



**Odero & another v Okumu (Commercial Case E189 of 2019)
[2024] KEHC 11887 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E189 OF 2019
A MABEYA, J
OCTOBER 4, 2024**

BETWEEN

CHARLES OKUMU ODERO 1ST PLAINTIFF

TEMPHARMA SOLUTIONS LIMITED 2ND PLAINTIFF

AND

ISABELLA TEMBLA OKUMU DEFENDANT

RULING

1. The plaintiffs' application dated 31/5/2023 seeks reinstatement of the suit. The application is brought under the provisions of sections 1A, 3 and 3 A of the *Civil Procedure Act* and order 12 rule 7 of the *Civil Procedure Rules* and on the grounds set out on the face of the Motion. The plaintiffs' counsel also filed his affidavit in support of the application.
2. The plaintiffs' suit was dismissed for want of prosecution as per the proceedings and orders of this Court of 31/5/2023. The plaintiff's case for reinstatement is that the case had been active and that numerous applications had been canvassed before Court.
3. That the plaintiffs sought to have the matter placed before the deputy registrar for pre-trial directions and hearing of the suit but these did not yield any results from the Court's registry. That the matter was mentioned for directions on 31/3/2021 without service of any notice upon the plaintiffs. That the matter was suddenly mentioned for Notice To Show Cause on 16/5/2023 and 31/5/2023. That no notice was served on the plaintiffs in both instances.
4. The suit was thereafter inactive until 31/5/2023 when Counsel realized the status of the file on the e-filing system that it had changed to closed file and that the matter had been dismissed for want of prosecution. That the repeated failure to issue notice of the mention dates raises questions on the



judicial officer tasked with the duty to effect service where dates are issued by the Court. That failure to tender reasons and to show cause was an inadvertence that was beyond the control of counsel following non-attendance on the mention dates. The Court was urged to re-instate the suit.

5. The defendant opposed the application through grounds of opposition. It contended that the plaintiffs filed their reply to defence and defence to counterclaim following the court's ruling then went to sleep and the matter remained unprosecuted for close to two years. That the plaintiff's application is dated 31/5/2023 the same date when the matter was for Notice to show cause and was dismissed. That the plaintiff cannot blame the court and had not offered sufficient proof why it should be reinstated.
6. I have considered the application and the submissions on record. The issue for determination is whether the dismissal of the suit under order 17 of the Civil Procedure Rules should be set aside.
7. The provisions of Order 17 of the Civil Procedure Rules provide for the court's power to dismiss a suit for want of prosecution where the matter has not been prosecuted for a period of one year. There is also power to set the dismissal.
8. Order 12 Rule 7 of the Civil Procedure Rules provides that: -

“Where under this Order judgment has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”
9. The power to set aside an order under Order 17 is in the discretion of the Court. Like all other discretions, the same has to be exercised judiciously.
10. In Ivita v. Kyumbu [1984] KLR 441, the Court of Appeal laid down the principles applicable in an application for re-instatement as follows: -

“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”.
11. The plaintiffs' contention is that the mention notice was not served upon them. That may be so but in the supporting affidavit, the plaintiffs have failed to give reasons for failure to prosecute the suit for more than one year.
12. The first requirement for dismissal is that the matter must be inactive or not set for hearing for over 12 months. The process of dismissal begins by a Notice to Show Cause why the suit should not be dismissed. This may be taken out by the defence or the Court may act on its own motion. All that the Court has to do is to 'give notice' to parties.
13. In Kestem Company Ltd v Ndala Shop Limited & 2 others [2018] eKLR, the court held that order 17 rule 2 (1) of the Civil Procedure Rules does not require service of notice. It uses the word 'give notice'. The court may give notice of dismissal through its official website or through the cause-list.



14. In *Josphat Oginda Sasia v. Wycliffe Wabwile Kiiya* [2022] eKLR, it was held that: -

“But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites or even court notice boards. (see the cases of *Fran Investments Limited v. G4S Security Services Limited* [2015] eKLR and *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR).”

15. In the present case, the plaintiffs do not dispute that they did not take any steps to prosecute the matter for over 12 months. The lack of service of the notice to show cause is not fatal. It was expected that in the present application, the plaintiffs would show cause. Failure to give an acceptable reason for failure to prosecute the case, in my, view is fatal to the plaintiffs’ application.

16. Counsel for the plaintiffs depones that there was difficulty in listing the matter and that efforts did not bear fruit. However, I note that there was no effort to prove those allegations. It is expected that this would have been demonstrated through correspondence to the court or some action on record.

17. I am aware that the court should always be inclined towards substantial justice and give parties a chance to ventilate their case through trial. However, the Court has a duty to ensure that justice is not delayed and that the cases are determined expeditiously. In *Investment Limited v. G4s Security Services Limited* (2015) eKLR, it was held that: -

“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.”

18. Although the application was filed timeously, no reasons have been advanced for the failure to prosecute the case for a period of 12 months.

19. In view of the foregoing, the Court is not satisfied that any cause has been shown and the application is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

A. MABEYA, FCI Arb

JUDGE

