



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 478 OF 2004**

**GIRO COMMERCIAL BANK LIMITED.....PLAINTIFF**

**VERSUS -**

**BENLUCKS (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**AMRATLAL BHANJI LAXMAN.....2<sup>ND</sup> DEFENDANT**

**MRS. INDU LAXMAN.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is an application by the Plaintiff who is asking the court to set aside the orders which were made on 17<sup>th</sup> June 2015.
2. The orders in issue were made by Riechi J. during an exercise dubbed “*Justice at Last?*”.
3. The learned Judge dismissed the plaintiff’s suit for want of prosecution.
4. On the day when the suit was dismissed, the defendant was represented by Mr. Ahmed advocate. However, the court records show that the plaintiff was not represented.
5. Having given consideration to the fact that the case was last in court on 9<sup>th</sup> November 2012, and that there had been no steps taken to prosecute the case for a period of 3 years, the learned Judge dismissed the suit. In arriving at that decision, the court noted that the plaintiff had not given any satisfactory response to the Notice which had been issued.
6. The plaintiff wishes to have the suit reinstated, so that it can thereafter proceed to substantive trial.
7. Mr. Munyu, the learned advocate for the plaintiff, submitted that the primary reason why the plaintiff was not in court on 17<sup>th</sup> June 2015, is that the plaintiff was never served with any Notice requiring them to show cause.
8. The plaintiff pointed out that the case was ready for trial, save for the fact that the defendant had not yet filed its Witness Statements.
9. The plaintiff urged the court not to visit upon it, the failure by his advocate to notice the case in the list of cases which were the subject of the “*Justice at Last?*” initiative.
10. In answer to the application, Mr. S. Amin, the learned advocate for the defendants, submitted that Order 12 Rule 7 of the Civil Procedure Rules, (*which the plaintiff had invoked*) were applicable to this case.
11. In that respect, the defendants are right. Order 12 Rule 7 deals with a situation in which the court was being requested to reinstate a suit which had been dismissed on the day it had come up for hearing, and when the plaintiff had failed to attend court.
12. In this instance, the order for the dismissal of the suit was not made when the case had come up

- for hearing.
13. The suit was dismissed pursuant to Order 17 Rule 2 of the Civil Procedure Rules.
  14. As far as the defendants were concerned, the dismissal was merited because the case was already over 11 years old.
  15. The plaintiff was said to have been slow in taking any steps in the case, in general. As an example, the plaintiff is said to have responded to a request for particulars six years after the said request was made.
  16. Another example of the plaintiff's lack of interest in the case, was the failure to take steps for about 3 years.
  17. Considering that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were elderly and unwell, they believe that the delay in the prosecution of the case was extremely prejudicial to them.
  18. The defendants cited the case of **UTALII TRANSPORT COMPANY LIMITED & 3 OTHERS Vs NIC BANK LIMITED & ANOTHER, Hccc No. 32 of 2010** to back their case.
  19. In that case Gikonyo J. conducted an extensive analysis of the question about what constitutes prolonged and inexcusable delay.
  20. Noting that there was no precise measure of what amounts to inordinate delay, the learned Judge said that;

***“Therefore, inordinate delay for the purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases?.***

21. He then went on to add that:

***“A delay is inexcusable if it is shown to be intentional and contumelious, for instance, where there had been disobedience of a peremptory order of the court?.***

22. Finally, the court noted that;

***“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 straightaway. 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?.***

23. He noted that when a court chooses not to dismiss a case even where there had been inordinate delay, it should not be perceived as if the court was assisting the indolent. The court should, in those circumstances, be seen as serving the interests of justice, by being sensitive to the justice which all the parties are entitled to.
24. The court rejected the application which had sought the dismissal of the suit for want of prosecution.
25. In the case before me, the learned Judge did not sustain the life of the case. Instead, he terminated the case.
26. The application before me is not in the nature of an appeal against the decision by the learned Judge. It is a request that the dismissal of the suit be set aside.
27. In determining the question as to whether or not justice demands that the suit be reinstated, I will first look at Order 17 Rule 2 of the Civil Procedure Rules. I will do so because that is the Rule which was the foundation upon which the dismissal of the suit was founded. The Rule 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?.***

28. The learned Judge appears to have been alive to that Rule because he actually noted that the plaintiff had not given any satisfactory response to the notice.
29. In this case, the plaintiff has stated very categorically that he was never served with any Notice

- requiring him to show cause. That fact has not been challenged by the defendants.
- 30.If anything, the defendants appear to be striving to demonstrate that the reasons why the court had dismissed the suit were reasonable.
- 31.However, that is not the issue before the court now. It could have been an issue when the court was asked to dismiss the suit.
- 32.However, it never became an issue even at that stage because the person who should have been trying to satisfy the court that he had a reasonable explanation for the delay in prosecuting the case, was never notified that he was required to do so.
- 33.The Notice itself read as follows;

***“After the inordinate delay of 3 years since the last step was taken on 9/11/2012 with a view to proceeding with the Suit, and service of Notice having been effected to show cause why this suit should not be dismissed and there being no satisfactory response, the Court in exercise of the powers conferred upon it by Order 17 Rule 2 of the Civil Procedure Rules hereby orders this suit dismissed/closed?.***

The plaintiff could only have been expected to come to court, to give a satisfactory response to the Notice, if he had been served with the said Notice. When he was unaware of the Notice, he had no reason to attend court.

Therefore, the plaintiff was seriously prejudiced, as he was condemned without having been accorded an opportunity to put forward his response. Such an injustice cannot be allowed to stand: it must be struck down.

Therefore, I do now set aside the dismissal of the suit, and order that the suit be reinstated.

As regards the costs of the application, the defendants cannot be penalized, as they were not responsible for the dismissal of the suit. Therefore, I order that the costs of the application shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 2<sup>nd</sup> day of February 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Akhaabi for Munyi for the Plaintiff

No appearance for the Defendants

Collins Odhiambo – Court clerk.