



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO.435 OF 2018**

**ECOTACT LIMITED T/A IKO TOILETS.....PLAINTIFF**

**=VERSUS=**

**NAIROBI CITY COUNTY.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 14<sup>th</sup> November 2021 brought under Order 17 Rule 2(1), (2), (3), and (4), Order 51 Rule 1 and Order 51 of the Civil Procedure Rules, 2010 and Section 1A, and 3A of the Civil Procedure Rules.

2. It seeks orders:-

*a) The suit herein be dismissed for want of prosecution.*

*b) Costs of the suit be borne by the Plaintiff.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 10.

4. The application is supported by the affidavit of David Oseko, the acting County Director; Legal Affairs of the Defendant/Applicant sworn on 18<sup>th</sup> August 2020.

5. He deponed that the Plaintiff filed its suit on 8<sup>th</sup> October 2018 by way of plaint dated 5<sup>th</sup> October 2018; and its Notice of Motion dated 8<sup>th</sup> October 2018 was fixed for hearing on 22<sup>nd</sup> October 2018. He further deponed that upon hearing; Hon. Justice L. Komingoi granted the Plaintiff injunctive orders against the Defendant on 4<sup>th</sup> December 2018 and since then, the Plaintiff has not taken any steps to prosecute its case.

6. He also deponed that from the Plaintiff's demeanor and conduct of its case, the Plaintiff has lost interest in prosecuting this case and it is not desirous of prosecuting this matter as it has never set down the suit for hearing since 4<sup>th</sup> November 2018.

7. He deponed that the delay in prosecuting the matter is inordinate and inexcusable and it elicits bad faith on the Plaintiff and prejudices the Defendant who stands to suffer injustice as it is incurring huge amounts of legal fees.

8. The application is opposed. There is a replying affidavit sworn on 10<sup>th</sup> April 2021 by Namada Simon, counsel for the Plaintiff.

9. He deponed that after filing the main suit on 8<sup>th</sup> October 2018 by way of plaint dated 5<sup>th</sup> October 2018, the Plaintiff's application dated 8<sup>th</sup> October 2018 was fixed for hearing on 22<sup>nd</sup> October 2018 and the ruling on the same was delivered on 4<sup>th</sup> December 2018 by Hon Justice L. Komingoi thus the Defendant's application should be dismissed for being defective and to allow directions to be taken.

**The Defendant's /Applicant's submissions**

10. They are dated 18<sup>th</sup> August 2020. They raise the following issues for determination:-

*a) Whether the suit should be dismissed for want of prosecution.*

***b) Whether the Defendant is entitled to the reliefs sought in the application.***

11. Counsel for the Defendant cited **Invesco Assurance Company Limited v. Oyange Barrack [2018]e KLR** to submit that in deciding whether or not a suit ought to be dismissed for want of prosecution, the following principles must be shown:-

- a) The delay is inordinate.
- b) The inordinate delay is excusable.
- c) The Defendant is likely to be prejudiced.

12. Counsel submitted that it can be discerned that the delay is inordinate from the court record which clearly shows that the Plaintiff has never taken any steps to set the suit down for hearing. He added that there were no plausible reasons for the delay which prejudices the Defendant and is contrary to Section 1A, 1B & 31 of the Civil Procedure Act, Cap 21 Laws of Kenya. He pleaded with the court to dismiss the suit on inspiration from the cases of **Abdala Tairara Godoro v City Council of Nairobi [2008]e KLR**, **Wem Freight Consultants Limited v Liquidator of Euro Bank Limited & 2 Others [2009] e KLR** and **Cecilia Wanjiku Njoroge v National Environmental Management Authority & Another [2013] e KLR**.

**The Plaintiff's /Respondent's submissions**

13. They are dated 7<sup>th</sup> August 2021. They raise the following issues for determination:-

- a) Whether the Applicant is entitled to the prayers sought in the application dated 18<sup>th</sup> August 2020.***
- b) Who to bear costs of the application.***

14. Counsel for the Plaintiff submitted that at Equity, "he who comes to equity must come with clean hands", but the Defendant's hands are tainted since it blatantly ignored this court's orders issued on 4<sup>th</sup> December 2018. He added that the Plaintiff has demonstrated sufficient cause that the suit should not be dismissed for want of prosecution by demonstrating that it moved this court in 2020 to take a hearing date but the court process had stalled as it was paralyzed due to outbreak of corona pandemic.

15. He submitted that the framework for dismissal of suit for want of prosecution is contained in Order 17 Rule 2 and the guiding criteria to be applied in considering whether/not a suit should be dismissed for want of prosecution has been articulated in **Ivita v 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?"

16. He cited **Invesco Assurance Company Limited case (supra)** to submit that the test of whether there has been inordinate delay is aimed at furthering the overriding objective more so to ensure the just determination of the proceedings.

17. I have considered the notice of motion and the supporting affidavit. I have considered the replying affidavit, the submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the suit ought to be dismissed for want of prosecution.

18. **Order 17 rule 2** of the Civil Procedure Rules provides that:-

***"(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."***

19. The matter was in court on 23<sup>rd</sup> January 2019 when this court issued ruling on the Defendant's application dated 6<sup>th</sup> December 2012. The Plaintiff out to have moved the court by January 2020. The record indicates that on 15<sup>th</sup> October 2019, a mention notice for 26<sup>th</sup> March 2020 was issued by this court and served on the parties. On 26<sup>th</sup> March 2020, the file was not placed before the court. It is noted that at the time, all hearings and mentions in criminal and civil cases had been suspended by the Honourable Chief Justice through his statement read on 15<sup>th</sup> March 2020.

20. This matter was mentioned again on 9<sup>th</sup> July 2020; both parties were absent and there is no evidence of issuance of Notice for mention on that day. The Plaintiff appeared on 7<sup>th</sup> October 2020 after being served with the application dated 18<sup>th</sup> August 2020. Even though court activities had been scaled down at the time, the Plaintiff had a duty to follow up on its case.

21. While a year has elapsed since the Plaintiff took any step to prosecute its case, the delay is not inordinate considering that the matter was

filed in August 2018, 2 applications have been heard since the matter was filed, and that the Plaintiff has filed a replying affidavit. The timing of the application is also considered. The delay is excusable owing to the circumstances. In the interest of justice, the Plaintiff should set down the matter for hearing and pay the Defendant costs of the application.

**22. In Lynette Wambui Giatu v. Kenya Methodist University (Kemu) [2021] eKLR** the court while reinstating a suit dismissed for want of prosecution stated; “I note the challenges the country, and the judiciary in particular, went through in the year 2020 since the outbreak of the covid 19 pandemic and find that the delay was not intentional and the reasons given above are reasonable.”

**23. In Mariam Bakari Kisuse v Momo Mohamed Matari [2021] eKLR**, the court declined to dismiss a matter for want of prosecution stating, “Although there has been delay on the part of the Plaintiff to set down the matter for hearing, this Court has not been shown that the delay is deliberate, contumelious and therefore inexcusable. In my view, in as much as there was some delay, the interest of justice can still be served if the Plaintiff is given an opportunity to prosecute her case.

**24.** In conclusion, I find no merit in this application and the same is dismissed with no orders as to costs. The Plaintiff is hereby directed to fix the matter for hearing within sixty (60) days in default the suit stands dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF DECEMBER 2021.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

Ms Shwidwa for Mr. Osundwa for the Defendant

Steve - Court Assistant