



REPUBLIC OF KENYA



**Mukuria v Munene & another (Civil Case 230 of 2019)
[2021] KEHC 187 (KLR) (Commercial and Tax) (4 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 230 OF 2019
WA OKWANY, J
NOVEMBER 4, 2021**

BETWEEN

JAMES GITAU MUKURIA APPLICANT

AND

PETER KAMAU MUNENE 1ST DEFENDANT

COOPERATIVE BANK OF KENYA 2ND DEFENDANT

RULING

1. The applicant filed the application before court dated 9th September 2019 seeking the following orders;
 1. THAT this honourable court be pleased to strike out the plaintiff's suit for want of summons.
 2. THAT in the alternative this Honourable Court be pleased to dismiss this suit for want of prosecution.
 3. THAT the costs of this application and the suit be awarded to the 2nd defendant.
2. The applicant's case is dormant as that the plaintiff has not taken any action on it since 30th November 2019 when it was last mentioned in court.
3. The plaintiff opposed the application through his replying affidavit and a further affidavit dated 8th April 2021 and 4th June 2021 respectively wherein he states that his advocate did not know the new number assigned to the case upon consolidation and transfer of the files ELC 514 OF 2015 and ELC MISC 300 to this court. He further contends that his advocate's law firm was affected by the Covid 19 pandemic which similarly affected the court registries.
4. The application was canvassed by way of written submissions. The main issue for determination is whether this suit should be dismissed for want of prosecution



5. Order 17 Rule 2 provides as follows: -

“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 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.”

6. In *Evita vs Kyumbu (1984) KLR 441* the court observed that: -

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

7. In *Mwangi S. Kimenyi vs Attorney General and Another, Civil Suit Misc. No. 720 of 2009*, the court restated the test as follows: -

“1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

8. In *Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR* the court considered the principles for dismissal of a suit for want of prosecution and stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Evita –vs-Kyumbu (1984) KLR 441*. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”



9. In *Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR*, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated as follows: -

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

10. *Nilesh Premchand Mulji Shab & Another t/a Ketan Emporium vs M.D. Popat & Another [2016] eKLR*, the court stated as follows: -

“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....”

11. Drawing guidance from the foregoing cases, the question that arises is whether the delay in prosecuting the suit is inordinate, unreasonable and likely to prejudice the defendant. It was not disputed that it has been more than a year since the matter was last before court on 30th October 2019. I however note that the plaintiff has shown interest in prosecuting the suit. I take judicial notice of the fact that court operations were disrupted by the Covid 19 pandemic in the year 2020. Even though it is clear that there has been a delay in proceeding with the matter, it has not been shown that the delay prejudiced the defendant or caused it any injustice. This is however not to say that the court takes the delay in prosecution lightly as such delays have had the effect of clogging the court system through backlog of cases.
12. Be that as it may, this court will in the wider interest of justice decline to dismiss the suit for want of prosecution and instead direct the plaintiff takes immediate steps to move the case to the next level within forty- five (45) of service with the defendants defence failure of which the suit will automatically stand dismissed for want of prosecution. In this regard, the defendant is directed to file and serve its defence within 14 days from the date of this ruling. I make no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 4th day of November 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Omondi for the Respondent.

No appearance for the Applicant.

Court Assistant: Margaret.

