution since the delay occasioned by the plaintiff is inordinate, unreasonable, inexcusable and has occasioned prejudice to the defendant, Counsel relied on the Court of Appeal decision in *Magunandu Company Limited v Joyce Wairimu Ngugi & another [2020] eKLR*. Counsel submitted that the delay in prosecuting this matter by the plaintiff is intentional so that she can continue enjoying the interim injunctive orders in perpetuity.
 8. Mr. Munyua, learned Counsel for the plaintiff cited the provisions of Order 17 Rule 2 of the *Civil Procedure Rules, 2010* and submitted that both the plaintiff and the defendant have taken steps to have this matter set down for hearing to no avail, with the latest attempt being vide a letter dated 2nd March, 2022, barely four (4) months before the instant application was filed. He relied on the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another [2014] eKLR* and submitted that a Court when exercising its power to dismiss a suit acts upon discretionary jurisdiction depending on the circumstances of the case at hand.
 9. He cited the case of *George Gatere Kibata v George Kuria Mwaura & another [2017] eKLR* and contended that the defendant herein approbates and reprobates that no steps have been taken to set a hearing date and later emphasizes in her submissions that only the defendant has been following up on the suit. Counsel for the plaintiff stated that the plaintiff has never at any point in time lost interest in this matter, which is supported by the fact that she has taken all the necessary steps through her Advocates on record to set down this suit for hearing. He referred to the case of *Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR* and stated that it is a basic concept of natural justice that no party should be condemned unheard.
 10. Mr. Munyua was of the view that the defendant will suffer no prejudice if this suit is set down for hearing on priority basis while on the other hand, the plaintiff stands to suffer irreparable harm since



she risks losing her matrimonial property in the event that the suit is dismissed. He submitted that the plaintiff is desirous of prosecuting this case to its logical conclusion hence if a hearing date is issued, there will be no further delay in prosecuting the suit. Further, that the defendant has admitted to not having received any response from the Court's known email address, yet it wants the plaintiff to engage in a futile exercise.

Analysis and determination.

11. 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 singular issue that arises for determination is whether the suit between the parties herein should be dismissed for want of prosecution.
12. In the affidavit filed by the defendant sworn by Jillian Ndirangu, the defendant's Counsel, she deposed that the plaintiff's suit was filed on 19th September, 2017, accompanied by an application seeking to restrain the defendant from realizing securities that had secured a credit facility advanced to the plaintiff's spouse by the defendant.
13. The plaintiff's claim is that the said securities constitute matrimonial property despite the fact that the properties are rental properties thus commercial in nature. Counsel averred that the defendant filed a defence to the said suit on 23rd October, 2017, and an injunction was granted on 24th November, 2017, pending the hearing and determination of the suit.
14. It was stated by Counsel that the matter was last in Court on 8th June, 2021 when the Court indicated that it did not have the Court file and since then, the plaintiff has not taken any steps to trace the said file and/or set down the suit for hearing, whereas the defendant on the other hand had written to Court severally requesting for the file to be traced for a mention dated to be issued.
15. Ms Ndirangu stated that there are no justifiable grounds for the delay, refusal and/or neglect by the plaintiff to prosecute the suit. She deposed that the defendant's entitlement to a fair, speedy and public hearing is being infringed upon by the plaintiff failing to prosecute this suit within a reasonable time.
16. The plaintiff in her replying affidavit deposed that this matter has been active since the ruling that was delivered on 5th June, 2020, which is evidenced by the fact that it was last in Court for mention on 7th November, 2022. She averred that through her Advocates on record, vide letters dated 7th September, 2021 and 2nd March, 2022, she took steps to write to the Court seeking for hearing dates but there has been no positive response on the same.
17. She further averred that she cannot be blamed for having failed to take steps to set the matter down for hearing yet it has been demonstrated that both parties herein have written to Court severally in futility.
18. The defendant stated that the application herein is premature and it should be dismissed with costs to the plaintiff.

If the suit between the parties herein should be dismissed for want of prosecution.

19. Dismissal of suits for want of prosecution is provided for under Order 17 Rule 2 of the [*Civil Procedure Rules, 2010*](#), which states as hereunder -
 - “ 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 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 defendant’s case is that the last time this matter was in Court was on 8th June, 2021, when it came up for mention for purposes of taking a hearing date but the Court file was missing and since then, the plaintiff has not taken any steps to prosecute the suit. It was stated by the defendant that unlike the plaintiff, it has written to Court severally requesting for the file to be traced and for a mention date to be given for this suit, to no avail. The plaintiff’s case on the other hand is that both parties to this suit have taken steps to have this matter set down for hearing with the plaintiff’s latest attempt being vide a letter dated 2nd March, 2022, barely four (4) months before the instant application was filed.
 21. It is not in dispute that prior to the filing of the application herein, this matter was last in Court on 8th June, 2021 for mention to fix a hearing date but on that day, the Court file was missing hence a hearing date could not be fixed. The defendant has demonstrated by way of email correspondence between its Advocates on record and the Court, and a letter dated 22nd July, 2021 addressed to the Deputy Registrar, High Court Commercial and Tax Division all of which have been annexed to its affidavit in support of the instant application, that it has taken steps and/or made efforts to have this matter set down for mention but its efforts bore no fruits.
 22. The plaintiff sought to demonstrate that she has taken steps to have this matter set down for hearing by annexing two letters dated 7th November, 2021 and 2nd March, 2022 addressed to the Deputy Registrar, High Court Commercial and Tax Division, requesting for a hearing date and an English-Arabic interpreter since the plaintiff is of Arabic descent. The defendant stated that in as much as the said letters bear Court stamps, the said stamps are barely legible thus the dates thereon cannot be established. The defendant also stated that Courts no longer receive hard copies of documents due to the Covid-19 Pandemic and hard copies are only received when the Court gives directions that such documents be availed.
 23. On perusal of the letters dated 7th November, 2021 and 2nd March, 2022, it is evident that they bear a receiving stamp that reads High Court of Kenya Nairobi Commercial Division, for that reason, it is my considered opinion that the said letters were actually received by the High Court of Kenya, Nairobi Commercial and Tax Division Registry. In the absence of evidence that the said stamp does not belong to the High Court Commercial and Tax Division Nairobi and/or that the said letters were not received by the said Registry, I accept the assertion by the plaintiff that the said letters were received by the relevant Registry and they constitute actual steps taken by the plaintiff to set the suit down for hearing.
 24. The *Civil Procedure Rules, 2010* provide for 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 operative words under Order 17 Rule 2(1) of the *Civil Procedure Rules* is, “step taken by either party”. This means that the



plaintiff is not the only party required to take the necessary steps to move the Court and/or set down the suit for mention/hearing within that period of one year.

25. In the event that the plaintiff fails to take the necessary steps to move the Court and/or set down the suit for mention/hearing and the defendant does, the said action counts and time starts running from the last time the defendant took steps to move the Court. It is evident from the foregoing that both parties to the suit have been trying to have the suit set down for mention/hearing but their efforts have been futile. The latest attempt was by the plaintiff approximately four (4) months before the present application was filed, vide a letter dated 2nd March, 2022, addressed to the Deputy Registrar, High Court Commercial and Tax division requesting for a hearing date and for an English-Arabic interpreter but the said letter elicited no response.
26. In the case of *George Gatere Kibata v George Kuria Mwaura & another [2017]* eKLR, the Court considered the principles for dismissal of a suit for want of prosecution and stated as follows -

“My understanding of the framework contained in Order 17 Rule 2 is that a court may suo moto dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.

Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of *Ivita vs. Kyumbu (1984) KLR 441* where it is summarized as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

27. It is evident that inasmuch as there has been delay in prosecuting the suit between the parties herein, the same was not occasioned by the plaintiff and/or the defendant but by the Court by its non-responsiveness to correspondence from the parties herein. This is because despite being moved and /or requested by the parties herein on several occasions to fix this matter for mention and/or hearing, the Court remained silent on the same. Be that as it may, I am persuaded that this application is premature having been filed before the elapse of one year since the plaintiff wrote a letter addressed to the Court dated 2nd March, 2022 requesting for a hearing date and an English-Arabic interpreter.
28. In the end, this Court finds that the application dated 7th July, 2022 is devoid of merit. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF OCTOBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mbaji h/b for Ms Ndirangu for the applicant

Mr. Munyua Ezekiel for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

