



REPUBLIC OF KENYA



**Environmental Solutions Ltd v Masaai Mara University (Civil Case 294 of 2015)
[2024] KEHC 13773 (KLR) (Commercial and Tax) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 294 OF 2015
A MABEYA, J
NOVEMBER 7, 2024**

BETWEEN

ENVIRONMENTAL SOLUTIONS LTD PLAINTIFF

AND

MASAAI MARA UNIVERSITY DEFENDANT

RULING

1. Before Court is the application by the defendant dated 24/02/2022. It is brought under sections 3A&63(e) of the *Civil Procedure Act*, Order 17 rules 2 & 4 and Order 51 rule 1 of the Civil Procedure Rules. The application seeks orders for dismissal of the suit for want of prosecution.
2. In support of the application, the applicant relied on the grounds set out on the face of it and the affidavit of Mercelyne Njoroge of 24/02/2022. It was contended that in a ruling dated 20/9/2019, Muigai J directed that the matter be determined on a preliminary point on jurisdiction. That on 5/10/2021, the plaintiff was given leave to commence arbitral proceedings but the plaintiff was not keen on doing so.
3. That that on 24/1/2022, the plaintiff sought leave of court to institute the said proceedings but it failed to do so. That it was therefore apparent that the plaintiff had lost interest in pursuing the matter as it has failed to institute the arbitral proceedings. That the matter has been in Court for close to seven years and the delay is inordinate which has prejudiced the defendant.
4. The plaintiff opposed the application vide the affidavit of Mutua Partick Nzoka sworn on 3/12/2022. He stated that the plaintiff had not lost interest in the suit. That it is the defendant who had raised a preliminary objection which it failed to prosecute. That the arbitral clause under the special conditions of the contract required a joint appointment of the arbitrator by the parties. That whilst the plaintiff had proposed an arbitrator, the defendant had not done so on its part.



5. That the Court had on 20/9/2019 directed the defendant to fix its preliminary objection for hearing at the registry but did not do so. That in the premises, the defendant was relying on its own inaction to prejudice the plaintiff.
6. This application was canvassed by way of written submissions which I have considered. It was submitted for the defendant that it has met the threshold for dismissing the suit in accordance with Order 17 Rule 2 of the Civil Procedure Rules. That no action had been taken for a year and the failure of the plaintiff to institute arbitral proceedings warrants dismissal of these proceedings.
7. For the plaintiff, it was submitted that the application for dismissal for want of prosecution was premature as the defendant had raised a preliminary objection which had not been heard and there was no effort on its part to prosecute the same. That the plaintiff had been actively pursuing the suit and the delay in pursuing the arbitral proceedings was occasioned by the defendant who had failed to cooperate in appointing the arbitrator.
8. I have considered the contestations by the parties. The issue for determination is whether the defendant has made a case for dismissal of the suit for want of prosecution.
9. Order 17 Rule 2 of the Civil Procedure Rules, provides that: -
 - “2(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 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.
10. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* [2016] eKLR, the court stated that: -

“Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita vs Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”
11. In the present case, the applicant contended that the Court gave the plaintiff permission to initiate arbitral proceedings on 5/10/2021 and that this permission was reaffirmed on 24/1/2022. That the plaintiff had failed to comply with those directions. That the delay and failure to commence the said proceedings justify the dismissal of the suit.



12. On its part, the plaintiff retorted that the application was premature as there was a preliminary objection on record that had not yet been prosecuted. That it was the defendant's inaction of failure to prosecute the objection that had led to the delay.
13. From the record, it is not disputed that it had been more than a year since the matter was prosecuted by the plaintiff. Its excuse is that there was a preliminary objection that had remained unprosecuted. That the said objection was to the effect that the Court had no jurisdiction to entertain the matter for reason of the arbitral clause on the contract of the parties.
14. The view the Court takes is that, with or without the objection, the plaintiff would have prosecuted its case. It should have had the objection dismissed for want of prosecution. Further, the Court is not satisfied that the failure by the defendant to appoint the arbitrator stalled these proceedings. This is so because the Arbitration Act has detailed procedures on what is to be done in a situation where a party refuses to either appoint or concur in the appointment of an arbitrator.
15. The Court therefore finds that the plaintiff has been indolent in either prosecuting this suit or proceeding with the arbitral proceedings. The Court has discretion under Order 17 Rule 2 to allow or deny an application for dismissal of a suit for want of prosecution.
16. In the circumstances of this case, I am satisfied that the application is meritorious and I allow the same as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

