



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kinyanjui v HFC Limited (Commercial Suit 58 of 2019)
[2023] KEHC 27644 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL SUIT 58 OF 2019
F WANGARI, J
OCTOBER 3, 2023**

BETWEEN

FRANCIS KIARIE KINYANJUI PLAINTIFF

AND

HFC LIMITED DEFENDANT

RULING

1. This ruling relates to an application dated 10th August, 2022 which seeks the following orders: -
 - a. That Plaintiff's suit be declared to have been dismissed for want of prosecution or, alternatively be dismissed for want of prosecution;
 - b. The costs of the suit be awarded to the Defendant.
2. The application was opposed through a replying affidavit dated 19th December, 2022. Directions were taken that the application be disposed of by way of written submissions. Both parties duly complied by filing detailed submissions as well as citing various decided cases in support of their rival positions.
3. I have duly considered the said submissions and I am grateful to Counsel for their industry and time in preparing the submissions. They are a useful guide to the court in arriving at a just determination on the issue at hand.

Analysis and Determination

4. Having considered the application, the response, written submissions, cited authorities and the law, the following are the issues for determination: -
 - a. Whether the application dated 10th August, 2022 is merited;
 - b. Who bears the costs:



5. The Legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited and concluded by parties who come to court seeking justice. Upon filing of cases, parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – Justice delayed is justice denied” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable.
6. Order 17 Rule 2(1) of the *Civil Procedure Rules*, which governs 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.”
7. Further Order 17 Rule 2(3) of the *Civil Procedure Rules*, states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1” Clearly, the statutory threshold set out under Order 17 Rule 2 (3) and (5) of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit or in the alternative, if no step is taken for two (2) years, the suit stands automatically dismissed.
8. I have perused the file and I am satisfied that at the point the application dated 10th August, 2022 was filed, the matter had last been in court on 26th February, 2020. I equally note that the court had on 15th January, 2020 delivered a ruling where it granted an order of injunction which was only to subsist for three (3) months.
9. The hearing of the main suit had been set for 29th April, 2020. The Plaintiff was granted three (3) months in order to allow him realize his desire to sell the subject property by private treaty and settle the debt. In fact, the court had directed that if by 15th April, 2020, the Plaintiff would have not paid the debt, the Defendant was at liberty to reactivate the realisation of its security.
10. There was no activity until 5th October, 2022 when the Defendant fixed its application for hearing on 24th January, 2023. It appears that there was no activity on 24.1.2023 but on 8.2.2023, the application was fixed for mention on 1.3.2023. On the said date, the Plaintiff in the absence of the Defendant sought for leave to file a supplementary list of documents and which leave was granted and matter fixed for hearing on 31.5.2023. It is on this day that the court’s attention was drawn to the application dated 10.8.2022.
11. Directions were taken that the application be canvassed by way of written submissions which as pointed out above, there was compliance by both parties. Therefore, I am satisfied that prior to the Defendant’s application, there had been an inaction for more than two (2) years which in my view is inordinate.
12. To overcome the application, the Plaintiff ought to show that the delay was excusable. In responding to the delay, the Plaintiff gave a raft of excuses. First, the Plaintiff shifted the blame on the Defendant for having served its defence late despite having filed the same in April, 2020. Secondly, the Plaintiff attributed his inaction on Covid-19 pandemic. The third reason proffered was the issue of non-extension of the lease.



13. The powers of court in such an application are discretionary and just like any other discretion, it must be exercised judicially and fairly. In *Ivita v Kyumbu* [1984] KLR 441, the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated: -

“...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 it 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, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time...”

14. The Defendant has indicated the prejudice it shall suffer if the suit is sustained. First, the issue of witness availability was raised to the effect that some of the witnesses may have left employment or moved to other branches thus the difficulty in tracing and availing them. Second, the cost of paying its lawyers keep on escalating.

15. At the onset, I find that the reasons offered by the Plaintiff are not merited or at all. For instance, Covid-19 did not stop court operations as matters continued to be filed and hearings conducted virtually. What merely happened was a scaling down of court's operations. On 4th March, 2020, the then Chief Justice through Gazette Notice No. 2357 published the Practice Directions on Electronic Case Management whose main aim was to address access to courts during the Covid – 19 period. This excuse therefore falls flat.

16. The other reasons appear to be blaming the Defendant but the Defendant did not take itself to court. It was dragged by the Plaintiff. In *James Mwangi Gatundu v Mastermind Tobacco (K) Ltd* [2018] eKLR, the court held as follows: -

“...it cannot lie in the Plaintiff's mouth to state that the Defendant was equally guilty of indolence in the prosecution of the suit. It was the Plaintiff who instituted the suit and it was his duty to prosecute it to its logical conclusion. He clearly failed in that duty...”

17. Therefore, the infractions alluded against the Defendant have no basis and I hold that the Plaintiff was indolent yet he was enjoying orders of injunction. In fact, I find that the Defendant has been magnanimous with the Plaintiff since from 15.4.2020, it was at liberty to reactivate realization of its security.

18. In *Kenya Plantation and Agricultural Workers Union v Unilever Tea (K) Limited* [2021] eKLR, the court while considering a similar application noted as follows:

“...Having carefully considered the arguments by both sides, I must agree with the applicant that the failure by the claimant to take action towards prosecuting the suit is without any good cause and the delay of over two years is inexcusable. Even if the grievants were out of reach, that did not prevent the claimant from writing the court to fix a hearing or at least a mention date. They also deliberately failed to invite the applicant to the court registry for over two years to seek for hearing date...The inaction by the claimant from 15/5/2019 to



15/10/2021 when the application was made is inordinate and not justified by any reasonable explanation...”

19. Further, Order 17 Rule 2 (5) which was introduced through [Legal Notice No. 22 of 2022](#) provides that where no action has been taken on a suit for two (2) years, the suit stands automatically dismissed immediately the two (2) years lapse. In *Kihara v Thumbi* [2022] eKLR, it was held as follows: -“... Clearly therefore, where no action has been undertaken in a suit for 2 years, such suit “stands dismissed” by operation of the law and the Court is not even obliged to issue any notice for such dismissal. The dismissal is automatic. The mischief intended under that provision which was introduced through L.N No 22 of 2020 must have been to ensure that suits which have been in the registries for 2 years and above with the parties taking no action are removed to pave way for other cases and not to take up valuable space in our already congested registries indefinitely...”
20. There is no doubt that more than two (2) years have lapsed and as it stands, there is no suit capable of being prosecuted. In *Macfoy vs United Africa Company* [1961] 3 All ER 1169 the court held as follows: -

“...If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so...” Based on the above, the suit having been dismissed through operation of the law ceased to exist but for convenience, I declare that the present suit stood dismissed on 29th April, 2022.
21. In [Josphat Mabilia Akoyo v George Mabele Sifuna & John Odhiambo](#) [2022] eKLR, the Court had the following to say: -

“...Courts should be willing to provide a forum to parties to settle disputes before them. But at the same time, courts should not be used as fora to breed injustice to parties who exercise diligence in proceeding with their matters. In the instant case, the record shows that even on occasions previous to the time the Court dismissed this suit for want of prosecution, the Applicant had not moved the Court appropriately. Justice should be meted swiftly while we are here on earth. Ours is a short duration of life and it is not just to delay matters until parties either die or just lose confidence in Courts being able to be quick in doing their business... Courts can do better! Justice delayed by whichever means is justice denied however pure it may look. I am not convinced that this Application herein is merited...”
22. Having holistically considered the application, the response, authorities cited and the law, I am satisfied that sustaining this suit would be a travesty to the Defendant. I thus find merit in the application dated 10th August, 2022.
23. As to the issue of costs, the same follows the event. That is what section 27 of the [Civil Procedure Act](#) decrees. However, this court has the discretion to direct otherwise. Though the application dated 10th August, 2022 is merited, I exercise my discretion by directing that each party to bear its own costs.
24. Flowing from the foregoing, I proceed to make the following orders: -
 - a. The application dated 10th August, 2022 is merited and is hereby allowed.
 - b. Consequently to (a) above, the suit instituted through the plaint dated 19th July, 2019 is hereby dismissed for want of prosecution.
 - c. Each party to bear their own costs.



Orders accordingly

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 3RD DAY OF OCTOBER, 2023.

.....

F. WANGARI

JUDGE

In the presence of:

Katisya Advocate for the Plaintiff

Kongere Advocate for the Defendant

Barile, Court Assistant

