

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. E379 OF 2022

HON. JUSTICE ALEEM VISRAM

16TH OCTOBER, 2025

MAXWELL MAURICE ODHIAMBO 1ST PLAINTIFF/RESPONDENT
SALOME GRACE ORWA 2ND PLAINTIFF/RESPONDENT

VERSUS

KENYA COMMERCIAL BANK LIMITED DEFENDANT/APPLICANT

RULING

Background

1. Before me is the Defendant's Notice of Motion dated 30th January, 2025, seeking an order that the suit be dismissed for want of prosecution pursuant to Order 17, rule 2 of the Civil Procedure Rules, 2010.
2. The application is premised on the grounds that the Plaintiffs have failed to take any step to prosecute the suit since 6th April, 2023, when their application for injunction was dismissed. The Defendant contends that the matter has been listed for mention on multiple occasions — namely 14th February, 2023, 23rd March, 2023, 29th March, 2023, 4th September, 2023, 28th September, 2023, 15th November, 2023, 29th February, 2024, 8th July, 2024, 20th January, 2025,

and 26th February, 2025 — yet the Plaintiffs failed to appear or comply with directions to file their trial bundle.

3. In reply, the Plaintiffs oppose the application contending that the delay was not deliberate but arose from a mistaken diary entry on 20th January 2025, and that they intend to amend their pleadings to include additional documents before taking a hearing date.

Issues for Determination

4. Having considered the pleadings, affidavits and submissions, the sole issue for determination is whether this suit should be dismissed for want of prosecution under Order 17, rule 2.

Analysis and Determination

5. Order 17, rule 2(1) of the Civil Procedure Rules provides:-

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.

6. The test to be applied was set out *in Nzoia Sugar Company Limited v West Kenya Sugar Limited [2020] eKLR*, and adopted in *Ivita v Kyumbu [1984]*

KLR 441, namely:-

- a. Whether the delay is inordinate;
 - b. Whether the delay is excusable; and
 - c. Whether the delay is likely to cause prejudice to the Defendant.
7. The rationale is anchored on Article 159(2)(b) of the Constitution that justice shall not be delayed, and on the overriding objective under Sections 1A and 1B of the Civil Procedure Act, which enjoin courts to facilitate the expeditious and proportionate resolution of disputes.
8. The record confirms that no step has been taken to prosecute this matter since 6th April, 2023, when the interlocutory application was dismissed — a period of about twenty-three (23) months by the time the present motion was filed. The Plaintiffs have not filed their trial bundle, nor fixed the suit for hearing, despite several mentions.
9. The Plaintiffs' explanation for the delay — that Counsel mis-diarised one mention date - does not account for the prolonged inactivity from April 2023 to January 2025. Nor have they demonstrated any concrete step towards amending their pleadings or preparing the matter for hearing.
10. In *George Gatere Kibata v George Kuria Mwaura & Another [2017] eKLR*, the court held that a suit qualifies for dismissal if no step has been taken for

over one year. Likewise, in *Utalii Transport Co. Ltd & 3 Others v NIC Bank Ltd & Another [2014] eKLR*, the court observed that “litigation must come to an end; the sword of Damocles cannot indefinitely hang over a Defendant’s head.”

11. I find the delay herein inordinate and inexcusable. The Plaintiffs have failed to demonstrate any active intention to prosecute their claim or comply with prior directions of this Court. No evidence was annexed to the replying affidavit to show that any attempts have been made to prosecute the matter beyond mere statements. The continued pendency of the matter, in the absence of prosecutorial zeal, is indeed prejudicial to the Defendant who remains exposed to litigation anxiety, expense, and uncertainty over property subject to the suit.
12. The discretion to dismiss a suit for want of prosecution must be exercised judiciously, bearing in mind that dismissal is a draconian step which should be resorted to, only where the delay is so inordinate that it renders a fair trial impossible.
13. In this case, given the long period of dormancy and absence of credible explanation, I am not persuaded that the Plaintiffs deserve the Court’s discretion.

Conclusion and Orders

14. In the result, I find that the Defendant’s application dated 30th January, 2025, is merited. Accordingly:-

1. The Plaintiffs’ suit filed on 29th September, 2022, is hereby dismissed for want of prosecution pursuant to Order 17, rule 2 of the Civil Procedure Rules, 2010.

2. Costs of the application and of the suit shall be borne by the Plaintiffs.

15. It is so ordered.

Dated and delivered virtually via Microsoft Teams this 16th day of October, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Lisper

.....for 1st Plaintiff/Respondent

.....for 2nd Plaintiff/Respondent

.....Defendant/Applicant