



County Government of Kakamega v Tumaz & Tumaz Enterprises Limited & another; Sarrai Group (Interested Party) (Civil Suit E001 of 2022) [2025] KEHC 15363 (KLR) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL SUIT E001 OF 2022
AC BETT, J
OCTOBER 31, 2025**

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA PLAINTIFF

AND

TUMAZ & TUMAZ ENTERPRISES LIMITED 1ST DEFENDANT

PONANGIPALLI RAMANA RAO 2ND DEFENDANT

AND

SARRAI GROUP INTERESTED PARTY

RULING

1. On 6th March 2025, vide a notice of motion application, the 1st defendant filed an application seeking that the suit be dismissed for want of prosecution. He prayed to be heard for orders that;
 - a. That the plaint dated 7th January, 2022, is Res Judicata as the issues raised have been conclusively determined by Honourable Justice Mabeya in rulings dated 14th April 2022 in the High Court of Kenya Commercial and Tax division, Insolvency Petition no. E 004 of 2019 and E 004 of 2022.
 - b. That the principle of res judicata is a matter of public policy and is one of the pillars a judicial system is founded.
 - c. The suit herein be dismissed for want of prosecution.
 - d. The plaintiff bears the costs of the suit.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the applicant. The applicant avers that the plaint which the plaintiff filed on 7th January



2022 was Res judicata as the issues they had raised were already heard and determined by Honorable Justice Mabeya in his ruling dated 14th April 2022 in the High Court Commercial and Tax Division, insolvency petition no E 004 of 2019 and E004 of 2022.

3. The applicant claimed that the plaintiff has not taken any step towards having the matter certified ready for hearing, nor prosecuted the case for the last two years.
4. The applicant asserts that the delay by the plaintiff in prosecuting the suit is inordinate and inexcusable, and hence a way to embarrass it and a further waste of the court's time.
5. It contends that the plaintiff's two-year delay in pursuing the case demonstrates that it lost interest in it and is detrimental to the company as it incurs legal fees, causing it distress.
6. It prays that the court dismisses the plaintiff's case for want of prosecution, as it amounts to extreme injustice.
7. The court directed that the matter be canvassed by written submissions.
8. In its submissions, the applicant contends that the plaintiff failed to make an appearance in court despite the several mentions and hearings set in court.
9. It quoted order 17 Rule (2) (3) of the Civil Procedure Rules. It maintains that Hon. Mabeya had already determined the issues raised by the plaintiff in his ruling dated 14th April 2022, as earlier stated.
10. The applicant states that this court lacks jurisdiction to handle the suit and that the matter is res judicata as it has already been heard and determined.
11. The party prays that the court exercises its discretion and dismiss the suit for want of prosecution.
12. The Plaintiff failed to file their submissions or response to the claim raised by the applicant.

Analysis and Determination

13. This court has considered the grounds stated in the application and the submissions, the relevant laws, and the facts of the case.
14. The power to dismiss a suit for want of prosecution is governed by Order 17 of the Civil Procedure Rules. Under Order 17 Rule 2(1) of the Civil Procedure Rules, it 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.”
15. Further Order 17 Rule 2(3) of the Civil Procedure Rules, states thus:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”
16. Evidently, the statutory threshold of Order 17 Rule 2 of the Civil Procedure Rules is that a suit qualifies to be dismissed for want of prosecution if either party makes no application in it or fails to take steps in it for at least one year preceding the presentation of a notice to show cause for dismissal by the court or an application by a party who seeks dismissal of the suit.
17. I am alive to the fact that before any court can dismiss a suit for want of prosecution, the test to be applied is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay.



18. Article 159(2)(b) of *the Constitution* enshrines the principle that justice shall not be delayed.
19. The guiding principles were laid down in *Ivita v Kyumbu* [1984] KLR 441, where Chesoni J (as he then was) held that the test is whether the delay is prolonged and inexcusable, and, if it is, whether justice can still be done despite the delay.
20. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat & Others* [2016] eKLR, the Court held that dismissal for want of prosecution is discretionary and involves considering whether the plaintiff has lost interest and whether the defendant will suffer prejudice.
21. The Court in *Argan Wekesa Okumu v Dima College Limited & 2 Others* [2015] eKLR further stated that the delay must be inordinate, inexcusable, and prejudicial to the fair trial of the matter.
22. In *Naftali Opondo Onyango v 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.”
23. In the present case, the record shows that the suit was filed on 7th January 2022 and that no action has been taken for over two years to progress the matter. The Plaintiff has not offered any explanation for this delay. The inaction satisfies the statutory threshold under Order 17 Rule 2 and constitutes inordinate and inexcusable delay.
24. The continued pendency of this matter without prosecution is prejudicial to the Defendant, who remains subject to the burdens of litigation and uncertainty. The maxim, justice delayed is justice denied, is apt in these circumstances. A party should not be expected to keep on attending court when the initiator of the suit keeps absenting himself for no apparent reason. The court is therefore satisfied that the legal threshold for dismissal for want of prosecution has been met.
25. In the interest of justice, this Court finds the Notice of Motion Application to be of merit and makes the following orders:-
 - a. The 1st Defendant’s application dated 6th March 2025 is hereby allowed.
 - b. Costs of the application and the suit are awarded to the 1st Defendant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF OCTOBER 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendants

No appearance for the Interested Party

Court Assistant: Polycap

