

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**

**HCCOMM NO. 305 OF 2013**

SHOWCASE PROPERTIES LIMITED.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LTD.....DEFENDANT

**RULING**

1. Before me is a Notice of Motion application dated 22<sup>nd</sup> April 2025 filed by the defendant pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 17 Rules 2(1) & (3) and Order 51 Rules 1, 3 & 4 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The defendant seeks an order for dismissal of this suit for want of prosecution.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Lilian Sogo, the defendant's Head Counsel – Litigation. Ms Sogo averred that the plaintiff instituted this suit in July 2013 and has since then filed numerous interlocutory applications aimed at preventing the defendant from exercising its statutory power of sale over L.R. No. 2/61, Kirichwa Road, Nairobi. She stated that the plaintiff's last application, dated 18<sup>th</sup> October 2022, was dismissed by a Ruling of the Court delivered on 29<sup>th</sup> September 2023, and since then, no further steps have been taken by the plaintiff to prosecute the main suit.
3. Ms Sogo asserted that the prolonged inactivity demonstrates indolence and loss of interest in prosecuting this suit. She described the delay as inordinate, unjustifiable, and inexcusable. She deposed that the said delay has subjected the

defendant to continued uncertainty and anxiety. She averred that the defendant has suffered and will continue to suffer prejudice due to the passage of more than ten (10) years since the suit was filed, particularly, in securing witnesses and evidence, while the suit has been used mainly to obtain interlocutory reliefs to block the realization of the charged property.

4. In opposition to the instant application, the plaintiff filed a replying affidavit sworn on 30<sup>th</sup> May 2025 by Mr. Francis Muhoro Gachanja, a Director of the plaintiff company. Mr. Gachanja acknowledged that this matter was last before the Court on 29<sup>th</sup> September 2023 when two Rulings were delivered, but stated that the plaintiff promptly filed a Notice of Appeal and applied for certified copies of the proceedings. He averred that thereafter, the parties have been engaged in extensive out-of-court negotiations aimed at settling the dispute herein by consent. Mr. Gachanja contended that on 23<sup>rd</sup> September 2024, the defendant initiated settlement talks by reaching out to the plaintiff, and that since then, the parties have exchanged correspondence in that regard. He asserted that only five (5) days before the instant application was filed, the defendant's representative, Mr. Joseph Muli, contacted him to arrange for a meeting for settlement discussions.
5. On 14<sup>th</sup> October 2025, this Court gave directions that the application herein would be canvassed by way of oral submissions. Mr. Biko Angwenyi, learned Counsel for the defendant submitted that this suit has been in the Court's docket since 2013 and has never been set down for hearing. He relied on the case of **Ivita v Kyumbu** [1975] KEHC 4 (KLR) and further submitted that the said delay is inordinate and inexcusable, hence this suit ought to be dismissed with costs to the defendant.

6. Mr. Mungai, learned Counsel for the plaintiff submitted that although this suit was filed in the year 2013, this Court delivered two Rulings on 29<sup>th</sup> September 2023, and in one of the Rulings, the Court struck out the 2<sup>nd</sup> defendant who had been joined to this suit vide an amended plaint dated 19<sup>th</sup> July 2021. Counsel stated that the plaintiff was dissatisfied with the said Ruling, and proceeded to lodge an appeal against it at the Court of Appeal. He contended that since the parties herein were engaging in out-of-court negotiations with a bid to settle the dispute herein, the defendant filed the application herein in bad faith. Mr. Mungai confirmed that the plaintiff has no order for stay of proceedings in this case
7. In a rejoinder, Mr. Angwenyi averred that although there is a Notice of Appeal, no appeal has been lodged. He acknowledged that there was correspondence between the parties herein, but stated that no reason has been advanced as to why no step was taken between 29<sup>th</sup> September 2023, when the two Rulings were delivered and 22<sup>nd</sup> April 2025, when the instant application was filed.

#### **ANALYSIS AND DETERMINATION.**

8. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the plaintiff and the oral submissions made by Counsel for the parties. The issue that arises for determination is whether the suit between the parties herein should be dismissed for want of prosecution.
9. Dismissal of suits for want of prosecution is provided for under Order 17 Rule 2 of the Civil Procedure Rules, 2010, which provides as hereunder -

***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.*
- 5) A suit stands dismissed after two years where no step has been undertaken.*
- 6) A party may apply to court after dismissal of a suit under this Order.*

10. Order 17 Rule 2 of the Civil Procedure Rules, 2010, provides for two instances in which a suit can be dismissed for want of prosecution. The first instance is contemplated as per Order 17 Rule 2, sub-rules 1-4 of the said Rules, and in instances where in a suit, no application has been made or step taken by either party for one year, the Court shall issue a Notice to Show Cause to the plaintiff, to show cause why the suit should not be dismissed and/or any party to the suit may apply for dismissal of the suit for want of prosecution. The operative words under Order 17 Rule 2(1) is **“step taken by either party”**. This means that the plaintiff is not the only party required to take the necessary steps to move the Court and/or set down the suit for mention/hearing within that period of one year.

11. In the event that the plaintiff fails to take the necessary steps to move the Court and/or set down the suit for mention/hearing and the defendant does, that action counts, and time starts running from the last time the defendant took steps to move the Court. In the case of **George Gatere Kibata v George Kuria**

**Mwaura & another** [2017] KEELC 2995 (KLR), the Court considered the principles for dismissal of a suit for want of prosecution, and stated as follows -

*My understanding of the framework contained in Order 17 Rule 2 is that a court may suo moto dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.*

*Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of Ivita vs. 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.”*

12. This matter was last in Court on 29<sup>th</sup> September 2023 when two Rulings were delivered, but no step has been taken by the plaintiff since then to set the suit down for hearing. It is therefore evident that a period of over one year had elapsed by the time the instant application was filed on 22<sup>nd</sup> April 2025.
13. The plaintiff in response to the instant application averred that immediately after the Rulings of 29<sup>th</sup> September 2023, it filed a Notice of Appeal and applied for certified copies of the proceedings for purposes of lodging an appeal at the Court of Appeal, against one of this Court’s Rulings. The plaintiff further averred that the parties herein have been engaged in out-of-court negotiations aimed at settling the dispute amicably. The plaintiff asserted that the defendant’s representative contacted the plaintiff only five (5) days before the filing of this application to arrange for a settlement meeting.

14. From the application herein and the affidavits filed, it is clear that the defendant does not dispute the fact that the plaintiff filed a Notice of Appeal against one of the Rulings delivered by the Court on 29<sup>th</sup> September 2023 and that the parties have been engaging in out-of-court negotiations aimed at settling the dispute herein amicably. This Court however is of the considered view that a Notice of Appeal is not an appeal and no evidence has been placed before this Court to confirm the filing of an actual appeal approximately two (2) years after the impugned Ruling was delivered. Further, the mere filing of a Notice of Appeal does not operate as a stay of proceedings, and it does not absolve a party from the obligation to prosecute its suit unless a formal stay is obtained.
15. In regard to the out-of-court negotiations, while Courts encourage parties to explore alternative dispute resolution mechanisms, negotiations cannot be used as a shield to justify prolonged inactivity in a suit. On perusal of the evidence adduced by the plaintiff in a bid to demonstrate the existence of out-of-court negotiations between the parties herein, there is no evidence of a concluded or binding process that would reasonably prevent the plaintiff from taking any step in Court for over one year. Nevertheless, even while negotiations were ongoing, nothing prevented the plaintiff from moving the Court to fix the matter for hearing or to seek appropriate directions.
16. In the said circumstances, this Court is persuaded that the delay of over one year and six months between the time the Rulings of 29<sup>th</sup> September 2023 were delivered and when the application herein was filed on 22<sup>nd</sup> April 2025 is not only prolonged, but it has not been explained in any satisfactory manner. The plaintiff has offered no plausible justification as to why from September 2023, it took no concrete steps to progress the main suit towards hearing and determination. This conduct, viewed in the context of a suit that has been

pending since 2013 and characterized largely by interlocutory applications, demonstrates clear indolence and lack of interest in prosecuting the main suit.

17. In view of the foregoing, this Court agrees with the defendant that as a result of the aforesaid delay, it has suffered prejudice due to the passage of more than ten (10) years since the suit was filed, which inevitably affects the availability of witnesses and the quality of evidence. This suit concerns the defendant's statutory power of sale over charged property, which has been stalled for over a decade. Therefore, its continued pendency will most likely subject the defendant to uncertainty and impair its ability to effectively enforce its contractual and statutory rights.
18. The principles guiding the exercise of a Court's discretion to dismiss a suit for non-prosecution are now settled. The Court must consider whether the delay is inordinate and inexcusable, whether it is intentional or contumelious, and whether such delay has caused prejudice to the defendant. Additionally, the Court must balance the right of the plaintiff to be heard on the merits of its case, as against the right of the defendant to have litigation concluded without unreasonable delay. In this case however, that balance tilts in favour of the defendant. The plaintiff has had more than adequate opportunity to prosecute its case but has failed to do so with the diligence required by law.
19. I therefore find that the delay in prosecuting this suit is inordinate, inexcusable and unjustifiable.
20. In the end, this Court finds that the defendant's application dated 22<sup>nd</sup> April 2025 is merited. It is hereby allowed as prayed. Costs of this application and the suit are awarded to the defendant.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 23<sup>rd</sup> day of January 2026. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Biko Angwenyi for the defendant/applicant

Mr. Masinde h/b for Mr. Mungai for plaintiff/respondent

Ms B. Wokabi – Court Assistant.